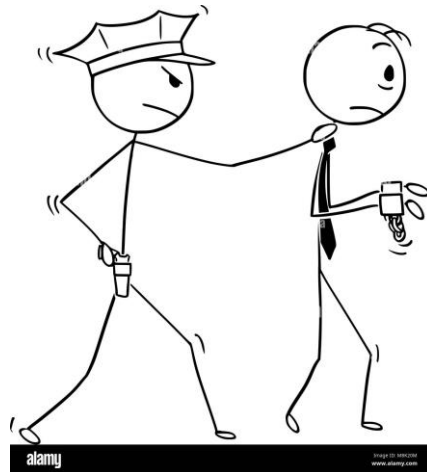


Garden State CLE Presents:

N.J. Arrest, Search & Seizure Spring 2024 - Review



Instructors



Best-selling author
of NJ law books
Robert Ramsey, Ed.D.

Presenters for
our Next
Lunchtime
Learning Event:



Certified Criminal
Trial Attorney
Joseph P. Rem, Jr.

Rule 509

Marital Privilege - Confidential Communications

Except as otherwise provided in this rule, no person shall disclose any communication made in confidence between such person and his or her spouse or civil union partner. There is no privilege under this rule (a) if both spouses or partners consent to the disclosure; (b) if the communication is relevant to an issue in an action between the spouses or partners; (c) in a criminal action or proceeding in which either spouse or partner consents to the disclosure; (d) in a criminal action or proceeding coming within Rule 501(2); or (e) in a criminal action or proceeding if the communication relates to an ongoing or future crime or fraud in which the spouses or partners were or are joint participants at the time of the communication. When a spouse or partner is incapacitated or deceased, consent to the disclosure may be given for such spouse or partner by the guardian, executor or ' . administrator. The requirement for consent shall not terminate with divorce, dissolution of a civil union, or separation. A communication between spouses or partners while living separate and apart under a divorce from bed and board or legal separation from a partner in a civil union shall not be a privileged communication.

State vs. Gargano, 476 N.J.Super 511(App.Div.2023)

Wiretap interceptions of privileged communications

During the investigation of an alleged drug distribution network, the State Police obtained wiretap orders authorizing the interception of communications on various cellular phones pursuant to the New Jersey Wiretapping and Surveillance Control Act (the Act), N.J.S.A. 2A:156A-1 to -37. By leave granted, the State challenged an order suppressing all intercepted communications that followed the interception of a privileged marital communication between one of the defendants and his codefendant spouse. The trial court entered the order under N.J.S.A. 2A:156A-21, which in pertinent part mandates the suppression of "the entire contents of all intercepted wire, electronic[,] or oral communications obtained during or after any interception" that is "unlawfully intercepted" or "not made in conformity with" the wiretap order or authorization. N.J.S.A. 2A:156A-21(a) and (c).

The Court affirms the order based on its interpretation of the Act. The State concedes that at the time of the interception of the initial privileged marital communication, N.J.R.E. 509 did not include a crime-fraud exception, and, as a result, the initial and subsequent 305 intercepted privileged marital communications are inadmissible at defendants' trial under the then-extant version of N.J.R.E. 509. The State argues interception of the initial privileged marital communication did not trigger the mandatory suppression of all subsequent wiretap interceptions during the investigation under N.J.S.A. 2A:156A-21 because

interception of the privileged marital communication was neither unlawful nor made in violation of the wiretap orders.

The Court concludes that not every interception of a privileged marital communication is unlawful and requires application of N.J.S.A. 2A:156A-21's suppression remedy. The court finds incidental interceptions of privileged communications during the mandatory intrinsic minimization process attendant to the execution of every wiretap order are anticipated by, and authorized by, the Act, and do not trigger N.J.S.A. 2A:156A-21's suppression remedy.

The Court holds that, because the State Police knew the initial interception was of a communication between married spouses, made no effort to minimize the interception, and monitored the communication beyond the time necessary to determine if it was privileged, the interception was unlawful under the Act and violated the wiretap order, which expressly required minimization. The Court rejects the State's argument suppression is not required because the initial marital communication, and the 305 subsequent marital communications, were intercepted based on the good faith but erroneous belief the crime-fraud exception recommended by the Court in State vs. Terry, 218 N.J. 224(2014), and later enacted, N.J.S.A. 2A:84A-22(2)(e), L. 2015, c. 138, § 2, eff. Nov. 9, 2015, would apply retroactively such that the interceptions would be supported on that basis.

State vs. Haskins, 477 N.J.Super 630(App.Div.2023)

Pipeline Retroactivity on the Issue of Motor Vehicle Stops Based Upon Tinted Windows

In this appeal, the Court held that the rule announced in State vs. Smith, 251 N.J. 244, 253(2022), that "reasonable and articulable suspicion of a tinted windows violation arises only when a vehicle's front windshield or front side windows are so darkly tinted that police cannot clearly see people or articles within the car," should be afforded pipeline retroactivity. The Court also determined a defendant who had not filed a notice of appeal when a retroactive decision was issued but was subsequently granted leave to file as within time under Rule 2:4-4 and State vs. Molina, 187 N.J. 531, 535-36(2006) is deemed within the "pipeline" for retroactivity purposes.

Discussion

This case provides a comprehensive discussion on how a court treats a new Rule of decisional law for purposes of deciding whether it should receive prospective or retro-active application. The case also spells out the rules of pipeline retro-activity.

State vs. Gartrell, 256 N.J. 241(2024)

Standing-Searches Without a Warrant of Abandoned Property

Defendant's possessory or ownership interest in the suitcase ceased when he fled police outside Penn Station and deliberately left his suitcase behind in a public place with no evidence of anyone else's interest in the bag. Because the State has demonstrated by a preponderance of the evidence that the suitcase was abandoned, defendant is without standing to challenge its seizure and search.

Discussion

In general, property is abandoned when a person, who has control or dominion over property, knowingly and voluntarily relinquishes any possessory or ownership interest in the property and when there are no other apparent or known owners of the property. And once property is abandoned, the previous owner of that property has no standing to challenge the warrantless search of that property. For defendant to have standing to move to suppress the evidence seized here, he would need to have a continuing proprietary, possessory or participatory interest in the property seized - the blue suitcase. But defendant's interest in the suitcase ceased when he fled police outside Penn Station and deliberately left his suitcase behind in a public place with no evidence of anyone else's interest in the bag. Because the State has demonstrated by a preponderance of the evidence that the suitcase was abandoned, defendant is without standing to challenge its seizure and search.

State vs. Ross, 256 N.J. 390(2024)

Obtaining Evidence Taken From the Body of the Defendant

Over four years after defendant Shlawrence Ross allegedly exchanged gunfire with police officers, he underwent elective surgery to have the bullet that was lodged in his abdomen removed. Defense counsel coordinated with the hospital where the surgery was conducted to have her investigator take possession of the bullet after the surgery. Post-surgery, however, the hospital's director of security contacted law enforcement regarding the removal of the bullet and did not turn it over to the defense.

The State subsequently sought a search warrant to obtain the bullet from the hospital. The trial court denied the search warrant application and the State's application for a subpoena seeking defendant's medical records regarding the surgery. The Appellate Division reversed, holding that the trial court erred in

applying discovery rules as opposed to search warrant principles to its analysis of the search warrant application. The Appellate Division remanded the matter for the trial court to determine whether probable cause existed for the issuance of the search warrant.

The proper analysis for determining whether the State can obtain this physical evidence rests within the principles of search and seizure under the Fourth Amendment. The Appellate Division properly remanded the matter for a determination of whether probable cause existed to issue a search warrant to the hospital -- a third party -- that is in possession of physical evidence related to a criminal offense.

The Supreme Court held that to be the incorrect analysis. The bullet in this case is physical evidence related to a criminal offense. Defendant has been charged with attempted murder, among other offenses, related to the December 3, 2017, incident during which he allegedly fired a gun at police, prompting officers to return fire. The bullet extracted from defendant's abdomen is physical evidence of that evening's events. A search warrant is therefore the proper means for the State to obtain the evidence.

Discussion

After hearing oral argument on the motion, the trial court had denied the State's applications and held that defense counsel was entitled to take possession of the bullet and any fragments from Cooper Hospital according to the arrangements that defense counsel made with hospital staff before defendant's surgery. The trial court found that the discovery rules shielded the bullet from the State's access because the bullet's existence was the result of defense counsel's "conscious litigation choice." The Court reasoned that the defense is entitled to conduct an investigation and ... to keep the results of that investigation to itself unless and until the defense chooses to use that information at trial. The trial court further explained that if defense counsel tested the bullet, she would have to disclose the test results to the State only if she intended to use them at trial. According to the trial court, because the bullet would not even be available to the State if not for the defense's conscious litigation decision, it was up to the defense to decide what it chooses to do with it.

State vs. Baker, 478 N.J.Super 116(2024)

Probable Cause Under the Automobile Exception to the Warrant Requirement

In this case, the court considered whether the trial court properly denied defendant's motion to suppress evidence seized after a search of the vehicle defendant was operating following a traffic stop. When the officer approached defendant's vehicle, he noticed a burnt smell of marijuana emanating from it. The officer did not intend to search the vehicle at that point. However, after the dispatcher informed the officer defendant had an outstanding warrant necessitating defendant's arrest, and the officer smelled a perceptible odor of raw marijuana on defendant's person as they sat together in the patrol car, the officer decided to search the vehicle.

The Court concludes that the officer's testimony regarding the odors established probable cause for the subsequent search of the vehicle. In addition, the finding of probable cause arose in unforeseeable and spontaneous circumstances. There were not two stops as argued by defendant. The discovery of the warrant and new smell emanating from defendant's person permitted the officer to continue the investigation. The search was permissible under the automobile exception to the warrant requirement as articulated in State vs. Witt, 223 N.J. 409(2015). Accordingly, the court affirmed the order denying defendant's suppression motion.

Discussion

Eight months after defendant's arrest, the Legislature enacted the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 to -56, which became effective on February 22, 2021. As a result of CREAMMA, an odor of marijuana cannot create reasonable suspicion or probable cause to conduct a warrantless search. However, CREAMMA only applies prospectively, State vs. Cohen, 254 N.J. 308, 328(2023), and therefore is not applicable to defendant's arrest.

State vs. Courtney, 478 N.J. Super 81 (2024)

Searches of a Vehicle That Will be Towed Away as Required Under John's Law

State vs. Witt, our Supreme Court held police cannot conduct a search pursuant to the automobile exception to the warrant requirement once a vehicle has been towed away and impounded. John's Law generally requires police to impound a vehicle for at least twelve hours when the driver is arrested for driving while intoxicated (DWI). This case addresses the novel question of whether police may conduct a search under the automobile exception when they are required to impound a vehicle pursuant to John's Law, but the vehicle has yet to be removed from the scene of the stop.

The trial judge suppressed a handgun found under the front passenger seat, reasoning that because the officers were required to impound the vehicle, they were also required to obtain a search warrant even though the search occurred roadside. After considering the plain text and rationale of Witt, the court reverses the suppression order, holding the inherent exigency justifying a warrantless search at the scene continues to exist so long as the detained vehicle remains at the location of the stop. The Court reasons the inherent exigency is not abated by the fact the vehicle will eventually be removed from the scene. Nor is such exigency abated when the decision is made to remove the vehicle, regardless of whether the decision is made in the exercise of police discretion or in compliance with a statutory impoundment mandate. The Court concludes the authority to conduct an automobile-exception search lapses only after the vehicle has been removed to a secure location, not in anticipation of such removal. So long as police satisfy the foundational requirements of probable cause, spontaneity, and unforeseeability, a contemporaneous on-the-spot search is permitted regardless of the ultimate disposition of the vehicle. Accordingly, the Court declines to create a new bright-line rule making vehicles subject to John's Law categorically ineligible for an on-scene search under the automobile exception.

Discussion

In Chambers vs. Marony, 399 U.S. 42(1970), the Court held that once probable cause to conduct a vehicle search has been established, it makes no difference under the automobile exception where that search takes place. This procedural point of law was considered and rejected in Witt, which requires that automobile exception searches occur at the situs of the stop.