

Garden State CLE presents:

Fourth Amendment *LIVE* !



Lesson Plan

Introduction

The expanding proliferation of police dashboard cameras, so-called "body-cams", security video and cell phone recordings have made video evidence more common and available than every before. Its importance to the defense is beyond question. (See State v. Stein, 225 NJ 582 (2016)).

Given the critical nature of this type of objective evidence and the impact it is likely to have on the fact-finder, it is imperative that defense attorneys view video evidence in a critical manner so as to uncover and exploit defense issues, especially those that can result in the suppression of evidence.

With these ideas in mind, let's view the following police video clips with an eye toward spotting exculpatory issues.

Practice Exercise I

Let's begin with a classic movie!

See how many 4th and 5th Amendment issues you can pick out of this clip from the 1954 movie "Dragnet"

Hint: Please note that this film was made a full seven year before *Mapp v. Ohio*, 367 US 643 (1961).



[Show Movie Clip]

Discussion - Dragnet

What 4th or 5th Amendment issues if any did you detect during the video?



Issue _____

Issue _____

Issue _____

Issue _____

Issue _____

None - the cops were perfect by 1954 standards in California!

Practice Exercise II

Now, let's practice with real police video footage. Follow along as we highlight the various 4th & 5th Amendment issues in:

"The Mobile Home Stop"



[Show Video]

Legal Analysis - Practice Exercise II

The Mobile Home Stop

- 1.) Officer establishes lawful basis for the MV stop justified under:
 - a.) Probable cause: *Whren v. United States*, 517 US 806 (1996)
 - b.) Reasonable suspicion: *Delaware v. Prouse*, 440 US 648 (1979) -
 - c.) Community caretaking: *State v. Goetaski*, 209 NJ Super.362 (App. Div. 1986)

- 2.) Driver (and any passengers) and the vehicle are detained (seized) for investigative purposes: *Brendlin v. California*, 551 US 249 (2007). Please have an obligation to act reasonably during a seizure.

- 3.) Note officer gets a voluntary admission to the traffic offense: NJRE 803(b)(1) to buttress PC for MV stop.

- 4.) Officer questions driver on a topic unrelated to the MV stop. This is permissible so long as it does not unreasonably prolong the detention: *Arizona v. Johnson*, 555 US 323 (2009); *State v. Dickey*, 152 NJ 468, 481-82 (1998).

- 5.) Officer has driver exit the vehicle - this option is categorical for police: *Pennsylvania v. Mimms*, 434 US 106 (1979).

- 6.) Driver gives consent for a dog search (not a search under federal law - but requires reasonable suspicion under NJ law): *State v. Elders*, 386 NJ Super. 208, 228-29; *State v. Cancel*, 256 NJ Super. 430 (App. Div. 1992).

- 7.) Dog alert provides probable cause to search the vehicle: *State v. Cancel*, 256 NJ Super. 430 (App. Div. 1992).

8.) 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;

9.) Officer gets denial of distribution quantity in vehicle;

10.) Officer safety search of vehicle during detention probably illegal in NJ - but no contraband located: State v. Legette, 227 NJ 460 (2017).

11.) Driver detained so officer can monitor her and conduct search simultaneously: Terry v. Ohio, 392 US 1 (1968).

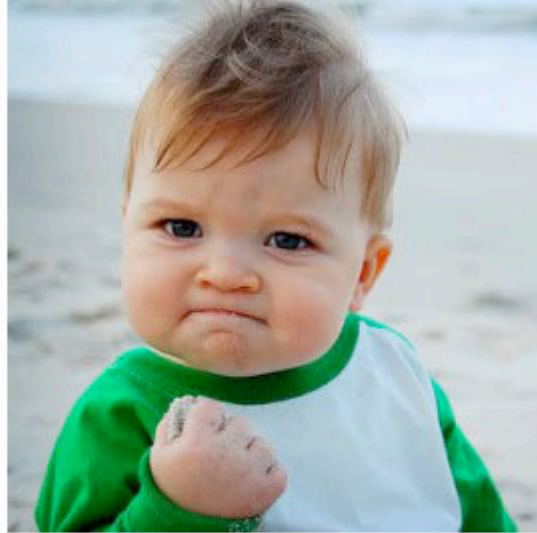
12.) Officer gets a voluntary admission as to luggage ownership. Note the invaluable evidence the officer receives by way of admission from not having *Mirandized* the detainee.

13.) Driver placed under arrest. Not subject to custodial interrogation until back at the police station.

Practice makes perfect

Okay - Enough practice! - Let's start analyzing raw police video in real time and discuss the 4th and 5th Amendment issues.

**Don't
give
up!**



**Achieve
success!**

Chapter 1- *Miranda* and traffic stops

Overview

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 (*Miranda v. Arizona*, 384 US 436 (1966)) 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.

Roadside questioning during course of a motor vehicle stop is generally controlled by *Berkemer v. McCarty*, 468 US 420 (1984). The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute “custodial interrogation” for the purposes of the *Miranda* rule. Although an ordinary traffic stop curtails the “freedom of action” of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief, done in public and the motorist expects that, while he may be given a summons, in the end he most likely will be allowed to continue on his way.

The Miranda & the tag- light stop



[Show video]

Legal Analysis - *Miranda* & the Tag-light MV Stop

Officer immediately has passenger exit vehicle - no apparent evidence of heightened concern for safety: *State v. Smith*, 134 NJ 599 (1994) - Contrast *Maryland v. Wilson*, 519 US 408 (1997).

Officer immediately uses restraints on passenger - no apparent evidence of need for restraints: Police must use the least intrusive means necessary to effectuate the purpose of the investigative detention. *State v. Davis*, 104 NJ 490, 504 (1986).

Officer performs unannounced door opening - permissible under NJ law. *State v. Mai*, 202 NJ 12 (2010).

Initial frisk does not appear to be based upon any articulable suspicion of a weapon in possession: *Terry v. Ohio*, 392 US 1 (1968).

Passenger *Mirandized*, despite no legal obligation during an investigative detention: *Berkemer v. McCarty*, 468 US 420 (1984).

Odor of marijuana gave officer probable cause to search the vehicle and arrest both subjects: *State v. Walker*, 213 NJ 281 (2013); *State v. Myers*, 442 NJ Super. 287 (App. Div. 2015).

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Both occupants *Mirandized*, despite no legal obligation during an investigative detention: *Berkemer v. McCarty*, 468 US 420 (1984).

Initial stop based upon defective tag light constitutes valid probable: NJSA 39:3-61; *Whren v. United States*, 517 US 806 (1996)

Officer gets voluntary admission of marijuana possession after unnecessary *Miranda* warnings: NJRE 803(b)(1)

Chapter 2 - The Field Inquiry

Overview

A simple field inquiry may quickly 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.

A field inquiry “is a limited form of police investigation that, except for impermissible reasons such as race, may be conducted ‘without grounds for suspicion. As a general rule, “a police officer properly initiates a field inquiry by approaching an individual on the street, or in another public place, and by asking him if he is willing to answer some questions. A permissible inquiry occurs when an officer questions a citizen in a conversational manner that is not harassing, overbearing, or accusatory in nature.

An encounter escalates from an inquiry to a detention “when an objectively reasonable person feels that his or her right to move has been restricted.” In that circumstance, “[a]n officer does not need a warrant to make such a stop if it is based on ‘specific and articulable facts which, taken together with rational inferences from those facts,’ give rise to a reasonable suspicion of criminal activity.”

When an officer has a reasonable suspicion that the subject may be armed, the officer may conduct a protective frisk for his own safety to recover the weapons. State v. Thomas, 110 NJ 673 (1988)

Chapter 2 - Field Inquiry

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[Show Clip]

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. State v. Witt, 223 NJ 409 (2015).

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. State v. Smith, 134 NJ 599 (1994); State v. Legette, 274 NJ Super. 278 (Law Div. 1994).

Pat-down must be based upon reasonable suspicion that suspect has a weapon. Officer concerned about furtive gesture touching waistband. State v. Lund, 119 NJ 35 (1990). Also, note here that officers were outnumbered by the passengers.

One 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. State v. Evans, 449 NJ 66 (App. Div. 2017).

Non-deadly use of force (choke-hold) reasonable given the circumstances confronting the officers. Tennessee v. Garner, 471 US 1 (1985) (A law-enforcement officer could not use deadly force to apprehend a fleeing suspected felon who was neither armed nor dangerous, and who did not pose a significant threat to public safety.)

Chapter 3 - Order to Exit Vehicle

Overview

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. *State v. Irelan*, 375 NJ Super. 100 (App. Div. 2005). 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. Note the "inadvertent element of this exception to the warrant requirement has been eliminated by the Supreme Court. *State v. Gonzales*, 227 NJ 77 (2016)

Chapter 3 - Order to exit vehicle



[Show Video]

Case Chronology - Order to exit vehicle/Search

Refusal to exit vehicle provides probable cause to arrest for NJSA 2C:29-1. State v. Perlstein, 206 NJ Super. 246 (App. Div. 1985). Also provides strong circumstantial evidence of intoxication under NJSA 39:4-50(a).

Note paraphernalia recovered during a search of the person incident to arrest. NJSA 2C:36-2. Chimel v. California, 395 US 752 (1969).

Search of vehicle justified based upon the probable cause to arrest for drunk driving. Weapons and contraband are recovered in plain view. State v. Irelan, 375 NJ Super. 100 (App. Div. 2005).

Chapter 4 - The Law of Arrest without a Warrant

Overview

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] State v. Perlstein, 206 NJ Super. 246 (App. Div. 1985).

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. See State v. Sloane, 193 NJ 423 (2008).

Chapter 4 - The law of arrest without an arrest warrant



[Show Video]

Case Chronology - Arrest without a warrant

Motor vehicle stop based upon no read-seat passenger seatbelts. Not a primary offense under New Jersey law. See NJSA 39:3-76.2f(c) and NJSA 39:3-76.2n.

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.

Chapter 5 - Residential entry and search based upon arrest warrant

Overview

While an arrest warrant and a search warrant both serve to subject the probable-cause determination of the police to judicial review, the interests protected by the two warrants differ. An arrest warrant is issued by a magistrate upon a showing that probable cause exists to believe that the subject of the warrant has committed an offense and thus the warrant primarily serves to protect an individual from an unreasonable seizure. A search warrant, in contrast, is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police

An arrest warrant generally furnishes no authority to the police to intrude on the privacy of a home or to engage in a search therein. In the absence of appropriate exigency, such as hot pursuit into the home, only one possible exception to this principle is recognized, and that is the aforementioned rule of which holds that an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. *Peyton*, New York, 445 US 573, 603 (1980).

Under the Fourth Amendment, may a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant.”?

In the absence of consent or exigency, an arrest warrant cannot be lawfully executed in a dwelling unless the officers executing the warrant have objectively reasonable bases for believing that the person named in the warrant both resides in the dwelling and is within the dwelling at the time. *State v. Miller*, 342 NJ Super. 474, 497 (App. Div. 2001)

Police would also be permitted to perform a protective sweep of the house to make sure no other individuals could interfere with the arrest. Maryland v. Buie, 494 US 325 (1990); State v. Davila, 203 NJ 97 (2010).

Chapter 5 - Residential Entry & Search Based upon Arrest Warrant



[Show video]

**Case Chronology - Residential EntrSearch based upon
an Arrest Warrant**

Police knock and announce their presence: Wilson v. Arkansas, 514 US 927 (1995).

Police force entry after announcing: State v. Johnson, 168 NJ 608 (2001) (Reasonable period of time required).

Police conduct protective sweep - but not a search for evidence, except things in plain view.

Chapter 6 - Road Block & DWI

Investigation

Overview

A motor vehicle stop at a road block constitutes a seizure within the meaning of the 4th Amendment. Police thus have an obligation to act reasonably.

The New Jersey courts have not yet approved a road block for the purpose of safety or document checks. New Jersey road blocks are authorized for DWI (State v. Kirk, 202 NJ Super. 28 (App. Div. 1985)) and emissions inspection (State v. Kadelak, 280 NJ Super. 349 (App. Div. 1995)).

Federally, the Supreme Court has approved DWI road blocks (Michigan v. Sitz, 496 US 444 (1990)) and the gathering of investigative information (Illinois v. Lidster, 540 US 419 (2004)). A general criminal law enforcement road block is unreasonable under the 4th Amendment (Indianapolis v. Edmond, 531 US 32 (2000)).

The administration of field sobriety tests are considered to produce non-testimonial evidence. As a result, *Miranda* warnings are not required. State v. Stever, 107 NJ 543 (1987).

Chapter 6 - Road block and DWI investigation



[Show Video]

Case Chronology - Road Block & DWI Investigation

No expectation of privacy in license plate: State v. Donis, 157 NJ 44 (1998); New York v. Class, 475 US 106 (1986).

Selection of vehicles can be based upon any criterion except race. State v. Segars, 172 NJ 481 (2002).

HGN testing in New Jersey not admissible as not sufficiently scientifically reliable. State v. Doriguzzi, 334 NJ Super. 530 (App. Div. 2000).

Field sobriety tests non-testimonial. State v. Stever, 107 NJ 543 (1987).

NCIC search permitted without any articulable suspicion. State v. Sloane, 193 NJ 423 (2008).

Portable breath testing devices not permitted in New Jersey. They have not been determined to be scientifically reliable. State v. Doriguzzi, 334 NJ Super. 530 (App. Div. 2000).

The tow of the vehicle is mandatory since there is no safe area to leave it and no person capable of driving it away. State v. Slockbower, 79 NJ 1 (1979).

Chapter 7 - The Plain View Exception for Dummies

Overview

We began with a classic movie, so let's end with one too!

The New Jersey Supreme Court has recently amended the test for judging the plain view exception to the warrant requirement. See *Coolidge v. New Hampshire*, 403 US 443 (1971).

Under current law, there are two elements:

- 1.) Officer must be lawfully in the viewing area:**

- 2.) The illegal nature of the object must be immediately apparent to the officer. (I.e. the officer has probable cause to associate the item with a violation of the criminal law.)**

- 3.) It is no longer necessary for the State to prove the discovery of the evidence was inadvertent. *State v. Gonzalez*, 227 NJ 77 (2016); *Horton v. California*, 496 US 128, 130, 138-39 (1990)**

Chapter 7 - The plain view exception for Dummies



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