Garden State CLE Presents:

"Blood Sport"

Telephonic Search Warrants & DWI: Together at Last!

Lesson Plan

1. Telephonic Search Warrants

a. In General & Historical Development

i. Created by State v. Valencia, 93 NJ 126 (1983)
ii. Required a showing of both probable cause and exigent circumstances
iii. Burden of production was on the State
iv. Codified at Rule 3:5-3(b)
v. Amended by State v. Pena-Flores, 198 N.J. 6, 28-29 (2009)

b. Creation

State v. Valencia, 93 NJ 126, 136-37 (1983)

In light of this judicial role, the State, when seeking to defend a telephone-authorized search, must make an evidential showing that is somewhat different from that imposed with respect to a warrantless search in which there has been no judicial involvement whatsoever. We now hold that to sustain a telephone-authorized search, the State must still show the existence of probable cause to search. In addition, the State must demonstrate to the issuing judge that the failure to secure a written warrant is necessitated by "exigent circumstances." We impose the requirement that exigent circumstances be shown because the telephone-authorized search should, analytically in that respect, be regarded as a warrantless search and, generally, a written warrant should be obtained whenever possible.

c. Warrant Procedure (P/C and Exigency)

State v. Valencia, 93 NJ 126, 138-39 (1983)

Adapting these standards to a telephone-authorized search, we now require the following procedural safeguards. The applicant-police officer must suitably identify himself; he must specify the purpose of the request. He must also disclose the basis for the information he intends to impart to the judge and must be placed under oath or affirmation by the judge before presenting any information. The judge shall also make a contemporaneous record of the application, either by tape or stenographic recording or by making adequate notes thereof. The judge shall also make a contemporaneous record or notation of his factual determination as to exigent circumstances and probable cause. He shall also memorialize the specific terms of his authorization to search. Further, promptly after such authorization, the judge shall issue a written confirmatory search warrant and shall file that warrant together with all documents evidencing the oral application and authorization with the clerk of the court. Compliance with these safeguards will assure a reliable underpinning to the judicial decision authorizing a search rendered over the telephone.

d. Burden of Production

State v. Valencia, 93 NJ 126, 138-39 (1983)

To recapitulate, a search authorized by a judge over the telephone is, for analytical purposes, to be considered a form of warrantless search. Upon a motion to suppress the evidence from such a search, the burden will be upon the State to establish its validity. If the State demonstrates (1) that the issuing judge found both exigent circumstances to excuse the failure to obtain a written warrant and probable cause to conduct the search and (2) that all of the procedural safeguards that we have outlined to assure the underlying reliability of the judge's decision to authorize the search have been met, the telephone authorization to search will then be deemed to be the functional equivalent of a written warrant. The burden of demonstrating the invalidity of the search shall thereafter revert to the defendant, in which event the determination of the issuing judge as to the existence of both exigent circumstances and probable cause shall be accorded substantial deference.

e. Rule 3:5-3(b) (Prior to relaxation)

(b) **A Superior Court judge may issue a search warrant upon sworn oral testimony of an applicant who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate longhand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of his or her information. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a search warrant. A warrant may issue if the judge is satisfied that exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that sufficient grounds for granting the application have been shown.**

Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for the purpose of R. 3:5. The judge shall direct the applicant to print the judge's name on the warrant. The judge shall also contemporaneously record factual determinations as to exigent circumstances. If a recording is made, the judge shall direct that the testimony be transcribed as soon as practicable. This transcribed record shall be certified by the judge. The judge shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant. In all other respects, the method of issuance and contents of the warrant shall be that required by subsection (a) of this rule.

f. State v. Pena-Flores, 198 N.J. 6, 28-29 (2009)

[T]here is a suggestion in our case law that a search pursuant to a telephonic warrant should be treated, analytically, as a warrantless search. As a result, it may be that resort to such warrants has been inhibited. It makes sense that if a telephonic warrant is treated as the equivalent of no warrant at all, police would generally see no benefit in the procedure. Moreover, our Court Rules have underscored the problem by requiring an applicant for a telephonic warrant to prove to the judge "that exigent circumstances exist sufficient to excuse the failure to obtain a written warrant." *R.* 3:5–3(b). By that requirement, which replicates the justification necessary to uphold a warrantless search, the telephonic or electronic warrant maintains its place in the hierarchy as a second-class citizen.

It seems to us that our procedures for seeking a warrant would be improved by recognizing what other jurisdictions have long acknowledged —that a warrant obtained by telephonic or electronic means is the analytical equivalent of an in-person warrant and should be treated accordingly. We note that that approach has been embraced by scholars as well.

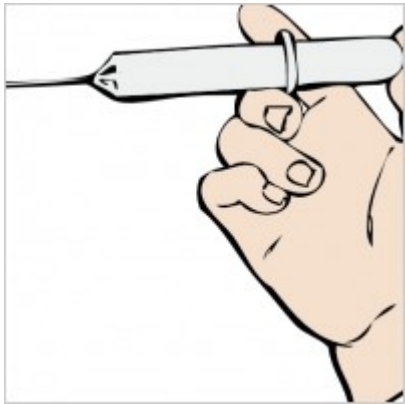
The foregoing observations seem to us to be intuitively correct. In furtherance of them, we will amend *R.* 3:5–3(b) to clarify the parity between the various methods for obtaining a warrant and to underscore that an officer may resort to electronic or telephonic means without the need to prove exigency.

[Note what "parity" means in this context.]

2. Missouri v. McNeely – In general

Schmerber v. California, 384 US 757, 770 (1966)

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.



We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions. (at 772)

Missouri v. McNeely, 133 S. Ct. 1552 (2013)

In [Schmerber], this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber,* not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

3. McNeely Directive (effective 12/1/13)

NOTICE TO THE BAR
TELEPHONIC REQUESTS FOR SEARCH WARRANTS FOR BLOOD TESTS IN DRIVING WHILE INTOXICATED (DWI) CASES (MISSOURI V. MCNEELY) -- RULE RELAXATION

The attached October 8, 2013 New Jersey Supreme Court order addresses the process for telephonic requests for search warrants for nonconsensual blood tests in certain DWI cases and is in response to the decision of the United States Supreme Court in Missouri v. McNeely, __ U.S. __, 133 S.Ct. 1552, 185 L.Ed. 2d 696 (2013). The order has a December 1, 2013 effective date.

In McNeely, the United States Supreme Court held "that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." 185 L.Ed.2d at 715. Further, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." Id. at 709.

The New Jersey Supreme Court order published with this notice relaxes and supplements the Part III (Criminal) and Part VII (Municipal Court) Rules so as to authorize certain Municipal Court judges to issue search warrants for nonconsensual blood testing in all driving while intoxicated (DWI) cases where no indictable charge is anticipated, with the Assignment Judge to designate either all of the Municipal Court judges in the county to have this authority or just particular specified judges. Such authorization is not limited to evening or weekend hours. Further, the search warrant may be issued in this limited category of cases by a designated Municipal Court judge in person or by telephone, radio or other means of electronic communication upon sworn oral testimony of a law enforcement officer or prosecuting attorney communicated to the issuing judge, pursuant to the procedures outlined in R. 3:5-3(a) and (b).

Superior Court judges will handle search warrants for blood tests in those DWI cases where an indictable charge is anticipated. The Supreme Court order does not affect any current procedures for Municipal Court judges to issue in-person search warrants for other matters.

In accordance with the Supreme Court's holding in State v. Pena-Flores, 198 N.J. 6 (2009), the attached Order also removes the requirement in R. 3:5-3(b) that exigent circumstances must exist in order to issue search warrants by telephone, radio or other means of electronic communication.

Further, the Order also asks the Supreme Court Criminal Practice Committee and Municipal Court Practice Committee to consider and make recommendations regarding the scope of authority for Municipal Court judges to issue telephonic search warrants in all cases.

Glenn A. Grant, J.A.D. Acting Administrative Director of the Courts
Dated: November 14, 2013

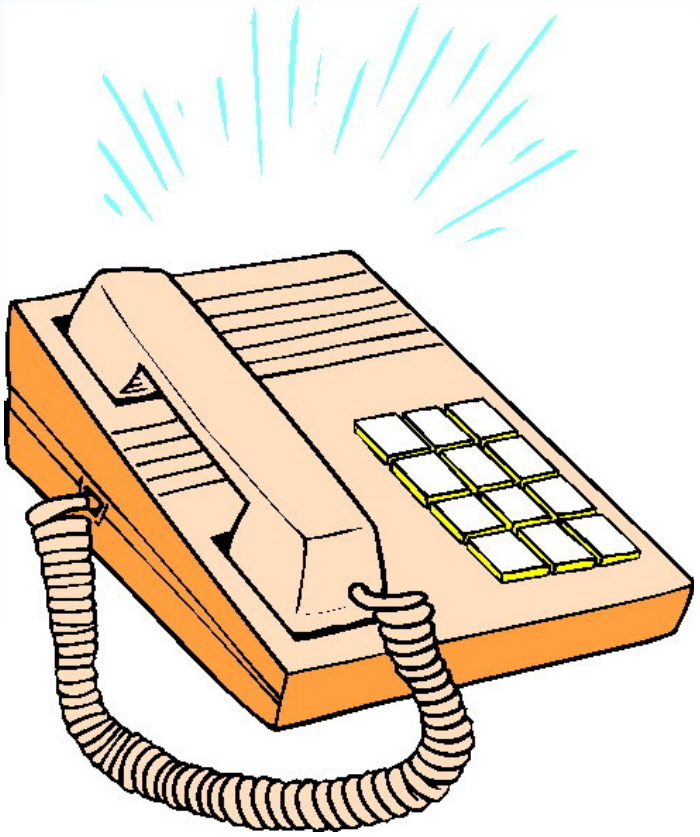
SUPREME COURT OF NEW JERSEY

It is ORDERED, pursuant to N.J. Const. Art. VI, sec. 2, par.3, that effective December 1, 2013 and until further order, Part III (Criminal) and Part VII (Municipal Court) of the Rules Governing the Court of the State of New Jersey are supplemented and relaxed so as to permit Municipal Court judges, as designated by the Assignment Judge, to issue search warrants for nonconsensual blood testing in all driving-while-intoxicated cases where no indictable charge is anticipated; this authorization is not limited to evening or weekend hours and such search warrants may be issued in-person or by telephone, radio or other means of electronic communication on the sworn oral testimony of a law enforcement officer or prosecuting attorney communicated to the issuing judge, pursuant to the procedures outlined in R. 3:5-3(a) and (b).

It is FURTHER ORDERED that R. 3:5-3(b) is also specifically relaxed so as to remove the requirement that exigent circumstances must exist to issue a search warrant by telephone, radio or other means of electronic communication.

It is FURTHER ORDERED that the Court's Criminal Practice Committee and Municipal Court Practice Committee are asked to consider the scope of authority for Municipal Court judges to issue telephonic/electronic search warrants in all cases and to provide the Court with any proposed rule recommendations.

For the Court,
/s/ Stuart Rabner
Chief Justice
Dated: October 8, 2013



4. Advocacy & Unresolved Legal Issues

a. Territorial Jurisdiction for search warrant - See Rule 7:7-8(d) –

Investigative Subpoenas in Operating While Under the Influence Cases.

When the State demonstrates to the court through sworn testimony and/or supporting documentation that there is a reasonable basis to believe that a person has operated a motor vehicle in violation of N.J.S.A. 39:4-50 or N.J.S.A. 39:3-10.13, a vessel in violation of N.J.S.A. 12:7-46, or an aircraft in violation of N.J.S.A. 6:1-18, a municipal court judge with jurisdiction over the municipality where the alleged offense occurred may issue an investigative subpoena directing an authorized agent of a medical facility located in New Jersey to produce medical records related to the presence of alcohol, narcotics, hallucinogens, habit-producing drugs or chemical inhalants in the operator's body. If no case is pending, the subpoena may be captioned "In the Matter" under investigation.

[See State v. Dyal, 97 NJ 229 (1984).]

[Also – consider problems associated with defendants who are taken for treatment to a facility in another state. e.g. in Sussex County]

b. Motion to suppress must be filed in Superior Court under Rule 3:5-7. (Burden of production will be on the Defendant as *per Pena-Flores*.)

There is no authority under the current Rules of Court for a municipal court judge to hear a motion to suppress involving evidence seized pursuant to the authority of a search warrant. See generally Rule 7:5-2(a):

7:5-2. Motion to Suppress Evidence

(a) Jurisdiction. **The municipal court shall entertain motions to suppress evidence seized without a warrant in matters within its trial jurisdiction on notice to the prosecuting attorney and, if the county prosecutor is not the prosecuting attorney, also to the county prosecutor. A motion to suppress evidence seized pursuant to a warrant and motions to suppress evidence seized without a warrant, but in matters beyond the trial jurisdiction of the municipal court, shall be made and heard in the Superior Court.**

c. Demand for discovery should be to municipal prosecutor Rule 7:5-1(b).

(b) Providing to Defendant; Inspection. **All completely executed warrants, together with the supporting papers and recordings described in paragraph (a) of this rule, shall be provided to the defendant in discovery pursuant to R. 7:7-7 and, upon notice to the county prosecutor and for good cause shown, available for inspection and copying by any other person claiming to be aggrieved by the search and seizure.**

(This Rule may have to be subject to amendment since local prosecutor may not have access to or possession of affidavit and related documents.)

d. Nothing to prevent the judge who issued the search warrant from trying the substantive issues in the DWI case.

State v. Medina, 349 NJ Super. 108, 129-130 (App. Div. 2002)

Defendant next contends that the Law Division judge erred by failing to recuse himself after adjudicating pretrial motions and reviewing the grand jury transcripts. The gist of defendant's argument is that the judge was exposed to prejudicial and inadmissible evidence in pretrial proceedings, and that he should have disqualified himself from conducting the bench trial. No motion to recuse was ever made.

[Rule 1:12–1(d)] provides that a judge "shall be disqualified on the court's own motion ... if the judge has given an opinion upon a matter in question in the action." However, "the *Rule* contains an important qualification." "A judicial statement of opinion in the course of the proceeding in the case ... or in another case in which the same issue is presented [does] not require disqualification." "A judge [may] continue to participate in a case when [an] opinion which he has rendered ... was expressed in the course of [the] proceedings regarding the same controversy.". The rule's prohibition "is directed primarily at statements made outside of the declarant's role as a judge."

Apart from *R.* 1:12–1(d), a judge must recuse himself "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." [*R.* 1:12–1(g).] However, exposure to inadmissible evidence in the course of pretrial proceedings generally does not require disqualification of the judge even where the judge is to serve as the fact-finder. "A judge sitting as the fact-finder is certainly capable of sorting through admissible and inadmissible evidence without resultant detriment to the decision-making process...." Trained judges have the ability "to exclude from their consideration irrelevant or improper evidence and materials which have come to their attention."

Having said this, a judge should be sensitive to the perception of the litigants, counsel, or the informed public that his exposure to inflammatory material might irredeemably preclude him from serving as a neutral and impartial arbiter of the facts. We, nevertheless, perceive no abuse of the judge's discretion in this case.

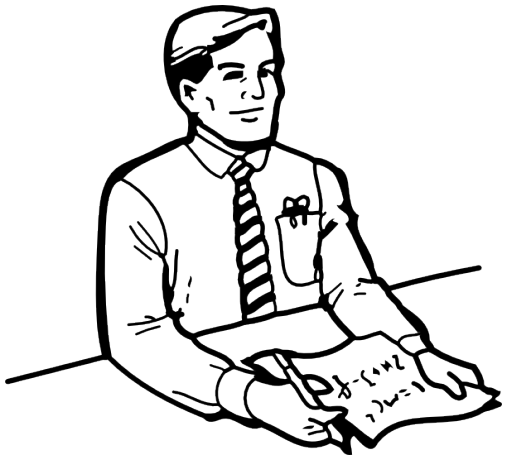
e. Grounds for motion to suppress

i. Truthfulness of information provided to the judge. Franks v. Delaware, 438 US 154 (1978). See also State v. Howery, 80 NJ 563, 566-68 (1979)

Generally, when the police seize evidence in violation of the warrant requirement, suppression of the evidence is the remedy. Our jurisprudence does not countenance the securing of a warrant through duplicitous means. For that reason, a warrant is invalid (1) if a police officer makes "material misstatements in a search warrant affidavit" with knowledge of the falsity of those statements or with reckless disregard for the truth and (2) if excision of the untruthful statements would leave the affidavit without probable cause for the issuance of the warrant.

Note - After *Franks* was decided, the N.J. Supreme Court ruled in *Howery* that to even be entitled to a hearing, a defendant must make a "substantial preliminary showing" that the officer seeking the warrant made misleading or false statements in the supporting affidavit.

In particular, a defendant must make a substantial preliminary showing that the affiant, either deliberately or with reckless disregard of the truth, failed to apprise the issuing judge of material information which, had it been included in the affidavit, would have militated against issuance of the search warrant. However, if probable cause exists independent of the errant information, the warrant remains valid and no hearing need be conducted. Additionally, statements alleged to be false "must be material to the extent that when they are excised from the affidavit, that document no longer contains facts sufficient to establish probable cause.



ii. Reasonableness of extraction process - Use of force in extracting the sample - State v. Ravotto, 169 NJ 227, 241-42 (2001). (Reasonable level force permitted, depending upon the underlying seriousness of the offense.)

In applying those tenets, we conclude that the force used by the police to extract defendant's blood was unreasonable under the totality of the circumstances. Defendant was terrified of needles and voiced his strong objection to the procedures used on him. He shouted and flailed as the nurse drew his blood. Several persons, including the police, and mechanical restraints were needed to hold defendant down. Defendant's fear is relevant to our analysis. A suspect's reaction to law enforcement officials is part of the fact pattern considered by a reviewing court when it determines whether police behavior was objectively reasonable. We also consider the offense that was under investigation as part of the totality of the circumstances. Although the Court does not diminish defendant's suspected offense or in any way condone driving while intoxicated, we note that the charge against defendant is quasi-criminal rather than criminal in nature. Moreover, defendant had been in a one-car accident and was not under suspicion for causing the death of or injury to any other person.

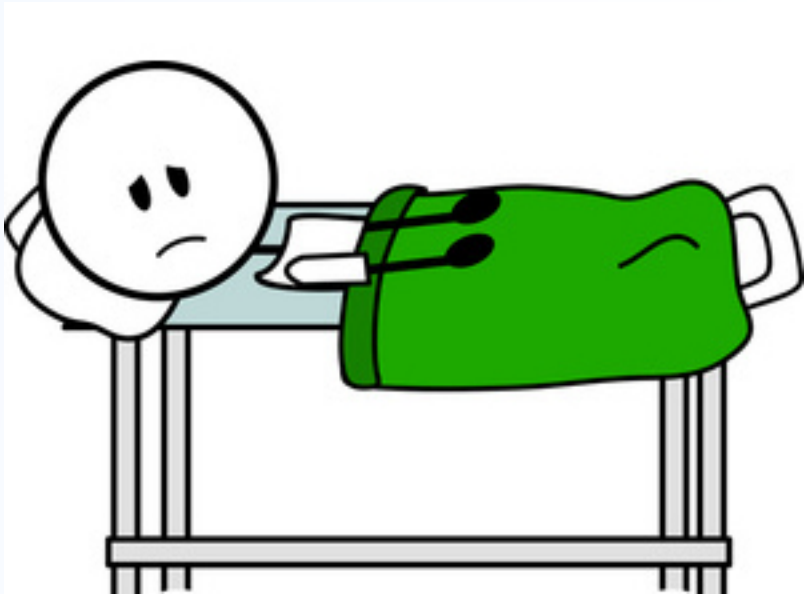
Note – As per the Rule relaxation, there will never be serious offenses associated with the blood-draw search warrant application in municipal court. This will limit the level of force police can use in these cases.

Note – Also consider issues related to medically *accepted manner of extraction. See. Schmerber* at 772.

iii. Lack of compliance by the judge with procedural guidelines on making and preserving a record of the evidence of probable cause. (See Task Force Report in Appendix II) See Rule 3:5-3(b).

• A warrant may issue if the judge is satisfied that exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that sufficient grounds for granting the application have been shown. Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for the purpose of R. 3:5. The judge shall direct the applicant to print the judge's name on the warrant. The judge shall also contemporaneously record factual determinations as to exigent circumstances. If a recording is made, the judge shall direct that the testimony be transcribed as soon as practicable. This transcribed record shall be certified by the judge. The judge shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant. In all other respects, the method of issuance and contents of the warrant shall be that required by subsection (a) of this rule.

iv. No discussion in order related to the taking of urine samples (See Jiosi v. Township of Nutley, 332 NJ Super. 169 (App. Div. 2000); State v. Malik, 221 NJ Super. 114 (App. Div. 1987)



Appendix I

The Need for a Showing of Exigency

1. Historical Development

a. Carroll v. U.S., 267 U.S. 132 (1925)
b. Chambers v. Maroney, 399 U.S. 42 (1970)
c. Pennsylvania v. Labron, 518 U.S. 938 (1996)

2. New Jersey View

a. State v. Cooke, 163 N.J. 657, 667-668 (2000) **

The early federal cases focused on the inherent mobility of automobiles, which created exigent or emergent circumstances making it impracticable to obtain a warrant.. Later, the Supreme Court articulated an additional rationale based on a reduced expectation of privacy in motor vehicles

More recently, the Supreme Court has held that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more.

However….

This Court has repeatedly looked to exigent circumstances to justify warrantless automobile searches. Without a requirement of exigent circumstances, virtually every search of an automobile would be valid provided the police had probable cause to act. For example, under the rationale advanced by the State, a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs. Such a broad ruling has no basis in our case law.

3. Development of Current New Jersey Law

a. State v. Dunlap, 185 NJ 543, 550-551 (2006)

There were at least ten officers present on the evening in question and even assuming that some were needed for other duties in connection with defendant's arrest and the on-going investigation, the State did not establish that an insufficient number **1283 would have been left to guard the car. To say that the late hour made access to a judge difficult or unpracticable, is to ignore the procedures in place for emergent duty judges in every vicinage and the existence, since 1984, of the telephonic warrant procedure. *R.* 3:5-3(b). Indeed, it is not without significance that the investigators here had time to call the prosecutor's office at about 10:00 pm and obtain verbal authorization for the consensual recording of defendant's conversation with [the female informant].

We have carefully reviewed this record in light of the State's claims and have determined that the decision of the Appellate Division is fully supported in every respect by the record and is legally unexceptionable. In reaching that conclusion we underscore the availability of the telephonic warrant and the option of vehicle impoundment as among the alternatives available to the ten police officers on the scene.

Nothing in this opinion should be viewed as a retrenchment from the well-established principles governing the automobile exception to the warrant requirement. The standards remain the same: probable cause and exigent circumstances, each of which to be determined on a case-by-case basis. Here, the unique facts, particularly the presence of ten officers, fully justified the Appellate Division's conclusion that exigency was absent. Different facts, such as a roadside stop effectuated by only one or two officers, would likely have changed the calculus. Police safety and the preservation of evidence remain the preeminent determinants of exigency.

b. State v. Johnson, 193 NJ 528, 556 (2008)

When the circumstances are sufficiently exigent that appearing before a judge to obtain a written warrant is either impossible or impracticable, but not so exigent that there is insufficient time to stabilize the situation and call for a warrant, police officers must obtain a telephonic warrant rather than conduct a warrantless search or seizure.

The State has argued that the exigent circumstances needed for a telephonic warrant are no different from the exigent circumstances justifying a bypass of the warrant requirement. We disagree, because if the State were correct the police would never have reason to apply for a telephonic warrant. Simply stated, for purposes of a telephonic warrant, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain a written warrant.). For purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain any form of warrant.

c. State v. Pena-Flores, 198 N.J. 6, 28-29 (2009)

[T]he warrantless search of an automobile in New Jersey is permissible where (1) the stop is unexpected; (2) the police have probable cause to believe that the vehicle contains contraband or evidence of a crime; and (3) exigent circumstances exist under which it is impracticable to obtain a warrant. The notion of exigency encompasses far broader considerations than the mere mobility of the vehicle No one factor is dispositive; courts must consider the totality of the circumstances. How the facts of the case bear on the issues of officer safety and the preservation of evidence is the fundamental inquiry. There is no magic formula-it is merely the compendium of facts that make it impracticable to secure a warrant. In each case it is the circumstances facing the officers that tell the tale.

[W]e will amend *R.* 3:5-3(b) to clarify the parity between the various methods for obtaining a warrant and to underscore that an officer may resort to electronic or telephonic means without the need to prove exigency. (at 35)

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