New Jersey Motor Vehicle Searches:

Past, Present & into the Future

The Impact of Pena-Flores

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2. Automobile Exception to the Warrant Requirement – In General

United States Supreme Court

Carroll vs. United States, 267 U.S. 132(1925) – (Historical & Impractical)

Chambers vs. Maroney, 399 U.S. 42, 52(1970) – (Inherent mobility of automobiles, which creates exigent or emergent circumstances making it impracticable to obtain a warrant)

California vs. Carney, 471 U.S. 386, 392, 105(1985) – (reduced expectation of privacy in motor vehicles because of the need for regulation)

Pennsylvania vs. Labron, 518 U.S. 938, 940 (1996) – ("[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.")

New Jersey Supreme Court

State vs. Patino, 83 N.J. 1, 9(1980) – The automobile exception to the warrant requirement permits police to stop and search a moving or readily movable vehicle when there is probable cause to believe the vehicle contains criminally related objects. The rationale for this exception is grounded in the exigent circumstances created by the inherent mobility of vehicles and the somewhat lessened expectation of privacy in one's vehicle.

State vs. Cooke, 163 N.J. 657(2000) – (Requirements of the New Jersey Constitution)

3. Probable Cause – Defined

Probable cause exists if at the time of the police action there is a well-grounded suspicion that a crime has been or is being committed. The standard defies scientific precision. We have explained, however, that it requires nothing more than a practical, common-sense decision whether, given all the circumstances ... there is a fair probability that contraband or evidence of a crime will be found in a particular place. State vs. Nishina, 175 N.J. 502, 515(2003)

Probable cause has been defined as a well-grounded suspicion that a crime has been or is being committed. State vs. Cooke, 163 N.J. 657, 671(2000).

4. Exigent Circumstances – In General

We conclude by stating the obvious: the term "exigent circumstances" is, by design, inexact. It is incapable of precise definition because, by its nature, the term takes on form and shape depending on the facts of any given case. We reiterate that exigency in the constitutional context amounts to "circumstances that make it impracticable to obtain a warrant when the police have probable cause to search the car. It is that impracticability and the existence of probable cause to believe that the vehicle contains evidence of a crime, together with a lessened expectation of privacy in an automobile that tips the balance in favor of condoning the warrantless search. Although the balance is a delicate one, we must attempt to maintain it to protect the rights and interests of all members of the community. State vs. Cooke, 163 N.J. 657, 676(2000).

Exigent circumstances have been described as unforeseeability and spontaneity of the circumstances giving rise to probable cause, and the inherent mobility of the automobile. Exigent circumstances may exist if the unanticipated circumstances that give rise to probable cause occur swiftly. In addition, exigent circumstances may arise where "[a]ny element of surprise had been lost; the vehicle contained the 'contraband' drugs; there were 'confederates waiting to move the evidence'; the police would need 'a special police detail to guard the immobilized automobile. State vs. Cooke, 163 N.J. 657, 672(2000).

5. Exigent Circumstances – Examples

There are several factors we consider relevant to a finding of exigency: it would have been impracticable to require Officer Harmon to leave his surveillance post to stand guard over the Escort; the element of surprise was lost when defendant was arrested in the presence of Miles; third parties had knowledge of the location of the Escort and were aware that defendant stored drugs in either the Escort or Hyundai; those same parties could have attempted to remove or destroy the drugs in the time necessary to obtain the warrant; and other parties in this known drug-trafficking area could have removed the car itself. Based on those factors, we are persuaded that the State has met its burden in demonstrating the impracticability of obtaining a warrant.

That said, we note that any one of the above factors, standing alone, would be insufficient to support a finding of exigency. Rather, it is the combination of factors in this case that justify the warrantless search. As stated previously, a car parked in the home driveway of vacationing owners, without more, does not give rise to exigency. As another example, exigency would not have existed in the present case if the officer had not observed or reasonably believed that third parties were capable of destroying or removing the evidence contained in the car. We must await future cases to develop other examples. State vs. Cooke, 163 N.J. 657, 675-676(2000).

5. Exigent Circumstances – Examples

We are satisfied that the exigent circumstances prong has also been established. The troopers had no advance information about defendant; they encountered him by chance while on patrol. Indeed, it was not until after the stop and the subsequent roadside investigation that they acquired probable cause that the vehicle contained items of evidence they had the right to seize. Therefore, the events that gave rise to probable cause were unforeseen, spontaneous, and developed swiftly. Considering the early-morning hour, the requirement that the troopers promptly transport defendant to the stationhouse to administer a Breathalyzer test, and the pressing need for assistance because of the accident on the Expressway, it was "impracticable for the police to procure a search warrant and immediate action was necessary.

Third parties had access to defendant's vehicle. Defendant's passenger was fully aware of the situation and was at liberty. Both the passenger and defendant possessed cellular phones and could have informed others. The roadside sobriety tests and arrest were conducted in plain view of the many vehicles that passed by. It would have been unduly burdensome and unreasonably restrictive to require the police to post a guard with the vehicle until a search warrant could be obtained. That impoundment of the vehicle was anticipated at the time of the search does not affect our conclusion because, as we have stated, if there is probable cause to search a vehicle at the scene of the stop, the police are not required to delay the search pending impoundment and issuance of a search warrant. State vs. Irelan, 375 N.J.Super 100, 119-120(App.Div.2005).

6. Prelude to *Pena-Flores*

[W]e reject the State's argument that "it would have been unduly burdensome and unreasonably restrictive to require the police to post a guard and repair to the courthouse for a warrant. 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 would have been left to guard the car. To say that the late hour made access to a judge difficult or unpracticable [sic], is to ignore the procedures in place for emergent duty judges in every vicinage and the existence, since 1984, of the telephonic warrant procedure. *Rule* 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 [their 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.

State vs. Dunlap, 185 N.J. 543, 550-551(2006)
(Contrast – State vs. Carroll, 386 N.J.Super 143(App.Div.2006) – (High speed pursuit, followed by crash and resisting defendant))

6. Prelude to *Pena-Flores*
State vs. Johnson, 193 N.J. 528, 555-556(2008)

The trial court's finding that there were exigent circumstances is simply not supported by the record. Here, [the arresting officer] did not give any reason that would have justified bypassing the warrant process. If [the officer] believed that there was a need to act with dispatch, he could have maintained the status quo in the apartment and applied for a telephonic search warrant pursuant to Rule 3:5-3. That rule, in part, provides that "[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." [7] Rule 3:5-3(b). 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.

FN7. 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.

7. **State vs. Pena-Flores, 965 A. 2d 114 (2009) – In General**

8. **State v. Pena-Flores, 965 A. 2d 114 (2009) – Legal Issues**

a. Document Searches

A new judicially created exception to the probable cause requirement of the Fourth Amendment for "identification searches" cannot be reconciled with [prior case law]. Where a driver has failed to produce his license and an investigating officer is merely trying to determine the driver's identity so he can issue a citation, no search of the passenger compartment can be justified. This is especially so where, as here, the unlicensed driver no longer has access to the vehicle's interior. State v. Lark, 319 N.J. Super. 618, 630 (App. Div. 1999)

Affirmed State v. Lark, 163 N.J. 294, 296-297 (2000) - In instances such as this, when a driver is without a license and offers false information in response to a reasonable police inquiry, there exists a sufficient basis for the police officer to detain the driver for further questioning until the officer learns the true identity of the driver. Assuming that the driver persists in concealing his or her identity and there appears to be no other reasonable alternative, the police officer may take the driver into custody. However, even in that instance, the officer generally may not search the vehicle unless one of the existing exceptions to the warrant requirement is applicable.

8. **State v. Pena-Flores, 965 A. 2d 114 (2009) – Legal Issues**

a. Document Searches

We turn next to Fuller, with regard to whom we reach a different conclusion. [The officer] pulled Fuller over unexpectedly for a traffic violation. As a result of a lookup, [the officer] determined that the license plate and the bill of sale did not correspond to Fuller's vehicle. Accordingly, he was entitled, separate and apart from the automobile exception, to look into the areas in the vehicle in which evidence of ownership might be expected to be found. *State v. Boykins*, 50 *N.J.* 73, 77, 232 *A.*2d 141 (1967) (citations omitted); *State v. Jones*, 195 *N.J.Super.* 119, 122-23, 478 *A.*2d 424 (App.Div.1984) ("[W]here there has been a traffic violation and the operator of the motor vehicle is unable to produce proof of registration, a police officer may [conduct a] search [of] the car for evidence of ownership .... confined to the glove compartment or other area where a registration might normally be kept in a vehicle."

8.State v. Pena-Flores, 965 A. 2d 114 (2009) – Legal Issues

b. Exigent Circumstances

Exigency must be determined on a case-by-case basis. 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.

Legitimate considerations are as varied as the possible scenarios surrounding an automobile stop. They include, for example, the time of day; the location of the stop; the nature of the neighborhood; the unfolding of the events establishing probable cause; the ratio of officers to suspects; the existence of confederates who know the location of the car and could remove it or its contents; whether the arrest was observed by passersby who could tamper with the car or its contents; whether it would be safe to leave the car unguarded and, if not, whether the delay that would be caused by obtaining a warrant would place the officers or the evidence at risk. As we have previously noted, "[f]or purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain *any form* of warrant."

8.State v. Pena-Flores, 965 A. 2d 114 (2009) – Legal Issues

c. Telephonic Search Warrants

[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. *State v. Valencia*, 93 *N.J.* 126, 137, 459 *A.*2d 1149 (1983). 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.

8.State v. Pena-Flores, 965 A. 2d 114 (2009) – Legal Issues

c.Telephonic Search Warrants

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.

In addition, we will establish a Task Force, including representatives of the Attorney General, the Prosecutors, the Public Defender, the defense bar, and the judiciary, to address the practical issues involved in obtaining telephonic and electronic warrants.[FN7] The Task Force will study the telephonic and electronic warrant procedures and make practical suggestions to ensure that technology becomes a vibrant part of our process. That will include recommendations for uniform procedures (including forms), equipment, and training, along with an evaluation of the scheme once it is underway.

FN7. For example, the State argues that, in reality, obtaining such a warrant is a difficult and time-consuming effort, in the main because judges are not always instantly available. There may be problems in developing an effective scheme to obtain warrants electronically or telephonically, but quick access to a judge should not be one of them.

8.State v. Pena-Flores, 965 A.2d 114 (2009) – Legal Issues

d. Implementation & Administration

Presumption of Validity

Burden of Proof & Burden of Production

Which Judges will have jurisdiction?

Where will motions to suppress be held? (Court/Venue)

Procedures for Attorney Review of Affidavit

Searches that do not involve automobiles

Necessary Equipment & Training of Police & Judiciary

Frequency of Requests for Telephonic Search Warrant

Funding for Recording, Transcription & Extra Judicial Services

Time Limitations to Obtain Search Warrant

Local & State Policy from Prosecutors

Future Use of Warrant Exceptions based upon Probable Cause

8.State v. Pena-Flores, 965 A.2d 114 (2009) – Legal Issues

e. Attorney General's Memorandum

Impact on other Exceptions to the Warrant Requirement

a. **Search Incident to Arrest (from Pena-Flores)**

State v. Eckel, 185 N.J. 523 (2006)

Under the federal Constitution, even if an arrestee is removed and secured elsewhere, a search of the passenger area of his automobile incident to his arrest is permissible. In 2006, however, we diverged from federal precedent in State v. Eckel and declared that the search of the interior compartment of a motor vehicle incident to arrest is limited to the area from which an occupant may, in fact, seize a weapon or destroy evidence. It follows that such a search cannot be sustained where the occupant has been "arrested, removed[,] and secured elsewhere," because the potential for obtaining a weapon or destroying contraband is by then eliminated. Where an occupant is arrested but not removed or secured, courts are required to make a fact-intensive determination regarding the danger posed by the arrestee.

As is obvious, the search incident to arrest exception is focused on the arrestee himself and on eliminating his potential to endanger the police or destroy evidence (See the *Dunlap* case where the defendant was restrained outside car and unable to gain access, search of vehicle was not justifiable as incident to arrest.)

Impact on other Exceptions to the Warrant Requirement

b. Justification for Motor Vehicle Stops

Delaware vs. Prouse, 440 U.S. 648(1979) – (Reasonable Suspicion)

State vs. Woodruff, 403 N.J.Super 620(LawDiv.2008) - (Weaving in a Lane)

State vs. Cohen, 347 N.J.Super 375(App.Div.2002) (Tinted Windows)

State vs. Pitcher, 379 N.J.Super 308(App.Div.2005) - Mistake of Fact

State vs. Puzio, 379 N.J.Super 378(App.Div.2005) - Mistake of Law

State vs. Donis, 157 N.J. 44(1998) - Stop based upon MTD Search

Impact on other Exceptions to the Warrant Requirement

c. Community Caretaking

State vs. Goetaski, 209 N.J.Super 362(App.Div.1986) (Shoulder rider at 4:00 am)

In the case before us, the facts were unusual enough for the time and place to warrant the closer scrutiny of a momentary investigative stop and inquiry. In this case, we will not substitute our judicial hindsight for what appears to us as a sound, nonpretextual [sic] exercise of curbstone judgment by the officer. But we do not hesitate to add that this stop is about as close to the constitutional line as we can condone.

State vs. Martinez, 260 N.J.Super 75(App.Div.1992) (Snail's pace at 2:00 a.m. - common law right of inquiry based upon founded suspicion of criminal activity)

State vs. Washington, 296 N.J.Super 569(App.Div.1997) - (Weaving and 9 miles below speed limit)

State vs. DiLoreto, 180 N.J. 264(2004)

The community caretaker doctrine remains a narrow exception to the warrant requirement. Consistent with that view, all future cases decided under that doctrine will turn strictly on their individual facts and will be subject, as always, to meticulous judicial review.

Impact on other Exceptions to the Warrant Requirement

d. Consent

State v. Carty, 170 N.J. 632, 635 (2002)

We hold that, in order for a consent to search a motor vehicle and its occupants to be valid, law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle. The reasonable and articulable suspicion standard is derived from the New Jersey Constitution and serves the prophylactic purpose of preventing the police from turning routine traffic stops into a fishing expedition for criminal activity unrelated to the lawful stop. Because that standard was not satisfied in this case, the evidence seized must be suppressed.

I.

Impact on other Exceptions to the Warrant Requirement

e. Plain View

State v. Johnson, 171 N.J. 192 (2002)

1. Lawfully in View Area

2. Discovery of Evidence Inadvertent

3. Probable cause to associate the Item with a violation of the Law

Impact on other Exceptions to the Warrant Requirement

f. Impoundment & Inventory

State v. Mangold, 82 N.J. 575 (1980)

State v. One 1994 Ford Thunderbird, 349 N.J, Super. 352 (App. Div. 2002)

Impact on other Exceptions to the Warrant Requirement

g. Regulatory/Administrative Search

State v. Hewitt, 400 N.J. Super. 376 (App. Div. 2008)

Impact on other Exceptions to the Warrant Requirement

h. Special Needs Searches

State v. Daniels, 382 N.J. Super. 14 (App. Div. 2005)

Impact on other Exceptions to the Warrant Requirement

i. **Weapons**

State v. Lund, 119 N.J. 35, 40 (1990)

[I]n *Michigan v. Long*, 463 *U.S.* 1032, 103 *S.Ct.* 3469, 77 *L.Ed.*2d 1201 (1983), the Court upheld the right of police to conduct a weapons search of the interior of a car when they have a reasonable belief that the motorist is potentially dangerous. In upholding the search, Justice O'Connor's opinion for the Court explained that a search of the passenger compartment of an automobile is "permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."

Attorney General Memorandum to State Police

Accordingly, effective immediately and until further notice, absent unusual case-specific circumstances suggesting true exigency, when State Troopers during a road stop develop probable cause to believe that the detained vehicle contains contraband or other evidence if a criminal offense, they should secure the vehicle and occupants and apply for a regular or telephonic search warrant, rather than rely on the automobile exception. Exceptions to this general rule should be made only with express approval of an appropriate supervisor.

Attorney General Memorandum to State Police

Plain View Seizures

The Court's decision is Pena-Flores and Fuller should not be read to prohibit a State Trooper from entering a detained vehicle for the limited purpose of retrieving contraband or other evidence that was observed in plain view, that is, where the trooper, while standing outside the vehicle, has observed an object inside the passenger cabin and where it is immediately apparent, without any further Fourth Amendment intrusion, that the observed object is contraband or evidence of a crime. A State Trooper entering the vehicle to retrieve that object should not conduct a search for any additional evidence, even if there is probable cause to believe that additional contraband or evidence is secreted in the vehicle. Rather, the trooper should only seize the object or item that was seen in plain view from the exterior. Moreover, this limited seizure principle applies only where there has been a visual observation of contraband or other evidence; it should not be used to authorize entering a vehicle based upon "plain smell".

Attorney General Memorandum to State Police

<u>Consent Search Alternative</u>

The consent-to-search doctrine was not affected by the Supreme Court's decision, and that option remains available in appropriate situations. Note that the probable cause standard of proof used to obtain a warrant or to satisfy the automobile exception is much more stringent than the reasonable articulable suspicion standard required under the State Constitution before police may ask a motorist for permission to conduct a consensual search. Supervisors authorized to approve consent search requests should be circumspect in relying on the consent search doctrine since many courts remain skeptical of consent searches. Therefore, where there is strong probable cause to believe that the detained vehicle contains evidence of a crime, troopers should forego requesting a consent to search and make an application for a warrant instead.

Attorney General Memorandum to State Police

<u>Automobile "Frisks" for Suspected Weapons</u>

State Troopers should note that the Court's decision does not affect the automobile frisk doctrine, and that when they have reasonable articulable suspicion to believe that there is a weapon in the passenger cabin, they may conduct a limited "frisk" of the vehicle to retrieve the weapon. The automobile frisk doctrine is pretrusted on the risk to officer safety that would result when the suspect(s) are released and allowed to re-enter the vehicle at the conclusion of an investigative detention. In any case where a State Trooper will be arresting all of the occupants thereby eliminating the risk that an occupant would gain access to the suspected weapon the automobile frisk doctrine should not be used.

Attorney General Memorandum to State Police

<u>Importance of Officer Safety</u>

As noted above, the Court explained that the "ratio" of officers to suspects is a legitimate factor to be considered in determining whether there is sufficient exigency to justify a warrantless search under the automobile exception. Under no circumstances should a State Trooper refrain from calling for backup, or a supervisor. Nor should any supervisor or other State Trooper refrain from coming to the scene to render assistance or check on the status and safety of the detaining trooper(s) on the theory that the presence of additional officers might lessen the chances for successfully applying the automobile exception. It must be emphasized that in situations where there is probable cause to believe that a vehicle contains evidence of a crime, the encounter has become a criminal investigation and the vehicle must be considered to be a crime scene. Concern for officer safety must be paramount, and troopers should never elect to maintain a dangerous "ratio" of suspects to officers for the purpose of preserving the option of conducting a warrantless search.

The Court did not address whether and to what degree the "ratio of officers to suspects" factor is affected when one or more vehicle occupants is secured (e.g., handcuffed or locked in the backseat of a troop car). A State Trooper should never refrain from taking reasonable public and officer safety precautions with respect to the handling and control of a vehicle's occupants/suspects for the purpose of enhancing the likelihood that a reviewing court might sustain a warrantless search under the automobile exception.