

**Garden State CLE
Presents:**



Lesson Plan

Winning Your Motion to Suppress Evidence

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a. **Municipal Court – Rule 7:5-2**

Notice must be in writing

Notice of motion must go to county prosecutor

No time requirement or limitation

No briefs unless by leave of court

All searches/seizures will be presumed unreasonable

Evidence seized via warrant must be in Superior Court (R. 3:5-7)

Automatic stay provision (10 days for order + 20 days to appeal R. 3:24(c))

No need for conditional plea, but "Only motions for suppression on the grounds of unlawful search and seizure automatically survive the entry of a guilty plea." State v. Greeley, 178 N.J. 38, 51 (2003).

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.

(b) Procedure. Written briefs in support of and opposition to the motion to suppress shall be filed only in the discretion of the judge, who shall determine the briefing schedule, if briefs are permitted. All motions to suppress shall be heard before the start of the trial.

(c) Order; Stay.

(1) *Order Granting Suppression.* An order granting a motion to suppress evidence shall be entered immediately upon decision of the motion. Within ten days after its entry, the municipal court administrator shall provide a copy of the order to all parties and, if the county prosecutor is not the prosecuting attorney, also to the county prosecutor. All further proceedings in the municipal court shall be stayed pending a timely appeal by the State, pursuant to R. 3:24. The property that is the subject of the suppression order shall, if not otherwise subject to lawful detention, be returned to the person entitled to it only after exhaustion by the State of its right to appeal.

(2) *Order Denying Suppression.* An order denying suppression may be reviewed on appeal from an ensuing judgment of conviction pursuant to R. 3:23 whether the judgment was entered on a guilty plea or on a finding of guilt following trial.

(d) Waiver. Unless otherwise ordered by the court for good cause, defendant's failure to make a pretrial motion to the municipal court pursuant to this rule shall constitute a waiver of any objection during trial to the admission of the evidence on the ground that the evidence was unlawfully obtained.

b. Superior Court – Rule 3:5-7

Time and manner controlled by Rule 3:10-2(a)

Briefs depend upon burden of going forward with evidence.

No need for conditional plea, but “Only motions for suppression *on the grounds of unlawful search and seizure* automatically survive the entry of a guilty plea.” *State v. Greeley*, 178 N.J. 38, 51 (2003).

Testimony only if material facts are in dispute.

(a) Notice; Time. On notice to the prosecutor of the county in which the matter is pending or threatened, to the applicant for the warrant if the search was with a warrant, and to co-indictees, if any, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him or her in a penal proceeding, may apply to the Superior Court only and in the county in which the matter is pending or threatened to suppress the evidence and for the return of the property seized even though the offense charged or to be charged may be within the jurisdiction of a municipal court. Such motion shall be made pursuant to [R. 3:10-2](#).

(b) Briefs. If the search was made with a warrant, a brief stating the facts and arguments in support of the motion shall be submitted with the notice of motion. The State shall, within ten days thereafter, submit a brief stating the facts and arguments in support of the search to which the movant may reply by brief submitted no later than three days before the hearing. If the search was made without a warrant, the State shall, within 15 days of the filing of the motion, file a brief, including a statement of the facts as it alleges them to be, and the movant shall file a brief and counter statement of facts no later than three days before the hearing.

(c) Hearing. All such motions by co-indictees shall be consolidated for determination in a single hearing, except for good cause shown. If material facts are disputed, testimony thereon shall be taken in open court.

(d) Appellate Review. Denial of a motion made pursuant to this rule may be reviewed on appeal from a judgment of conviction notwithstanding that such judgment is entered following a plea of guilty.

(e) Return of Property. If a motion made pursuant to this rule is granted, the property shall be delivered to the person entitled thereto, unless otherwise subject to lawful detention, and shall not be admissible in evidence in any court. Delivery of the property need not be made, however, until the expiration of the time within which the State may obtain leave to appeal pursuant to R. 2:5-6.

(f) Consequences of Failure to Move. If a timely motion is not made in accordance with this rule, the defendant shall be deemed to have waived any objection during trial to the admission of evidence on the ground that such evidence was unlawfully obtained.

(g) Effect of Irregularity in Warrant. In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution.

c. Issues Related to Search Warrants

No probable cause or search (seizure) was otherwise unreasonable. State v. Chippero, 201 NJ 14 (2009); State v. Fanelle, 404 NJ Super. 180 (Law Div. 2008). State v. Ravotto, 169 NJ 227 (2001).

Defective affidavit – State v. Dispoto, 383 NJ Super. 205 (App. Div. 2006); State v. Martinez, 387 NJ Super. 129 (App. Div. 2006).

Detention of Occupants during Search – LA County v. Rettele, 550 US 609 (2007).

Neutral & Detached Magistrate – State v. McCann, 391 NJ Super. 542 (App. Div. 2007); State v. Marshall, 199 NJ 602 (2009). State v. Broom-Smith, 201 NJ 229 (2010).

Oath or Affirmation – State v. Gioe, 401 NJ Super. 331 (App. Div. 2008).

False Statements in Affidavit – Delaware v. Franks, 438 US 154 (1978); State v. Howley, 80 NJ 563 (1979). (Hearing requires a substantial preliminary showing that the false statement was made knowingly, intentionally or with reckless disregard for the truth.)

No Knock Warrants – State v. Johnson, 168 NJ 608 (2001) Minimal level of objective evidence (not a hunch) related to a reasonable suspicion of risk to officer safety, loss of evidence; totality of circumstances test). Contrast Michigan v. Hudson, 126 S. Ct. 2159 (2006)

d. Burden of Production

Under authority of a Search warrant: on defendant

Without a Search Warrant: on State

e. Burden of Proof

Civil Standard of Preponderance of Evidence except in three instances:

Consent State v. Johnson, 68 N.J. 349, 353-354 (1975)

Inevitable Discovery State v. Sugar, 100 N.J. 214, 238 (1985)

Collateral Source State v. Holland, 176 N.J. 344, 360-361 (2003)

Each requires proof by the State by clear and convicting evidence.

Clear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the precise facts in issue. In re Seaman, 133 N.J. 67, 74 (1993).

Suppression of admission or confession – Proof beyond a reasonable doubt

f. Hearing Procedures under NJRE 104(a).

(a) Questions of admissibility generally. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for [Rule 403](#) or a valid claim of privilege. The judge may hear and determine such matters out of the presence or hearing of the jury.

(d) Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.

Suppression of admission or confession – Rules of Evidence do apply

NJRE 104(c) - Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury. In such a hearing the rules of evidence shall apply and the burden of persuasion as to the admissibility of the statement is on the prosecution. If the judge admits the statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible. If the judge subsequently determines from all of the evidence that the statement is not admissible, the judge shall take appropriate action.

g. Automatic Standing

State v. Alston, 88 N.J. 211 (1981).

A defendant has automatic standing to move to suppress evidence from a claimed unreasonable search or seizure if he has a proprietary, possessory or participatory interest in either the place searched or the property seized.

Abandoned Property - State v. Johnson, 193 N.J. 528, 548-549 (2008).

A defendant will not have standing to object to the search or seizure of abandoned property. The Court came to that conclusion because a defendant has no constitutionally protected interest in property that has been abandoned. Because our standing rule is intended to provide broad protection to the privacy rights of our citizens and to deter the police from conducting unreasonable searches and seizures, the Court has defined "abandoned property" in a way that is consonant with that goal.

For standing purposes, 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. The State bears the burden of proving by a preponderance of the evidence that the defendant abandoned the property and therefore has no standing to object to the search.

State v. Carvajal, 202 N.J. 214 (2010) – Practical Application

h. Foundational Issues

State Action

Enhanced protections under Art I, p 7.

Duty of Police to Act Reasonably

Objective Reasonableness

Expectation of Privacy

Totality of the Circumstances

Probable Cause

Reasonable Suspicion (detentions & weapons – “Stop, and if appropriate, frisk.”)

i. Advocacy Issues

Strategic – State

Fact fit under one or more exceptions to warrant requirement
Cops subjective opinions are meaningless
Facts judged under totality of circumstances

Strategic – Defense

Cops lied (or take advantage of poorly written reports)
Cops acted unreasonably in the way they seized or searched
Search fits under no recognized exception to warrant requirement

Tactical – State & Defense

Witness Preparation (State & Defense)

What witnesses do you want to call?

Should the Defendant testify?

Option 1 - Admit the Act – Win the Case

Option 2 – Drive a wedge between ill-prepared (sequestered) witnesses.

j. Current hot issues in New Jersey Fourth Amendment Law

State v. Pena-Flores, 198 N.J. 6, 30 (2009).

Exigency – re-defined

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.”

Telephonic Search Warrants Task Force Report

Automobile Exception

The 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. 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

But See...

State v. Minittee, 415 N.J. Super. 475 (App. Div. 2010)

State v. Pompa, 414 N.J. Super. 419 (App. Div. 2010).

k. Common Exceptions to the Warrant Requirement under N.J. Law

Abandoned Property - State v. Johnson, 193 NJ 528 (2008)
Administrative Inspection Exception - State v. Hewitt, 400 NJ Super. 476 (App. Div. 2008)
Attenuation Doctrine - State v. Badessa, 185 NJ 303 (2005)
Automobile Exception - State v. Cooke, 163 NJ 657 (2000)
Border Searches - State v. Green, 346 NJ Super. 87 (App. Div. 2001)
Community Caretaking Exception - State v. Goetaski, 209 NJ Super. 362 (App. Div. 1986)
Consent - State v. Carty, 170 NJ 632 (2002)
Consent Once Removed - State v. Penalber, 396 NJ Super. 1 (App. Div. 2006)
Emergency Aid Exception - State v. Frankel, 179 NJ 586 (2004)
Field Inquiry - State v. Nishina, 175 NJ 502 (2003)
Frisk - State v. Thomas, 110 NJ 673 (1988)
Hot Pursuit - State v. Bolte, 115 NJ 579 (1989)
Incident to a Lawful Arrest - State v. Dangerfield, 171 NJ 446 (2002)
Inevitable Discovery - State v. Sugar, 100 NJ 214 (1985)
Inventory Searches - State v. Mangold, 82 NJ 575 (1980)
Investigative Detention - State v. Dickey, 152 NJ 468 (1998)
Probable Cause & Exigent Circumstances - State v. LaBoo, 396 NJ Super. 97 (App. Div. 2007)
Road Blocks - State v. Kirk, 202 NJ Super. 28 (1985)
Special Needs Exception - State v. Best, 201 NJ 100 (2010)
Strip Searches - State v. Harris, 384 NJ Super. 29 (App. Div. 2006)

I. Issues for suppression of confessions and admissions

Totality of the circumstances test:

A trial court will admit a confession into evidence only if the State has proven beyond a reasonable doubt that, based on the totality of the circumstances, the suspect's waiver of those rights was knowing, intelligent and voluntary. The court must specifically consider the defendant's characteristics and the nature of the interrogation, and may include in its consideration the defendant's age, education, intelligence, length of detention, advice concerning constitutional rights, whether questioning was repeated and prolonged, and whether physical punishment or mental exhaustion were involved. *State v. Galloway*, 133 N.J. 631, 654, 628 A.2d 735 (1993).

Was there custody?

Was there interrogation?

Nature of warnings given:

Who gave the warnings?

When and Where?

What was said?

Is there a signed waiver form?

Issues as voluntariness:

How did defendant assert his right to remain silent? Ambiguity.

Did police scrupulously honor defendant's request to remain silent?

Per se issues

1. Attorney Present: *State v. Reed*, 133 N.J. 237 (1993)
2. Active Bench Warrant: *State v. A.G.D.*, 178 N.J. 56 (2003)
3. Fabricated Evidence: *State v. Patton*, 362 N.J. Super. 16 (App. Div. 2003).

m. Conclusion

A few last words of legal advice