Garden State CLE Presents:

NJ Arrest, Search & Seizure Annual Review - 2022

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I.) Police procedure: No knock search warrant

Wilson v. Arkansas, 514 US 927 (1995)

(Knock & announce requirement adopted as reasonable under common law)

Our own cases have acknowledged that the common-law principle of announcement is "embedded in Anglo-American law," but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. As even petitioner concedes, the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances.

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

Hudson v. Michigan, 547 US 586 (2006)

(Knock & announce violation does not mandate suppression of evidence)

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

Quite apart from the requirement of un-attenuated causation, the exclusionary rule has never been applied except where its deterrence benefits outweigh its `substantial social costs, The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted *Richards* justification for a no-knock entry had inadequate support. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that the exclusionary rule frequently requires

extensive litigation to determine whether particular evidence must be excluded. Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not), what constituted a "reasonable wait time" in a particular case, (or, for that matter, how many seconds the police in fact waited), or whether there was "reasonable suspicion" of the sort that would invoke the *Richards* exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.

Another consequence of the incongruent remedy Hudson proposes would be police officers' refraining from timely entry after knocking and announcing. As we have observed, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others. We deemed these consequences severe enough to produce our unanimous agreement that a mere "reasonable suspicion" that knocking and announcing "under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime," will cause the requirement to yield.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrence against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

State v. Caronna, 469 N.J. Super. 462 (App. Div. 2021)

(The New Jersey View)

This court held that the exclusionary rule applies where police violate Article I, Paragraph 7 of the New Jersey Constitution by unreasonably and unjustifiably ignoring a search warrant requirement that they knock and announce their presence before entering a dwelling. Doing so deters police from flagrantly violating knock-and-announce search warrant requirements; safeguards against unconstitutional, unreasonable, and illegal search and seizures under New Jersey law; and, importantly, upholds the rule of law and integrity of our administration of justice.

II.) Police request for passenger's ID during a routine motor vehicle stop

Hornberger v. ABC Corp., 351 NJ Super. 577 (App. Div. 2002)

(Demand for ID from motor vehicle passenger)

There are no New Jersey cases which address whether an officer may demand a passenger's identification after stopping a vehicle for a routine traffic violation and the out-of-state authority is split. We favor the view that the request for the passengers' identification here was improper. This view is the most consistent with our Supreme Court's decision in *Carty* and the prophylactic purpose of discouraging the police from turning a routine traffic stop into a "fishing expedition for criminal activity unrelated to the stop. There were no facts or circumstances to justify either removing the passengers from the car or frisking the three testers. The search of the car which followed was also improper, because it was consequent upon these prior, unjustified actions. We thus find it unnecessary to consider plaintiffs' argument that defendants broadcast Ogletree's opinion that the search of the car was illegal with actual malice.

State v. Sloan, 193 NJ 423 (2008)

(NCIC lookup not a search within the meaning of the 4th Amendment – no legitimate expectation of privacy in NCIC data)

The police properly stopped a motor vehicle after confirming that its driver did not have a valid license. They later ran a check on the passenger in the National Crime Information Center (NCIC) database, which resulted in his arrest on outstanding warrants. Police found crack cocaine on him during a search incident to arrest.

We hold that at the time of the stop, the passenger, like the driver, was seized under the federal and state constitutions. We also hold that police do not need reasonable suspicion before they may access the NCIC database. Because the decision to check the NCIC database was within the scope of the traffic stop and did not unreasonably prolong the stop, there was no basis to suppress the evidence found.

State v. Boston, 469 N.J. Super. 223 (App. Div. 2021)

(The New Jersey View)

Defendant Dwayne D. Boston was convicted of third-degree possession of cocaine following a routine traffic stop on his way home from the movies with his wife and children. He contends the police unlawfully asked him, a front-seat passenger in his wife's car, to hand over his State identification card after he told them he did not have a driver's license. The court agrees, and concludes defendant's subsequent arrest on an open traffic warrant was

unlawful, and the drugs seized in the ensuing search incident to his arrest should have been excluded at trial.

The court holds in a routine traffic stop where the driver has to be arrested on an open traffic warrant, the officer's asking whether a passenger is a licensed driver is reasonable; but when the passenger claims he does not possess a license, the officer's further demand for identification from the unlicensed passenger in the absence of particularized suspicion is not.

III.) *Terry* stop Frisk for weapons

State v. Carrillo, 469 N.J. Super.318 (App. Div. 2021)

(The New Jersey View)

Just minutes after a police officer patted down Josue A. Carrillo during a traffic stop and found nothing, the officer patted him down again. That time, the officer detected what felt like a handgun. In the subsequent search, the officer seized a.22 revolver and a small bag of drugs. Carrillo pleaded guilty to possessing the handgun after the trial court denied his suppression motion on the papers.

The main issue in Carrillo's appeal is whether the officer violated Carrillo's rights when he patted him down a second time. We conclude an officer may conduct a second pat-down when, giving weight to the unproductive first one, the circumstances preceding the second one still give the officer reason to believe the suspect is armed and dangerous. Because there exist issues of fact material to that question, we reverse the trial court's order and remand for a testimonial hearing.

We focus on the second pat-down. The trial court found the second pat-down was constitutionally permissible, stating that "continued... furtive behavior by the defendant against the hood of the automobile indicat[ed] to the [o]fficer the defendant[was] perhaps hiding something in his pants or on his person." Thus, "[u]nder the totality of the circumstances... the [o]fficer was certainly justified in searching the defendant, which ultimately resulted in the recovery of a gun and drugs from the defendant."

In assessing the pat-down's constitutionality, the trial court misstated the standard. It is not enough for an officer to have reason to believe a suspect "perhaps" is hiding "something." The "something" must be a weapon. Under Terry v. Ohio, an officer must have "reason to believe that he [or she] is dealing with an armed and dangerous individual." If so, the officer is "entitled... to conduct a carefully limited search of the outer clothing of such person[] in an attempt to discover weapons which might be used to assault him [or her]." Police may not conduct a Terry pat-down "simply... to discover drugs or drug paraphernalia" when officers "harbor[] no... belief that [the person] `was armed and dangerous. "Since `[t]he sole justification of the search... is the protection of the police officer and others nearby... it must... be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. "The reasonableness of the search... is to be measured by an objective standard."

Of course, if an officer has reason to believe that the "something" a suspect is hiding is a weapon — as opposed to drugs or other contraband — then a "Terry frisk" may be justified under the totality of circumstances.

Here, the trial court did not make the essential finding that Werner had reason to believe Carrillo concealed a weapon before conducting the second pat-down. Nor did the court weigh the fact that Werner had already conducted a Terry pat-down of Carrillo, and evidently was satisfied that he was not "armed and dangerous."

IV.) Expectation of privacy – stationhouse telephone calls

State v. McQueen, 248 N.J. 26 (2021)

(The New Jersey View)

The right of privacy — the right to be free from government officials arbitrarily prying into our personal conversations — is one of the preeminent rights in our constitutional hierarchy. Article I, Paragraph 7 of the New Jersey Constitution provides heightened protection to telephone calls and prohibits government eavesdropping, absent a warrant or an exception to the warrant requirement. This case tests whether the right of privacy, safeguarded by our State Constitution, extends to an arrestee's call on a police line from the stationhouse when neither party to the call is aware that the police are recording their conversation.

The police arrested Rasheem McQueen for allegedly committing certain offenses and brought him to the police station, where he gave a statement to an investigating detective. The police permitted McQueen to make a telephone call from one of the stationhouse's landlines but did not tell him his conversation would be recorded or accessible to law enforcement without his consent or a warrant. McQueen called and spoke with defendant Myshira Allen-Brewer. The next day, a detective retrieved the recording and listened to their private conversation. Based, in part, on the contents of that conversation, Allen-Brewer was charged with various crimes.

We affirm suppression of the evidence. The right of privacy, and particularly privacy in one's telephone conversations, is among the most valued of all rights in a civilized society

McQueen's custodial status in the stationhouse did not strip him of all constitutional protections. The police provided McQueen and Allen-Brewer with no notice that their conversation would be recorded or monitored. Article I, Paragraph 7, which prohibits unreasonable searches and seizures, broadly protects the privacy of telephone conversations in many different settings. We hold that McQueen and Allen-Brewer had a reasonable expectation of privacy in their conversation in the absence of fair notice that their conversation would be monitored or recorded. The recorded stationhouse telephone conversation was not seized pursuant to a warrant or any justifiable exigency and therefore must be suppressed.

Merely because a person has a protectible privacy right in a telephone call placed from a home, an office, a motel, or a telephone booth does not necessarily mean that an arrestee has the same privacy right in a call placed from a police station. A police station's "report writing room" is not an area open to the public, and legitimate security concerns must be taken into account in the setting of a stationhouse.

Few would dispute that an arrestee has a lesser expectation of privacy within the confines of a police station. Certainly, an arrestee does not have freedom of movement. A police station, however, is not a constitution-free zone.

In the case before us, we conclude that, under Article I, Paragraph 7 of the New Jersey Constitution, an arrestee has a reasonable expectation of privacy in a call made from a police station in the absence of notice that the conversation may be monitored or recorded.

V.) Residential Protective Sweep

Historical Background

The fundamental privacy interests of the home are at the very core of the protections afforded by our Federal and State Constitutions, and the warrantless search of a home is permissible only if the search falls within one of the few specifically established and well-delineated exceptions to the warrant requirement. One such exception is the protective sweep doctrine. In Maryland v. Buie, the United States Supreme Court recognized that "an in-home arrest puts the officer at the disadvantage of being on his adversary's `turf'" and in possible jeopardy of "[a]n ambush in a confined setting of unknown configuration." The Court set forth a two-tiered standard governing the scope of a protective search of a residence during an in-home arrest:

(1) "[O]fficers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched"; and

(2) officers could search beyond those adjoining areas based on "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."

The New Jersey Supreme Court has also placed strict limits on the scope of the protective-sweep doctrine when, in a non-arrest context, police officers are "lawfully" in a home "for a legitimate purpose," such as by consent. State v. Davila, 203 N.J. 97, 102-03 (2010). In that scenario, "[a] protective sweep may only occur when... the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger." Even so, a "sweep will be upheld only if

(1) it is conducted quickly; and

(2) it is restricted to places or areas where the person posing a danger could hide."

State v. Radel, N.J. (2022)

(The New Jersey View)

When an arrest occurs outside a home, the police may not enter the dwelling or conduct a protective sweep in the absence of a reasonable and articulable suspicion that a person or persons are present inside and pose an imminent threat to the officers' safety. This sensible balancing of the fundamental right to privacy in one's home and the compelling interest in officer safety will depend on an objective assessment of the particular circumstances in each case, such as the manner of the arrest, the distance of the arrest from the home, the reasonableness of the officers' suspicion that persons were in the dwelling and likely to launch an imminent attack, and any other relevant factors. A self-created exigency by the police cannot justify entry into the home or a protective sweep. Here, a protective sweep was not warranted in the Radel case.

VI.) Race as a factor in an investigative motor vehicle stop

State v. Nyema, 249 NJ 509 (2022)

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution, in almost identical language, protect against unreasonable searches and seizures. Under both Constitutions, "searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and therefore invalid." Consequently, "the State bears the burden of proving by a preponderance of the evidence that [the] warrantless search or seizure `fell within one of the few well-delineated exceptions to the warrant requirement.'"

The exception at issue in this case is an investigative stop, a procedure that involves a relatively brief detention by police during which a person's movement is restricted. When police stop a motor vehicle, the stop constitutes a seizure of persons, no matter how brief or limited. An investigative stop or detention, however, does not offend the Federal or State Constitution, and no warrant is needed, "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."

Although reasonable suspicion is a less demanding standard than probable cause, "[n]either `inarticulate hunches' nor an arresting officer's subjective good faith can justify infringement of a citizen's constitutionally guaranteed rights. Determining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of "the totality of circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement

against the individual's right to be protected from unwarranted and/or overbearing police intrusions." In many cases, the reasonable suspicion inquiry begins with the description police obtained regarding a person involved in criminal activity and whether that information was sufficient to initiate an investigatory detention. This Court has determined that the police lacked reasonable suspicion to conduct an investigatory stop when law enforcement arrived at a multi-unit apartment building to execute an arrest warrant for a Black, male fugitive. There, the police saw the defendant, also a Black male, exit the building with a friend and immediately separate, seemingly because he saw the officers. "[T]he only features that [the testifying officer] could say that [the defendant] shared in common with the targeted fugitive were that both were Black and both were men." Ibid. That commonality was insufficient to justify the stop, even in conjunction with the officer's belief that the two men split up to avoid police attention.

Applying those principles to the present case and taking into account the totality of the circumstances, we do not find that the information Sergeant Horan possessed at the time of the motor-vehicle stop constituted reasonable and articulable suspicion.

Sergeant Horan testified that he "believe[d] that the entirety of the initial dispatch" stated that there were "two suspects described as Black males, one with a handgun." Certainly, race and sex — when taken together with other, discrete factors — can support reasonable and articulable suspicion. But here, the initial description did not provide any additional physical descriptions such as the suspects' approximate heights, weights, ages, clothing worn, mode of transportation, or any other identifying feature that would differentiate the two Black male suspects from any other Black men in New Jersey. That vague description, quite frankly, was "descriptive of nothing." See Caldwell, 158 N.J. at 468, 730 A.2d 352 (Handler, J., concurring). If that description alone were sufficient to allow police to conduct an investigatory stop of defendants' vehicle, then law enforcement officers would have been permitted to stop every Black man within a reasonable radius of the robbery. Such a generic description that encompasses each and every man belonging to a particular race cannot, without more, meet the constitutional threshold of individualized reasonable suspicion.

And the radio dispatch indicated that the store was robbed by two Black men. Sergeant Horan testified that upon seeing three Black males in the vehicle, he inferred that the third was the getaway driver. While Sergeant Horan's inference was reasonable, with the dearth of information available at the time regarding the suspects, it could easily be argued that police would have also been able to stop a single Black man in a car, or on foot, based on the assumption that the robbery suspects split up after the crime. The reality is that the ambiguous nature of the description could have resulted in Black men in any configuration and using any mode of transportation being stopped because the only descriptors of the suspects were race and sex.