

Garden State CLE Presents:



The Fourth Amendment in DWI Defense

Instructors



Robert Ramsey, Ed.D.



John Menzel, Esquire

Lesson Plan

©2024
Garden State CLE
All Rights
Reserved

Part I

Procedural Issues

In general - The language of the 4th Amendment and Article I, paragraph 7 of the New Jersey Constitution are virtually identical. The New Jersey provision has been part of our constitutional law since 1844. The key for defense lawyers is to recognize that much of New Jersey search and seizure law provides much more protection to people within the state than is otherwise available under the 14th Amendment.

The touchstone of the Fourth Amendment is reasonableness, and reasonableness, in turn, is measured in objective terms by examining the totality of circumstances. In applying this test, courts give weight to a police officer's knowledge and experience as well as rational inferences that could be drawn from the facts objectively and reasonably viewed in light of the officer's expertise.

a) Motions for Suppression of Evidence: Burdens of proof and going forward with the evidence

Physical Evidence - Municipal court motions to suppress physical evidence seized by law enforcement may be filed under Rule 7:5-2. Rules of Evidence are relaxed under N.J.R.E. 104(a) except for N.J.R.E. 403 or a valid claim of privilege. In addition, the tendered evidence must be relevant, trustworthy and in the interests of justice. N.J.R.E. 101(a)(3). The burden of proof is usually by preponderance of evidence (State vs. Patino, 83 N.J. 1(1980)) except for cases involving consent where the burden is clear and convincing evidence. (State vs. King, 44 N.J. 346(1965)).

Clear and convincing evidence is defined as 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. It is evidence so clear, direct, 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).

The prosecutor has the burden of going forward with the evidence in cases that do not involve a search warrant. Prosecutors may also have the burden in cases involving telephonic search warrants. (State vs. Valencia, 93 N.J. 126, 139(1983)) (“[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.”)

b) Should the Defendant Testify at His Hearing?

Unlike cross-examination of the defendant at trial, N.J.R.E. 104(d) limits the cross examination of the defendant to those issues explored during direct examination as well as veracity issues such as memory, perception, bias and interest in the outcome, etc. Moreover, the defendant’s hearing testimony may not be considered as substantive evidence against him at trial. Simmons vs. U.S., 390 U.S. 377, 392-93(1968); (State vs. Petrovich, 125 N.J.Super 147(LawDiv.1973). However, motion testimony by the defendant can be used for impeachment purposes if he (stupidly) elects to testify during his trial. Harris vs. New York, 401 U.S. 222(1971).

c) Appeal Procedures – Under Rule 7:5-2(c)(1), the State has a right of appeal to the Law Division on an interlocutory basis following an order of 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 Rule 3:24.

Order Denying Suppression - An order denying suppression may be reviewed on appeal from an ensuing judgment of conviction pursuant to

Rule 3:23 whether the judgment was entered on a guilty plea or on a finding of guilt following trial.

[Instructor's Comment - There is no need to enter a conditional plea under Rule 7:6-2(c) following a denial of a motion to suppress as the right to appeal is automatically preserved by Rule 7:5-2(c)(2)]

d) Confessions and Admissions - Motions to suppress a defendant's admission or confession should be brought under Rule 7:7-2(a) and Rule 7:7-1. The motion should be done in writing with a request to relax the Rule under Rule 1:1-2. Burden of proof is beyond a reasonable doubt (N.J.R.E. 104(c)) and the Rules of Evidence apply. Burden is on the State to demonstrate the voluntariness of the admission/confession (i.e., waiver of Miranda rights).

e) Appeal Procedures - Appeal of a suppression denial should be taken under the procedures set forth under Rule 3:23-2 following trial or a conditional plea. Such an appeal may also be taken by either side on an interlocutory basis under Rule 3:24.

f) Recusal Under Rule 1:12-1(d) and (g) – A judge who has authorized a telephonic search warrant in municipal court may not hear the underlying motion to suppress. See Rule 7:5-2(b). In the absence of highly inflammatory evidence, a municipal court judge who denies a motion to suppress may also try the case on the merits. See State vs. Medina, 349 N.J.Super 108, 129-130(App.Div.2002).

Part II

Motor Vehicle Stops

In general - Every DWI case begins with a motor vehicle stop of some kind. As a matter of black letter law, a motor vehicle stop is considered to be a seizure within the meaning of the 4th Amendment. (Brower v. Inyo County, 489 U.S. 593 (1989)). The seizure subsumes the vehicle itself, the driver and all the passengers. (Brendlin vs. California, 551 U.S. 249(2007)). As a result, the police have an obligation to act reasonably.

a) Traffic Violations

The Supreme Court has established two standards that will justify a motor vehicle stop. In those cases involving evidence that the vehicle is unregistered or otherwise not lawfully on the road, the stop can be based upon a reasonable suspicion. (Delaware vs. Prouse, 440 U.S. 648(1979)). In those instances where the police become aware of a traffic or criminal violation by the driver or a passenger, the stop can be based upon probable cause. (Whren vs. U.S., 517 U.S. 806(1996)).

b) Other Traffic-Related Justifications for MV Stops

1) Traffic violation in officer's presence

2) Community caretaking – State vs. Goetaski, 209 N.J.Super 362(App.Div.1986); State vs. Martinez, 260 N.J.Super 75(App.Div.1992); State vs. Washington, 296 N.J.Super 569(App.Div.1997))

3) Mobile data terminals – State vs. Williams, 254 N.J. 8(2023); Kansas vs. Glover, 589 U.S. 376(2020). To challenge racially based traffic stops, see State vs. Segars, 172 N.J. 481(2002).

c) Equipment Violation – State vs. Moss, 277 N.J.Super 545(App.Div.1994).

d) Operation – Asleep Behind the Wheel

Generally speaking, a defendant who is found passed out behind the wheel of his vehicle in the driver's seat provides the police with probable cause to believe that the defendant has been operating his vehicle within the meaning of N.J.S.A. 39:4-50(a). State vs. Thompson, 462 N.J.Super 370(App.Div.2020).

e) Telephone Reports of Suspected Intoxication

Under New Jersey law, an anonymous telephone tip reporting an intoxicated driver possesses sufficient indicia of reliability to enable the police to locate and stop the suspect vehicle. (State vs. Golotta, 178 N.J. 205(2003); State vs. Amelio, 197 N.J. 207(2008) (known source). The reasoning of the New Jersey Supreme Court in Golotta was cited by the Supreme Court in Navarette vs. California, 572 U.S. 393(2014) which recognized the validity of DWI stops based upon anonymous sources.

f) Traffic Accidents

The authority for the police to detain persons and vehicles that have been involved in traffic accidents stems from the community caretaking exception to the warrant requirement as discussed by the Court in South Dakota vs. Opperman, 428 U.S. 364(1976). The requirement for driver cooperation is set forth under N.J.S.A. 39:4-129 and N.J.S.A. 39:4-130.

g) Roadblocks

The use of a roadblock for the purpose of DWI interdiction was ruled to be reasonable in New Jersey in State vs. Kirk, 202 N.J.Super 28(App.Div.1985) and by the Supreme Court five years later in Michigan vs. Sitz, 496 U.S. 444(1990). Over the years, the courts in New Jersey have eliminated many of the administrative steps the police must take to establish a lawful roadblock. (State vs. DeCamera, 237 N.J.Super 380(App.Div.1989) (No advance publicity needed). One new

requirement is that police provide a warning sign that motorists who attempt to evade the roadblock will be stopped. (State vs. Badessa, 185 N.J. 303(2005) (Suppressing both the stop and refusal to submit a breath sample). Finally, two cases resulted in suppression of DWI evidence obtained from roadblocks. State vs. Barcia, 228 N.J.Super 267(LawDiv.1988) (Close of GW Bridge) and State vs. Egan, 213 N.J.Super 133(App.Div.1986) (Insufficient command authority).

h) Arrests for drunk driving

An arrest is considered to be a seizure within the meaning of the 4th Amendment. (See discussion in State v. Caldwell, 158 N.J. 452, 458-59(1999)). Accordingly, the police have a duty to act reasonably. Apart from the constitutional requirement of probable cause, in N.J. the authority for police to arrest suspected drunk drivers is also statutory. N.J.S.A. 39:5-25 provides:

A law enforcement officer may arrest without a warrant any person who [sic] the officer has probable cause to believe has operated a motor vehicle in violation of R.S. 39:4-50 or section 5 of P.L. 1990, c. 103 (C. 39:3-10.13), regardless of whether the suspected violation occurs in the officer's presence. The exemption from arrest of a motorman or person having control of a street car or auto bus, as conferred herein, shall not operate to prevent his arrest, however, for a violation of R.S. 39:4-50. The arresting officer shall bring any person so arrested before any judge of the municipal court of the municipality wherein the offense is committed, or before the director at any place designated as his office. If the arrest is for a violation of R.S. 39:4-50, the arresting officer may, if no judge, clerk or deputy clerk is available, detain the person arrested, either in any police station, lockup or other place maintained by any municipality for the detention of offenders or in the common jail of the county, for such reasonable time as will permit the arresting officer to obtain a warrant for the offender's further detention, which temporary detention shall not exceed 24 hours from the time

of the arrest. If the arrest is for a violation of any other provision of this subtitle, the person arrested shall be detained in the police station or municipal court until the arresting officer makes a complaint and a warrant issues.

i) Arrests Within a Residence Following a Hot Pursuit

Hot pursuit of a suspect by the police does not categorically establish sufficient exigency for the police to make a residential entry to effect an arrest. (Lange vs. California, 594 U.S. 295(2021) (DWI petty offense); Welsh vs. Wisconsin, 466 U.S. 740(1984) (Civil DWI a petty offense)). New Jersey case law follows these precedents and does not constitute automatic exigency in the absence of objective evidence that the fleeing defendant poses a substantial threat to public safety. (State vs. Bolte, 115 N.J. 579(1989)).

j) Automobile Searches

Probable cause to believe that a driver has operated while under the influence of alcohol will automatically provide the police with probable cause to believe that evidence related to the intoxicated operation can be located within the vehicle under the automobile exception to the warrant requirement. State vs. Irelan, 375 N.J.Super 100(App.Div.2005).

k) Impoundment under John's Law (N.J.S.A. 39:4-50-23) and subsequent vehicle searches. The police may conduct a roadside search of a motor vehicle stopped for drunk-driving under the automobile exception even though it will be towed away under John's Law. State v. Courtney, 478 N.J.Super 81(App.Div.2024).

Part III

Investigative Detention and Arrest

In general - The investigative detention of the driver of a motor vehicle for purposes of DWI enforcement must be based upon a reasonable suspicion. Terry vs. Ohio, 392 U.S. 1(1968). The information obtained during a DWI investigative detention will trigger the ability of the police to affect an arrest when the evidence establishes probable cause. Probable cause is also an element of the refusal statute under N.J.S.A. 39:4-50.4a(a)(3) that must be proved at trial beyond a reasonable doubt.

a) Admissions and Confessions

There is no requirement that the police administer Miranda Warnings in the absence of both custody and interrogation. While an investigative detention is not considered to be custody for Miranda purposes, (State vs. Hickman, 335 N.J.Super 623(App.Div.2000); Berkemer vs. McCarty, 468 U.S. 420(1984)), voluntary statements made by the defendant following his arrest are considered to be admissions which may be used against the defendant at trial. State vs. Cryan, 363 N.J.Super 442(App.Div.2003)

b) Motorist's Duty to Perform Standardized Field Sobriety Tests (SFT)

The performance of SFT is an acceptable component of an investigative detention based upon a reasonable and articulable suspicion of intoxicated driving. (State vs. Bernokeits, 423 N.J.Super 365(App.Div.1994)). Moreover, SFT are not considered to be testimonial and are thus not subject to Miranda Warnings. (State vs. Green, 209 N.J.Super 347(App.Div.1986)). Moreover, the failure of the defendant to perform SFT at the direction of a police officer will permit the fact-finder to draw an adverse inference. State vs. Bryant, 328 N.J.Super 379(App.Div.2000). There is no case law or statutory requirement that defendants participate in HGN examination (State vs. Doriguzzi, 334 N.J.Super 530(App.Div.2000)) or voluntarily cooperate with the DRE evaluation process outlined in State vs. Olenowski, 255 N.J. 529(2023).

c) Body Worn Camera Video – Presumptions under N.J.S.A. 40A:14-118.5(q)(2)

[i]f a law enforcement officer, employee, or agent fails to adhere to the recording or retention requirements contained in this act, or intentionally interferes with a [BWC]'s ability to accurately capture audio or video recordings:

(2) there shall be a rebuttable presumption that exculpatory evidence was destroyed or not captured in favor of a criminal defendant who reasonably asserts that exculpatory evidence was destroyed or not captured;

Part IV
Blood and breath evidence

In general - Because DWI breath tests are simple, painless and common, they do not implicate any significant privacy concerns. Thus, the police may seek such evidence under the search incident to an arrest exception to the warrant requirement. By contrast, the taking of a blood sample from an arrested defendant involves an invasion of bodily integrity and requires either extreme exigency, knowing & voluntary consent or a search warrant. Birchfield vs. North Dakota, 579 U.S. 438(2016). Use of the exigent circumstances exception to the warrant requirement to obtain a blood sample is considered to be highly circumscribed and is not available on a categorical basis. Missouri vs. McNeely, 569 U.S. 141(2013). But see State vs. Jones, 437 N.J.Super 68(2014) where exigency excused obtaining a search warrant.

a) Consent to Draw and Test Blood – Attorney General Waiver Form

I, _____, hereby voluntarily consent to allow _____, a member of _____, and any other representative designated to assist, to take blood sample(s) from me, and I voluntarily consent to the testing of my blood sample(s).

I have been advised by _____ and fully understand that I have the right to refuse giving my consent to the taking and testing of my blood sample(s).

I have been further advised that I may withdraw my consent at any time and for any reason up until the commencement of the taking of the blood sample(s).

I have knowingly and voluntarily given my written consent to the taking and testing of my blood sample(s).

Commentary - One critical issue that may arise is whether the defendant's high level of intoxication made it impossible for him to understand the waiver of his rights. This issue has been explored one time in the context of Miranda waivers. State vs. Warmbrun, 277 N.J.Super 51(App.Div.1994).

b) Search Warrants

Rule 3:5-3(b)

(c) Telephonic. 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 or other means of electronic communication. The applicant shall arrange to contemporaneously record such sworn oral testimony by means of a recording device if available; otherwise, adequate 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 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 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 this rule.

Amended by order dated December 1, 2013 to allow designated municipal court judges to issue telephonic search warrants in DWI cases that do not involve indictable offenses.

The previous requirement for a showing of exigency has been eliminated by the Supreme Court from the current version of this Rule. Open issues include territorial jurisdiction and whether a telephonic search warrant is considered to be the functional equivalent of a warrantless search. See State vs. Valencia, 93 N.J. 126, 139(1983).

c) Motion to Suppress Procedures - Rule 7:5-2

(a) Jurisdiction. The municipal court shall entertain motions to suppress evidence seized with a warrant issued by a municipal court judge or 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. In matters beyond the trial jurisdiction of municipal courts, and in matters where a search warrant was issued by a Superior Court judge, a motion to suppress evidence shall be made and heard in the Superior Court.

(b) Procedure. 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 submit a brief stating the facts and arguments in support of the search, within a time as determined by the judge, but no less than 10 days after submission of the motion. If the search was made without a warrant, written briefs in support of and in opposition to the motion to suppress shall be filed either voluntarily or in the discretion of the judge, who shall determine the briefing schedule. All motions to suppress shall be heard before the start of the trial. If the municipal court

having jurisdiction over the motion to suppress evidence seized with a warrant has more than one municipal court judge, the motion shall be heard by a judge other than the judge who issued the warrant, such judge to be designated by the chief judge for that municipal court. If the municipal court having jurisdiction of the motion to suppress evidence seized with a warrant has only one judge, who issued the warrant, the motion to suppress evidence shall be heard by the Municipal Court Presiding Judge for the vicinage, or such municipal court judge in the vicinage that the Assignment Judge shall designate.

d) Materially False Evidence Submitted by Police in the Search Warrant Application – Suppression

Franks vs. Delaware, 438 U.S. 154(1978). See also State vs. Howery, 80 N.J. 563(1979) (The defendant must present evidence of a “substantial preliminary showing” of falsity in the warrant. He must allege deliberate falsehood or reckless disregard for the truth, pointing out with specificity the portions of the warrant that are claimed to be untrue. These allegations should be supported by an offer of proof including reliable statements by witnesses, and they must be proved by a preponderance of the evidence. Finally, the misstatements claimed 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.)

e) Use of Force in Blood Extractions

With or without a search warrant, police may not use unreasonable force in searching for evidence. Graham vs. Connor, 490 U.S. 386(1989). The level of force that is reasonable in a DWI blood extraction case is fact-sensitive. State vs. Ravotto, 169 N.J. 227(2001).

f) Hey! Let go! Ouch!! Use of force in urine extractions - Jiosi vs. Township of Nutley, 332 N.J.Super 169(App.Div.2000).