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THE STATE OF NEW JERSEY v. _____ Defendant.	MUNICIPAL COURT OF ___ COUNTY OF __ SUMMONS NO. _____ Criminal Action Brief in Support of Suppression Motion and Objection to Lab Report

THE STATE MUST PROVE PROBABLE CAUSE TO STOP THE MOTORIST AND TAKE BLOOD SAMPLES

Automobiles are areas of privacy protected by the Fourth Amendment of the United States Constitution. State v. Williams, 163 N.J. Super. 352, 356 (App. Div. 1979). New Jersey Courts have held that Article 1, Paragraph 7 of the New Jersey Constitution affords greater protection than the Fourth Amendment. State v. Davis, 104 N.J. 490 (1986), State v. Kirk, 202 N.J. Super. 28, 35 (App. Div. 1985). The burden is on the State to prove an exception to the warrant requirement showing the need for the search. State v. Welsh, 84 N.J. 348, at 352. Understandable, professional curiosity is not sufficient justification for an intrusion on a constitutionally protected automobile. State v. Patino, 83 N.J. 1 (1980). .

The United States Supreme Court has declared that random stops for license and registration checks violate the Fourth Amendment prohibition against unreasonable searches. Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed. 2d 660, 674 (1979); State v. Patino, 83 N.J. 1 (1980). If there was no indication that motor vehicle laws were violated or that any other laws were violated, police officers will have violated the constitutional rights of defendant by ordering him to exit the vehicle

so the police on the scene could conduct warrantless searches. To help prepare for the Suppression motion, your Clients may wish to take photos of stop/accident location. Clients may also wish to prepare a diagram of the stop/ accident location.

The following recent cases are useful to if arguing a stop was improper:

Odor of Alcohol Insufficient to Search Car State v. Jones, 326 NJ Super. 234 (App. Div. 1999).

Absent proofs that an open container of alcohol was in plain view, the odor of alcohol, combined with the admission of consumption of one bottle of beer by a motor vehicle operator, is insufficient to establish probable cause to search the vehicle for open containers where a trained police officer testifies that, based upon the circumstances and his experience, occupants often possess open containers of alcohol.

Auto Exception to Search Applicable only if Exigent Circumstances State v. Santiago 319 NJ Super. 632 (App. Div. 1999).

The "automobile exception" justifies a police search of an automobile without a warrant only if there are exigent circumstances that render it "impracticable" to first obtain a warrant. When police have possession of a parcel and have it turned over to defendant by a "controlled delivery," police cannot later search defendant's automobile and the parcel without a warrant, since it was not impracticable to have first obtained a search warrant, and whatever "exigency" may have existed was created by the police themselves.

Police cannot Search for Driver Identification in Minor Motor Vehicle Stop State v. Lark 319 NJ Super. 618 (App. Div. 1999), affirmed by NJ Supreme Court. __ NJ __ (2000)

Under the federal and state constitutions, following a motor vehicle stop for a minor traffic violation, a police officer may not enter the vehicle to search for proof of the driver's identity even though the driver has failed to produce his driver's license and may have lied about his identity. The officers lacked probable cause to believe a crime had been committed. The dictum in *State v. Boykins*, 50 N.J. 73 (1967), does not authorize the search.

MV Stop Not Permitted on Community Caretaking State v. Cryan 320 NJ Super. 325 (App. Div. 1999)

A motor vehicle stop may not be based on community caretaking grounds where the officer stopped the defendant because, at 4 a.m., the defendant did not proceed for five seconds after a traffic light turned green.

Legally parked car no grounds for search *State in the Interest of A.P.* 315 NJ Super. 166 (Law Div. 1998)

Here, where the juvenile was a passenger in a legally parked car and the officer who approached him to make a community - care-taking inquiry, as opposed to a lawful stop based on a traffic violation, had no prior knowledge of the juvenile, and there was no criminal activity in the area and no signs of alcohol or a controlled dangerous substance, the juvenile's furtive movements in avoiding eye contact with the officer did not provide a basis for an objective reasonable and articulable suspicion, and the evidence seized (a lighter and a "pipe-like smoking device") must be suppressed; the issue of whether or not the juvenile's statement to the officer that he did not lean forward and down as the officer approached was lie which would justify a suspicion that he might be armed, is subject to ambiguity and interpretation.

Search not permitted for speeding ticket *Knowles v. Iowa* 67 U.S.L.W. 4027 decided December 8, 1998). (Unanimous U.S. Supreme Court decision - Justice Rehnquist).

Since searches incident to traffic citations are not required either to protect an officer's safety or to discover and preserve evidence, there is no justification for an exception to the Fourth Amendment's warrant requirement. Suppression granted.

2. THE PROSECUTOR SHOULD BE REQUIRED TO SHOW ANY BLOOD SPECIMEN WAS OBTAINED IN A MEDICALLY ACCEPTED MANNER AND SUBMIT A NOTARIZED STATEMENT

NJSA 2A: 62A-10 provides details for hospital personnel who withdraw blood for police:

NJSA 2A: 62A-11. provides Any person taking a specimen [blood or bodily substance] pursuant to section 1 of this act shall, upon request, furnish to any law enforcement agency a certificate stating that the specimen was taken pursuant to section 1 of this act and in a medically acceptable manner. The certificate shall be

signed under oath before a notary public or other person empowered to take oaths and shall be admissible in any proceeding as evidence of the statements contained therein.

A good defense attorney should argue that if a certificate is not signed in front of a notary, the blood results should be inadmissible.

3 THE STATE MUST PROVE CHAIN OF CUSTODY IN A CRIMINAL OR BLOOD CASE

According to N.J. Practice, Criminal Procedure by Honorable Leonard Arnold, J.S.C. (West Publishing), Volume 32, Chapter 21, Section 1034, a party seeking to introduce an item of physical evidence must prove that the item was that which was taken from a particular person or place which makes the item relevant as evidence in the trial. Such proof is provided by testimony identifying the item as having been taken from that person or place, and by evidence tracing custody of the item from the time it was taken until it is offered in evidence. This latter evidence is necessary to avoid any claim of substitution or tampering. State v. Johnson, 90 N.J. Super. 105, 216 A.2d 397 (App. Div. 1965), aff'd 46 N.J. 289, 216 A.2d 392 (1966).

The required proof includes:

1) testimony by an investigator identifying the item as that which the investigator discovered and took;

2) testimony by that investigator that there was no tampering with the item while it was in his/her custody;

3) testimony regarding delivery of the item to the second person who had custody of the item;

4) possibly similar testimony by the second and each subsequent person who had custody of the item until the time of its presentation in court. Where the item has been submitted to a laboratory for analysis, proof of the chain of custody should ideally include: testimony from the person who took the item (or specimen) to the laboratory;

proof of the method of reception and storage at the laboratory prior to and after analysis; up to the time of trial. Arnold, N.J. Practice, Criminal Procedure, Sec. 1034.

Often the Prosecutor cannot prove the chain of custody.

4. LAB EVIDENCE IN A DRUG CASE SHOULD NOT BE ROUTINELY ADMITTED WHERE THERE IS A FORMAL WRITTEN OBJECTION TO LAB CERTIFICATE

Under N.J.S.A. 2C: 35-19 in a drug case, the defendant through attorney, may object to the entry of a proffered laboratory certificate as evidence at the time of trial. Grounds for objection may include:

-The certificate is illegible and has not been certified in accordance with N.J.S.A. 2C: 35-19 (b).

-the certificate fails to establish the type of analysis performed, the subscriber's full training and experience, the nature and condition of the equipment used, or the full conclusions reached by the subscriber.

-The State has failed to provide all results and notes pursuant to State vs. Weller 225 N.J. Super. 274 (Law Div. 1986). The defense should request these documents and if they have not been provided to the defense object to the lab report. The defense may try to be provided with the operator's manual for all instruments used to test the substances, pursuant to State v Ford 240 N.J. Super. 44 (App. Div. 1990).

5 BLOOD TEST "REPORTS" ARE HEARSAY, WHICH MAY BE INADMISSIBLE

Blood test results, documents and papers are writings and thus hearsay. Under the evidence RULE 802. HEARSAY RULE : "Hearsay is not admissible except as provided by these rules or by other law. "

Admission of hearsay which is not admissible under any exception or other law and its use as a foundation for a conviction violates a defendant's Sixth Amendment

right to confront witnesses against him. State v Long 255 NJ Super. 716, 726 (Law Div. 1993)

RULE 803. HEARSAY EXCEPTIONS NOT DEPENDENT ON DECLARANT'S UNAVAILABILITY

The following written statements are not excluded by the hearsay rule:

.....
(6) Records of regularly conducted activity. [Business Records]
A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

A good attorney should argue that there is no proof the writing was made in the ordinary course or business.

(8) Public records, reports, and findings. Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement
[Source: The Internet- http://www.njlawnet.com/njevidence/]

An attorney should argue there is no proof that the official actually performed the act. There is no proof the report was part of an official duty. If the public cannot readily obtain a copy of the results, is it really a public record?

RULE 808. EXPERT OPINION INCLUDED IN A HEARSAY STATEMENT ADMISSIBLE UNDER AN EXCEPTION

Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

According to Biunno, Current NJ Rules of Evidence, Comment 1 to NJRE 808, (Gann) NJRE 808 codifies principles first set out in State v Matulewicz 101 NJ 27 (1985). As stated by the 1991 Supreme Court Committee Comment, NJRE 808 is intended in general terms all of the specific criteria discussed in Matulewicz. Before a determination can be made by the trial court, it must hear proofs as to the "Method and circumstances" involved in the preparation of the proffered report. In particular, "proof should be adduced to reflect:

-the relative degrees of objectivity and subjectivity involved in the procedure,

-the regularity with which these analyses are done,

-the routine quality of each analysis,

-the presence of any motive to single out a specific analysis for the purpose of rendering an untrustworthy report, and

-the responsibility of each chemist to make accurate and reliable analyses.

Therefore, expert opinions contained in hearsay should not be admissible unless there is actual testimony that all conditions of NJRE 808 and State v Matulewicz are followed. In a DWI blood case for drug or alcohol influence, the State Police civilian chemists use a gas chromatagraph machine. Often there is no evidence that the as chromatagraph machine was inspected before or after the testing of the blood. All machines should be inspected on a periodic basis. For example, in Matulewicz, the expert witness was not produced. The results were too unreliable, too great a chance of a prejudicial finding are police lab's reports which are offered without a right of a defendant to question the police chemist. NJ Administrative Office of the Court, Bench Book, P1-1-28

Recently, in State v Oliveri ___ NJ Super. ___ (App. Div. 2001) (A-1037-99T3 decided January 16, 2001) the blood-alcohol report, prepared by a forensic scientist in a State Police laboratory, was admissible without accompanying

testimony from the chemist who performed the test, pursuant to NJRE 808. That Rule of Evidence codifies the principles set forth in State v Matulewicz, 101 NJ 27 (1985). NJSA 2C:35-19 is inapplicable when dealing with a blood- alcohol analysis. That statute addresses the admissibility of certificates that analyze controlled dangerous substances and their analogs.

In Oliveri, the state submitted the mandatory information concerning how the blood was initially drawn and the chain of custody that brought it to the State Police laboratory. The Court held there was no viable challenge to the methodology used to draw defendant's blood or to the chain of custody that brought the blood to the State Police laboratory. In Oliveri, defendant's attorney was supplied the gas chromatograph charts as part of pretrial discovery. The court noted defense counsel did not attempt to show any such deviations on the charts.

RULE 807. DISCRETION OF JUDGE TO EXCLUDE EVIDENCE UNDER CERTAIN EXCEPTIONS

Except if offered by an accused in a criminal proceeding, when any statement is admissible by reason of Rules 803(c)(8), 803(c)(9), 803(c)(10), 803(c)(11), 803(c)(12), 803(c)(13), 803(c)(14), 803(c)(15), 803(c)(26) or 804(b), the judge may exclude it at the trial if it appears that the proponent's intention to offer the statement in evidence was not made known to the adverse party at such time as to provide that party with a fair opportunity to meet it.

The defense attorney should object and request the judge to exclude the evidence at trial if the prosecutor did not provide a notice of intent to offer the evidence.

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6 NJ EVIDENCE RULE 506-PATIENT AND PHYSICIAN PRIVILEGE MAY RENDER THE HOSPITAL BLOOD RESULTS CONFIDENTIAL IF NO SUBPOENA OR COURT ORDER

N.J.S. 2A: 84A-22.2 sets forth the patient- Physician privilege

State v. Schreiber 122 NJ 579, 586-588; (1991) declared the physician-patient privilege is not applicable where police bring the DWI suspect to the hospital. However, the defense counsel should argue the privilege should continue to apply to other aspects of the hospital and blood work.

Even after Schreiber, a driver suspected of having an elevated blood alcohol level does not necessarily lose all interest in the confidentiality of his medical records. Where a blood test was taken for diagnostic rather than investigative purposes and where investigation is of death by auto charges or any other crime or disorderly persons offense, the privilege would still apply under the restrictions established by State v. Dyal, 97 N.J. 229 (1984). Biunno, Current NJ Rules of Evidence, Comment 1 to NJRE 506, (Gann)

A Hospital blood test was admissible in DWI case of State v. Lutz 309 N.J. Super. 317 (App. Div. 1998) where witnesses from the hospital were produced. The Defendant in Lutz contended that the results of his blood test were forensically unreliable and inadmissible. The Court noted that although there may be differences in the methodology used for tests conducted by law enforcement for "forensic" purposes in comparison to those conducted by a hospital for "diagnostic" purposes, the procedure utilized to test defendant's blood was sufficient to establish the reliability of defendant's test results. The State was required to produce witnesses who drew blood, plus witnesses for the chain of custody, rather than hearsay reports and the state. The Court affirmed the driving-under-the-influence-of-alcohol conviction. A good defense attorney can argue if the State fails to produce the same witnesses as in Lutz, the blood test should be inadmissible in the DWI case.

OTHER DEFENSE OBJECTIONS-

7- Gas chromatagraph results not provided

8- Testimony is objected to from any so-called non medical drug recognition expert or police office that the defendant was under the influence. There is no reported NJ court case that ever recognized DRE as scientific.

9- If all discovery and gas chromatography results are not provided, defense makes a motion to exclude the all test results under State v Holup 253 NJ Super. 320 (App. Div. 1992)

10- If the state is not prepared to proceed, defense objects to the adjournment and make a record for appeal. State v. Farrell 320 NJ Super. 425 (App. Div. 1999)