
CRIMINAL LAW UPDATE

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March 2003

new jersey cases

One of the most seemingly misunderstood, misapplied and abused exceptions to the search warrant requirement of both the federal and state Constitutions is the "search incident to arrest" exception. At the outset it is important to remember that any search without a warrant is *presumptively invalid*, the burden being on the state to show exigent circumstances sufficient to justify the absence of a warrant. A simpler way to state the test is that the police *do not have the right* to search without first getting a warrant unless they can satisfactorily answer the question, "So what was the big emergency?" Appellate Division Judges Colleser, Stern and Alley seemed to have gotten it right in *State v. Rose*. (App.Div. 12/3/03). In *Rose*, the police learned that the accused was in a motel room and had a number of outstanding arrest warrants. The police entered the motel room, arrested and handcuffed Rose, and *then* searched the motel room, finding drugs under the toilet seat cover. (Oh for the glorious life of a drug dealer: stuck in a motel with a toilet seat cover as your drug repository). The Appellate Division first noted that occupants of motel rooms do have an expectation of privacy (whew! that saves the daytime business). Then the court *suppressed* the search, finding that once arrested and in handcuffs, Rose no longer had *any* area "within his immediate control" in which he might grab for a weapon

or destroy the evidence. Indeed, in reversing the Law Division, the Appellate Division held that even the presence of Rose's girlfriend in the motel room did not alter the conclusion in that there was no reasonable basis to find--indeed, it was improper to assume--that she would have destroyed the evidence or reached for a weapon. By focusing on the language of prior cases that police may only search the area under an arrestee's "immediate control," the court has sharpened the focus on the original basis for this exception to the warrant requirement: it is *not* the mere presence of the arrestee that is significant, but whether he/she can reach for weapons or contraband. Once secured by the police, *nothing* is within his/her "immediate control" and from that point forward a search warrant would be required, absent other exigent circumstances. The same issue when applied to motor vehicle searches is more complicated by their mobile nature, but that is for another day.

When a woman (not a sexist reference, just an overwhelming statistical reality) applies for a domestic violence temporary restraining order, can the issuing judge, after finding that an act of domestic violence took place, also *automatically* issue an order that the defendant surrender all weapons, and authorize a search for such weapons? When the search for those weapons turns up evidence of cocaine possession, the answer becomes more than merely academic. As *N.J.S.A. 2C:25-28j*

A Publication of the Bergen County Bar Association

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authorizes search warrants to protect victims of domestic violence from further violence, and *not* to discover evidence of criminality, probable cause is not the standard which applies. In *State v. Johnson* (353 N.J. Super 15 (App.Div. 6/11/02)) the court held that a search warrant under such circumstances can be issued if the judge finds that there exists *reasonable cause* (and the difference is...?) to believe that (1) an act of domestic violence was committed, (2) the defendant possesses or has access to a firearm, and (3) (very importantly, and almost always overlooked) that his access to the weapon poses a heightened risk of injury to the victim.

increased (surprise) revoked penalties

Penalties for Driving While Suspended repeat offenders were increased on June 24, 2002. The ordinary jail penalty for a second offense ranges up to five days; for third offense a flat 10 days. The amendment to the statute (N.J.S.A. 39:3-40j) requires incarceration for *10 days more than the defendant received on his last violation* whenever the violation also "involves a motor vehicle moving violation." The problem arises in third offense cases where the judge is going to be unsure how many days imprisonment were imposed for the second offense, as it can range from zero (in the minds of some judges) or one (in the minds of others) up to five days. Perhaps DMV now must get in the business of listing the incarceration portion of the penalty to assist future judges in imposing sentences. Of course, judges may simply want to rely on the defendant for an accurate statement as to how many days imprisonment were imposed last time (heh, heh). The real trick now will be to plead the client to *only* Driving While Revoked.

bergen county news and matters

In Bergen County, discovery on criminal matters is available *at two separate times*, and often in *two separate forms*. Most criminal defendants wind up in the Preindictment Plea Court (PIP) before Judge Austin about two months after

charges are filed. From the date you receive a notice scheduling the PIP hearing, discovery is available from Criminal Case Management in Room 134. When you appear there, all you need is the name of your client and the date of the PIP hearing. Discovery is *free*. If you choose to wait until the date of the PIP hearing, the discovery will be available in the courtroom. Have questions about PIP? Call Nicholas Brunetto at 201-752-4368, the PIP Court Team Leader.

If the matter is not resolved at PIP, and proceeds to indictment, *another package of discovery should be obtained from the Prosecutor's Office*, as additional discovery may have been added to the package in the interim. This discovery can be obtained at Room 215 (the main Prosecutor's Office). If you know the prosecutor assigned to the case, request his/her secretary, advising the receptionist of the defendant's name and indictment number. It is advisable to call in advance of appearing, both to insure that the discovery is prepared, and to learn the cost (all checks should be made payable to the "County of Bergen"). If you do not know which prosecutor is assigned to the case, call Angela Maglio at 201-646-2405. *Hint: trial court judges are not particularly thrilled when attorneys appear for arraignment on the indictment unable to state what motions they wish to file on the case because "they just picked up discovery today."*

Judge John Conte, recovering from health problems, is expected back on the bench, if all goes as planned, on Monday March 31st. **Judge Sebastian Gaeta** will join the criminal bench on March 3rd. **Judge Robert Contillo** will be reassigned.

Good judgment comes from experience, and often experience comes from bad judgment.-- Rita Mae Brown (b. 1944), American writer.

We cannot escape fear. We can only transform it into a companion that accompanies us on all our exciting adventures.-- Susan Jeffers.

