

# CRIMINAL LAW UPDATE

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## **cases**

When police seize evidence in violation of the Fourth Amendment, the remedy for that illegal seizure is suppression of the evidence. But what happens if the item seized in an illegal search of a home is not drugs, or a gun, but the defendant himself? You can't suppress a defendant (although sometimes you just really, *really* want to), but what about a confession he gives while in custody from that arrest? Is that confession the "fruits of an illegal search" and subject to suppression? The answer is, both surprisingly and somewhat confusingly, *no*. In *State v. Bell*, 388 N.J. Super 629 (App.Div. 11/17/06) the police had a valid arrest warrant for Mr. Bell, amply demonstrating probable cause for his arrest. While an arrest warrant will justify an entry into defendant's home for his arrest, it will not support an entry into any other residences. To "search" for defendant at another residence, the police must have a search warrant. Here, the police entered the residence of defendant's aunt, searched it, and found Bell hiding (shockingly, after sweet old auntie denied he was even home). They arrested him, and three hours later he confessed to murder (whoops! I just said what???). The defendant's argument was simple, and seemingly compelling: but for the illegal search, the police never would have arrested Bell, and without an arrest, he would not have been in custody to have his confession coerced...err, freely given. The court disagreed. Suppression was not necessary, the court ruled, as the illegal search was unrelated to the confession. Once the police, during that illegal search, came upon defendant, they had probable cause to arrest him, i.e., they had an arrest warrant. His custody was therefore legal, and the confession thereafter given was admissible, the court ruling that defendant's confession was *not* the product of any illegal government activity (i.e., the illegal search). Remember, the court did not rule that the confession was too attenuated in time or place from the illegal search; it ruled that there was no relationship between the two. Suppression of evidence is warranted as a remedy in order to deprive the state from enjoying the fruits of its illegal conduct. Given *Bell*, what is now the disincentive for police, armed with an arrest warrant, to search illegally the homes of all defendant's friends and family in pursuit of him, yet in violation of the constitution? His custody will be deemed legal, and any confession admissible. While the decision is in accord with federal law, the Appellate Division had the opportunity to grant residents greater protections under the state constitution, but declined.

As if there are not enough forms associated with criminal pleas and sentencing, a new one has come into being as a result of *State v. Molina*, 187 N.J. 531 (App.Div.

7/12/06). In *Molina*, the Supreme Court held that unless a defendant is advised of his right to appeal at sentencing, he has up to five years to prosecute an appeal of his case as if he had filed it within time. As a result, each defendant must now, at the end of the sentencing proceeding, sign a form acknowledging that he has been properly advised of his right to an appeal and the time limitations for doing so. The court also granted defendants the right to appeal out of time when they requested their counsel to file an appeal, but counsel failed to do so.

The next time you have a photo lineup or live lineup identification in a case and you wish to know whether the procedure utilized comports with the Attorney General Guidelines, go to the appendix in *State v. Herrera*, 187 N.J. 493 (6/20/06). (The guidelines can also be found at the Attorney General's website). A court may be impressed that the police did not follow their own AG-mandated guidelines. And when arguing that *Wade* hearing as to the impermissibly suggestive nature of the identification procedure, keep in mind the words of Justice Albin in his dissenting opinion in *Herrera*: *Misidentification is the single greatest source of error leading to wrongful convictions in this country. In recent years, capital convictions have been overturned in a number of jurisdictions because DNA evidence has irrefutably established that the defendants condemned to death were wrongly convicted based on mistaken identification testimony. Fair identification procedures cannot fully ensure that mistaken identification will not occur, for any ultimate judgement that relies on human perception and memory is fraught with the potential for error. Highly suggestive identification procedures, however, exponentially increase the possibility of misidentifications and unjust convictions.* Ask the judge to charge this language *verbatim*.

Here is an interesting assertion of the duties expected of a criminal defense attorney: when a defendant has indictments pending in more than one vicinage, defense counsel is *obligated* to move for a consolidation at an early stage where appropriate. *State v. Rountree*, 338 N.J. Super 190 (App.Div. 9/21/06).

Can a child under the age of 18 file for protection under the *Protection of Domestic Violence Act*? Unless the juvenile is emancipated (married, in military service, or has a child or is pregnant), or had a "dating" relationship with the abuser, the answer is no. In *M.A. v. E.A.*, 388 N.J. Super 612 (App.Div. 11/17/06) the court held that a 15-year old girl was ineligible for the issuance of a domestic violence restraining order against her stepfather who was sexually assaulting her. Why? She wasn't a "victim" as defined in the statute: she was under 18, unemancipated, and was not in a dating relationship with her stepfather. Furthermore, the court ruled that the girl's mother could not, on the girl's behalf, claim to be a victim of the stepfather's domestic violence, because she was not the person who was abused, the anguish caused her by the abuse notwithstanding. So, unless the stepfather is criminally charged and a judge ordered a *no-contact* provision, or DYFS steps in, the girl is entitled to no legal protection.

Can a defendant, who runs away from police officers who ordered him to stop, be convicted of "obstructing a public servant from lawfully performing in a official function by means of flight," in violation of *N.J.S.A. 2c: 29-1(a)*? Can he be convicted even when the police do not have a reasonable and articulable suspicion of criminal wrongdoing to justify a stop? The answer, in *State v. Crawley* 187 N.J. 440 (7/24/06) is *yes*. Even if the suspect did not commit an offense, "he cannot be the judge of his own cause and take matters into his own hands and resist or take flight." Ironically, without the requisite reasonable and articulable suspicion, any contraband discovered during the encounter will be suppressed, but defendant will nonetheless be convicted of his flight. Justice Wallace, in dissent, argued that the statute requires that the police officer be "lawfully performing an official function." If the stop was without reasonable and articulable suspicion, it is unconstitutional, and an unconstitutional stop cannot be a legal one.

Why you must approach your case with an open and skeptical mind: *If we begin with certainties, we shall end in doubts; but if we begin with doubts, and we are patient in them, we shall end in certainties.* Sir Francis Bacon (1561-1626), English philosopher, essayist.

Is there any play, any stage, any forum anywhere with the drama of even the most mundane criminal trial?