

Summer 2017 Municipal court law review

1. Reasonable articulable suspicion was not present when this investigative detention began. Therefore, the statements and evidence obtained thereafter must be suppressed. State v. Rosario ___N.J.___ (2017)

Defendant was faced with an investigative detention once the officer blocked in her vehicle, directed the patrol car's alley light to shine into her car, and then approached her driver's-side window to address her. Under the totality of the circumstances, a reasonable person would feel the constraints on her freedom of movement from having become the focus of law enforcement attention. Accordingly, an investigative detention had begun. Reasonable articulable suspicion did not ripen prior to the officer's subsequent exchanges with defendant.

In this appeal, the Court addresses whether and at what point defendant's interaction with the police officer escalated from a field inquiry into an investigative detention.

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. Warrantless searches and seizures presumptively violate those protections, but not all police-citizen encounters constitute searches or seizures for purposes of the warrant requirement.

2. Three categories of encounters with police have been identified by the courts: (1) field inquiry; (2) investigative detention; and (3) arrest. The test of a field inquiry is whether a defendant, under all of the attendant circumstances, reasonably believed he could walk away without answering any of the officer's questions. In contrast to a field inquiry, an investigative detention, also called a Terry stop or an investigatory stop, occurs during a police encounter when an objectively reasonable person would feel that his or her right to move has been restricted. Because an investigative detention is a temporary seizure that restricts a person's movement, it must be based on an officer's reasonable and particularized suspicion that an individual has just engaged in, or was about to engage in, criminal activity. An arrest requires probable cause and generally is supported through an arrest warrant or by demonstration of grounds that would have justified one.

3. The key issue in this case lies in the distinction between a field inquiry and an investigative detention. The difference between a field inquiry and an investigative

detention always comes down to whether an objectively reasonable person would have felt free to leave or terminate the encounter with police. The encounter is measured from a defendant's perspective.

4. A person sitting in a lawfully parked car outside her home who suddenly finds herself blocked in by a patrol car that shines a flood light into the vehicle, only to have the officer exit his marked car and approach the driver's side of the vehicle, would not reasonably feel free to leave. Here, the officer immediately asked for defendant's identification. Although not determinative, that fact only reinforces that this was an investigative detention. It defies typical human experience to believe that one who is ordered to produce identification in such circumstances would feel free to leave. That conduct is not a garden-variety, non-intrusive, conversational interaction between an officer and an individual.

5. Because it was an investigative detention from the point that Officer Campan took those directed actions toward defendant, the Court must consider whether, based on a totality of the circumstances, the encounter was "justified at its inception" by a reasonable and articulable suspicion of criminal activity. An anonymous tip, standing alone, inherently lacks the reliability necessary to support reasonable suspicion. Mere furtive gestures of an occupant of an automobile do not give rise to an articulable suspicion suggesting criminal activity. The suspicious behavior identified by the State in defendant's later responses to Campan's questioning occurred after the investigative detention had begun. Neither those responses, nor her blurted-out incriminatory statements, nor the surrendered contraband can be used, post hoc, to establish the reasonable and articulable suspicion required at the outset of the investigative detention that here began earlier in time.

6. Reasonable articulable suspicion was not present when this investigative detention began. Therefore, the statements and evidence obtained thereafter must be suppressed, and it is unnecessary to address the Miranda arguments advanced by the parties.

(A-91-15; 077420)

2. Five officers' swift and coordinated action eliminated the risk that any of the four occupants would gain immediate access to the weapon. State v. Robinson 228 N.J. 529 (2017)

Although the circumstances gave rise to a reasonable suspicion that there was a weapon in the vehicle, the five officers' swift and coordinated action eliminated the risk that any of the four occupants would gain immediate access to the weapon. Accordingly, the protective sweep exception to the warrant requirement does not govern this case. The community-caretaking exception to the warrant requirement is irrelevant. However, the inevitable discovery exception to the exclusionary rule may be pertinent to this case.

1. The [Fourth Amendment](#) of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution guarantee “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and set forth the requirements for warrants. Warrantless searches are permissible only if justified by one of the few specifically established and well-delineated exceptions to the warrant requirement. It is the State’s burden to prove that a warrantless search falls within one or more of those exceptions.

2. The protective sweep exception to the warrant requirement derives from [Terry v. Ohio](#), 392 [U.S.](#) 1 (1968). In [Terry](#), the Supreme Court held that a police officer may initiate an investigatory stop in the presence of “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” [Id.](#) at 21. [Terry](#) stops are narrowly drawn to permit a reasonable search for weapons.

3. The United States Supreme Court applied the protective sweep exception to an automobile setting in [Michigan v. Long](#), 463 [U.S.](#) 1032, 1049 (1983). The Court adopted that standard in [State v. Lund](#), 119 [N.J.](#) 35, 48 (1990), but rejected the State’s claim that the search reviewed in that case was a valid protective sweep. In [State v. Gamble](#), the Court upheld an automobile search as a lawful protective sweep. 218 [N.J.](#)412, 431-33 (2014).

4. [Long](#) and the Court’s opinions in [Lund](#) and [Gamble](#) define the standard for a valid protective sweep of an automobile following a traffic stop: the State must present specific and articulable facts that, considered with the rational inferences from those facts, warrant a belief that an individual in the vehicle is dangerous and that he or she may gain immediate control of weapons. The protective sweep exception in the automobile setting does not turn solely on the potential presence of a weapon in a vehicle. Instead, it addresses the imminent danger to police when a driver or passenger will be permitted access to a vehicle that may contain a weapon or may be in a position to evade or overpower the officers at the scene. That standard governs this appeal.

5. In light of Officer Ceci's observations of defendant's driving, there were specific and articulable facts giving rise to reasonable suspicion that defendant had committed motor vehicle violations and that the traffic stop was therefore lawful. However, Officer Ceci's search of the car was not a valid protective sweep. There is no doubt that Officer Ceci's concerns that defendant and Henderson could be armed were justified, but Officer Ceci addressed the potential danger with prompt and effective action. None of the four occupants was given an opportunity to return to the car or was in a position to gain access to any weapon. The record did not reveal specific and articulable facts that, at the time of Officer Ceci's search of the vehicle, would reasonably warrant the conclusion that any of the vehicle's four occupants was potentially capable of gaining immediate control of weapons. The search of the car was not within the protective sweep exception to the warrant requirement.

6. This case does not fit within the narrow parameters of the community-caretaking doctrine as applied to the search of a motor vehicle. There was no potential threat to any person's safety warranting application of the doctrine at the time that the search took place. The Court does not reach the "plain-feel" exception.

7. In light of the officers' continued control over the vehicle, their reasonable concern that one or more occupants could have been armed, and the uncertain status of the vehicle's owner, it may have been inevitable that the handgun would have been discovered. Consequently, the inevitable discovery exception to the exclusionary rule is potentially relevant to this case. The Court explains that exception and provides guidance for evaluating its applicability on remand, but offers no view on the resolution of any issues raised on remand. (A-40-15; 076267)

3 Defense not required to produce witness statement if not in writing. State v. Tier, 228 N.J. 555 (2017)

In this appeal, the Court considers a question of first impression: What are a defendant's post-indictment reciprocal discovery obligations to the State regarding a defense witness's oral statements?

At a status conference, the State took issue with the witness list defendant produced because it listed the names of three men but did not provide identifiers, addresses, or synopses of their anticipated testimony

HELD: A plain reading of Rule 3:13-3(b)(2)(C) requires production of witness statements only if those statements have already been reduced to writing. Nothing in the rules precludes a trial court from ordering a defendant to designate witnesses as

either character or fact witnesses, however. The Court encourages practitioners to participate in cooperative discovery in order to ease the burden on all parties involved.

Rule 3:13-3(b)(2)(C) reads, in pertinent part: “A defendant shall provide the State with all relevant material, including, but not limited to . . . the names, addresses, and birthdates of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements.” This Rule has not seen much review.

In addition to the confidentiality concerns raised by disclosure of work product, one of the underlying principles on which our criminal justice system is based is that a defendant “has a fundamental right to remain silent.” Williams v. Florida, 399 U.S. 78, 112, 90 S. Ct. 1893, 1912, 26 L. Ed. 2d 446, 483 (1970) (Black, J., concurring in part and dissenting in part). This defendant agreed to reciprocal discovery, implicating the Rule and necessitating its review. See R. 3:13-3(b)(1).

Rule 3:13-3(b)(2)(C) plainly requires a defendant to produce “the names, addresses, and birthdates of those persons known to defendant who may be called as witnesses at trial.” Written statements, however, need only be produced if they exist. This result is unquestionably mandated by the language “if any,” which modifies “written statements.” The language following “if any” does not alter that result; it merely indicates that memoranda either reporting or summarizing a witness’s oral statements constitute discoverable written statements for purposes of Rule 3:13-3(b)(2)(C).

The trial court’s order was based upon a mistaken understanding of the applicable law, requiring reversal. However, the Court stops short of finding that the entire order was an abuse of discretion. Nothing in the court rules prevents the trial court from obligating defendant to identify a witness as either a character or fact witness. To the contrary, requiring a defendant to identify the category of witness not only alleviates some of the State’s concern regarding the burden of investigating a never-ending list of potential witnesses, but falls in line with the Court’s policy encouraging cooperation in the discovery process. **(A-73-15) (077328)**

4. Defendant has automatic standing to challenge the search of a residential apartment. State v. Amir Randolph 228 NJ 566 (2017)

HELD: Defendant had automatic standing to challenge the search of the apartment because he was charged with possessory drug offenses and because the State failed to show that the apartment was abandoned or that defendant was a trespasser. Failing to issue the “mere presence” charge was harmless error.

1. This appeal concerns defendant's standing to challenge the search of the apartment. The New Jersey Constitution's prohibition against unreasonable searches and seizures affords greater protection than the federal Constitution. In New Jersey, the State bears the burden of showing that defendant has no proprietary, possessory, or participatory interest in either the place searched or the property seized. Although the Court does not engage in a reasonable expectation of privacy analysis when a defendant has automatic standing to challenge a search, it does so in determining whether a defendant has a protectible right of privacy in a novel class of objects or category of places. Here, the Court is applying traditional principles of automatic standing to a place that historically has enjoyed a heightened expectation of privacy—the home. No unique circumstances call for the Court to engage in an additional reasonable expectation of privacy analysis as a supplement to its standing rule.

2. The automatic standing rule, however, is subject to reasonable exceptions, and, in this appeal, the Court recognizes three exceptions in cases concerning real property: An accused will not have standing to challenge a search of abandoned property, property on which he was trespassing, or property from which he was lawfully evicted. The State has the burden of establishing that one of those exceptions applies to strip a defendant of automatic standing to challenge a search.

3. In the present case, defendant had automatic standing to challenge the search of the second-floor apartment because he was charged with possessory drug offenses, and because the State failed to establish that Sergeant Trowbridge had an objectively reasonable basis to believe that the apartment was abandoned or that defendant was a trespasser. Regardless of the disarray in the apartment and the fact that it was not fully furnished, there were clear signs that someone occupied it.

4. Importantly, at the suppression hearing, the prosecutor contended that the police conducted a lawful search pursuant to the exigent-circumstances and protective-sweep exceptions to the warrant requirement. The trial court never addressed those substantive grounds. The trial court, moreover, did not apply the well-established principles governing standing. Rather, the court turned to the reasonable expectation of privacy test, typically used in federal courts, and concluded—without any evidence—that the apartment was vacant. The Court, therefore, concludes that the trial court erred in its analysis and that a new suppression hearing must be conducted.

5. The Court next considers whether the trial court erred in not instructing the jury on “mere presence” and, if so, whether the failure to give the charge denied defendant a fair trial. Defendant requested that the trial court read to the jury the Model Charge that instructs that a defendant's “mere presence” at the scene, standing alone, is

insufficient to prove guilt. The court denied that request. The trial court was clearly mistaken in its belief that the “mere presence” charge is given only in conspiracy cases. No constraint barred the trial court from giving the “mere presence” charge, and the better course would have been to give the charge to disabuse the jury of any possible notion that a conviction could be based solely on defendant’s presence in the building. However, unlike the appellate panel, the Court concludes that the failure to give the “mere presence” charge did not deprive defendant of a fair trial. The charge, as a whole, sufficiently informed the jury—without using the words “mere presence”—that defendant’s presence in the building, standing alone, would be insufficient to establish guilt. The Court, therefore, reverse the judgment of the Appellate Division granting defendant a new trial.

Finally, the Court agrees with the Appellate Division that, if there is a retrial, the trial court “must carefully consider whether it is appropriate to charge flight, and, if so, must tailor the charge to the facts of the case.” 441 N.J. Super. at 563-64. In doing so, the court must determine whether the probative value of evidence of flight is “substantially outweighed by the risk of . . . undue prejudice, confusion of issues, or misleading the jury,” N.J.R.E. 403(a), and whether a carefully crafted limiting instruction could ameliorate any potential prejudice. **(A-70-15) (076506)**

5. NJ adopts same-elements test as the sole test for determining what constitutes the “same offense” for purposes of double jeopardy. More difficult for double jeopardy. State v. Miles, 229 N.J. 83

In this appeal, the Court clarifies the methodology to be used in analyzing whether two offenses are the “same offense” for double jeopardy purposes. Since the 1980s, New Jersey courts have applied both the same-evidence test and the same-elements test articulated in Blockburger v. United States, 284 U.S. 299 (1932), in double jeopardy determinations. A finding that offenses met either test resulted in double jeopardy protection for the defendant.

A grand jury returned an indictment-charging defendant with the offenses in the warrant complaint. Defendant then appeared pro se in municipal court to resolve the disorderly-persons offense. At some point before that video proceeding, the original municipal charge was amended to a different disorderly-persons offense—loitering to possess marijuana. Defendant asked the municipal court judge, “why they got me going to Superior Court for this, Your Honor?” The judge then responded that defendant was

“not going to Superior Court for this,” but rather for an unrelated child support issue. Defendant then pled guilty to loitering to possess marijuana.

Thereafter, defendant moved to dismiss the Superior Court indictment on double-jeopardy grounds, arguing that prosecution on the possession charges was barred because he had already pled guilty to an offense that arose from the same conduct. The Superior Court denied defendant’s motion to dismiss, reasoning that prosecution on the indicted charges was not barred because it required proof of an additional element—proximity to a school. Defendant pled guilty to possession of CDS with intent to distribute within 1000 feet of a school (the school-zone charge), but preserved his right to appeal the denial of the motion to dismiss.

On appeal, the Appellate Division remanded for a finding on the circumstances surrounding the amendment of the disorderly-persons offense. The panel noted that a plea to the original municipal charge, instead of the amended one, could have led to a different result after applying the double-jeopardy analysis.

On remand, the Superior Court found no direct evidence as to the circumstances surrounding the amendment, and the prosecutor represented that his office was not informed of defendant’s municipal court proceedings. Despite defendant’s expressed confusion during the municipal court plea hearing, the Superior Court concluded that the school-zone prosecution was not precluded by notions of fundamental fairness.

Defendant appealed again, arguing that double jeopardy barred prosecution on the school-zone charge. The Appellate Division agreed, finding that, although the second prosecution was not barred under the same-elements test, it was barred under the same-evidence test. 443 N.J. Super. 212, 220, 225-27 (App. Div. 2015).

The Court granted the State’s petition for certification. 225 N.J. 339 (2016).

HELD: New Jersey now joins the majority of jurisdictions in returning to the Blockburger same-elements test as the sole test for determining what constitutes the “same offense” for purposes of double jeopardy. In the interest of justice, the Court applied both the same-elements test and the now-replaced same-evidence test in this case; going forward, for offenses committed after the issuance of this opinion, the same-elements test will serve as the singular framework for determining whether two charges are the same offense for purposes of double-jeopardy analysis.

1. Here, the municipal court had jurisdiction to resolve defendant’s disorderly-persons charge pursuant to N.J.S.A. 2B:12-17, and failure to join does not automatically bar subsequent prosecution. For judicial efficiency and fairness to defendants, the Court urges careful coordination between the municipal courts and county prosecutors.

2. The Court has consistently interpreted the State Constitution's double-jeopardy protection as coextensive with the guarantee of the federal Constitution. A prime concern when reviewing a double-jeopardy claim is whether the second prosecution is for the same offense involved in the first.

3. The United States Supreme Court first announced its test for determining whether a second prosecution is for the same offense in Blockburger, supra, 284 U.S. at 304: If each statute at issue requires proof of an element that the other does not, they do not constitute the same offense and a second prosecution may proceed. This has come to be known as the same-elements test.

4. The Court read the language in Illinois v. Vitale, 447 U.S. 410, 421 (1980), as creating an alternative to Blockburger's same-elements test—the same-evidence test. The United States Supreme Court reached the same conclusion in Grady v. Corbin, 495 U.S. 508, 510 (1990), but revised its position in United States v. Dixon, 509 U.S. 688, 704, 708-09 (1993), in which it deemed the same-evidence test unworkable and reinstated the Blockburger same-elements test as the sole measure of whether two offenses constitute the same offense.

5. Since Dixon, the majority of states have similarly ruled that the Blockburger same-elements test sets forth the proper test for determining whether two charges are the same offense. Until this case, the Court has not had occasion to reevaluate double-jeopardy jurisprudence in light of Dixon's return to the same-elements test. As a result, appellate panels have split over whether the same-evidence test still applies in New Jersey.

6. The Court now adopts the same-elements test as the sole double-jeopardy analysis, thereby realigning New Jersey law with federal law. The same-elements test is effortlessly applied at early stages of prosecution; it is capable of producing uniform, predictable results; and it aids defendants by reducing multiple court appearances. Rule 3:15-1(b) bars subsequent prosecutions for indictable offenses, and failure by the prosecution to properly join indictable offenses bars a subsequent prosecution. State v. Williams, 172 N.J. 361, 368 (2002). The Court recognizes a narrow circumstance where it is possible that neither the same-elements test nor the rule in Williams would prevent a second prosecution; if those unlikely events unfolded, the second prosecution might well be barred on joinder or fundamental fairness grounds. As a further safeguard, the Court invites the Supreme Court Committee on Criminal Practice to review the joinder rule and consider adding non-indictable offenses to it.

7. Because the decision establishes a new rule of law, the Court applies the new singular same-elements standard prospectively to offenses committed after the date of

this opinion. In fairness to defendant, the Court conducts double-jeopardy analysis using both the same-elements test and the now-removed same-evidence test. Application of the Blockburger same-elements test would lead to the conclusion that loitering to possess marijuana is not the same offense as possession within a school zone. Each offense contains at least one element not required to prove the other. Under the same-evidence test, however, successive prosecution for the school-zone offense is prohibited because it is based on the same evidence that supported the plea and conviction on the loitering offense.

8. For offenses committed after the issuance of this opinion, the same-elements test will serve as the singular framework for determining whether two charges are the same offense for double-jeopardy analysis.

JUSTICE ALBIN, DISSENTING, expresses the view that majority's new rule cannot be squared with the principles of fairness that previously animated New Jersey's double-jeopardy jurisprudence. According to Justice Albin, the majority's reversion to the same-elements test will allow the State to pursue repeated prosecutions for the same offense despite an earlier conviction or acquittal. **(A-72-15) (077035)**

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13. Editorial Assistance provided by Associate Editor: Ariella Sweeney, a second year student at Pennsylvania State Law School. Ms. Sweeney's goal is to work in Child Advocacy in either New York or Florida. Before attending Pennsylvania State Law School, she graduated from the University of Central Florida with several President's List awards and as Vice-President of her Pre-Law Fraternity.

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