



**State of New Jersey**

OFFICE OF THE ATTORNEY GENERAL  
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June 5, 2009

John Paff  
2106 S. Cypress Bend Drive  
Apt. 102  
Pompano Beach, FL 33069-4457

Dear Mr. Paff:

I have reviewed the circumstances surrounding the complaint you made on June 1, 2009, regarding an alleged improper search involving a NJ State Trooper. Thank you for bringing this matter to our attention and providing us the opportunity to address your concerns.

A legal review of the circumstances and documentation regarding your complaint was conducted by the Office of Professional Standards. The review determined that the trooper did not violate any of the New Jersey State Police Standard Operating Procedures, Rules and Regulations, or laws of the State Of New Jersey. Based upon these facts, there will be no further action taken by my office on this matter.

Should you have any additional concerns, please contact the Office of Professional Standards at 1-877-253-4125 or the Office of State Police Affairs at 609-341-3232 and refer to investigation #2009-0357.

Very truly yours,

*Lt. Kevin Tormey*

Lt. Kevin J. Tormey  
Bureau Chief  
Intake and Adjudication Bureau

KJT/dn



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March 19, 2009

Office of Professional Standards  
New Jersey State Police  
810 Bear Tavern Road - Suite 310  
West Trenton, NJ 08628

*(via Fax only to 609-882-2033)*

RE: Complaint against Troopers Locchetto and Howell

Dear Sir or Madam:

Today, I read the Appellate Division's unpublished decision in State v. Vernett Shaw and Paul Green, Docket No. A-4829-07T4, on the Judiciary's Internet site<sup>1</sup>. After reading it, I came away with the conclusion that it's the policy and practice of the New Jersey State Police to conduct motor vehicle searches without regard to whether or not a search warrant is legally required.

As a life-long New Jersey resident, I was distressed at what I read and decided to file an Internal Affairs complaint against Troopers Lewis Locchetto and Howell<sup>2</sup> for their actions arising out of a motor vehicle stop occurring at about 9:40 p.m. on February 24, 2007. Please accept this letter as my complaint.

I would not be filing this complaint if I thought that Trooper Locchetto's and Trooper Howell's improper search was an isolated incident. If it was an isolated incident, I would trust that the State Police's Internal Affairs program would have already taken note of the problem and remedied it.

But, Trooper Locchetto's testified that:

- a. "During a roadside stop, when you smell the odor of raw marijuana and/or burnt marijuana, you can search that car" without a warrant. (Decision, pp. 5-6).
- b. He did not think of calling for a warrant while he was awaiting backup "because that's not our procedure." (Decision, p. 6).
- c. When asked why they did not have the car towed to the State Police barracks and searched there, he responded "that's not what we do." (Decision, p. 6).

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<sup>1</sup> <http://www.judiciary.state.nj.us/opinions/a4829-07.pdf>

<sup>2</sup> No first name for Trooper Howell is listed in the Appellate Division decision.

On page 7 of the decision, the defense attorney argued, apparently validly, “that the State Police policy to never apply for a warrant, telephonic or otherwise, was contrary to well-established case law.”

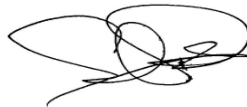
It baffles me that the State Police would have, as a matter of policy, such a callous disregard for motorists’ constitutional rights. I am certainly no fan of the “Drug War”<sup>3</sup> but even if I was I would oppose this “we don’t need no stinkin’ warrants” policy because the failure of the Troopers to get a warrant in this case resulted in suppression of the evidence needed to convict the theoretical bad-guys.

So, I decided to file this Internal Affairs complaint. I figure that if the State Police really do have a policy that permits warrantless searches regardless of exigent circumstances or other factors, my complaint will be considered unfounded and the Troopers will suffer no punishment. While I would not like that result, at least I would know that the State Police simply consider themselves to be above the law.

Alternatively, if there really is no policy that permits unbridled, warrantless searches, and that indeed warrantless searches violate State Police rules and regulations, then I believe that the State Police administration would be as concerned as I am that Trooper Locchetto falsely testified that the State Police has established such a no-warrant policy. In such a case, I would think that both Troopers would be punished for searching the car without a warrant and that Trooper Locchetto would be punished for publicly misrepresenting the policies of the New Jersey State Police and creating a public perception that troopers are taught to ignore the rule of law.

Thank you for your attention to this matter. I await being notified of the disposition of my complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "John Paff", with a large, stylized flourish above the name.

John Paff

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<sup>3</sup> I am a proud, long-time member of the Libertarian Party. The LP’s position on the “War on Drugs” is articulated in the “Personal Privacy” plank of our platform at <http://www.lp.org/platform>

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4829-07T4

STATE OF NEW JERSEY,

Plaintiff-Appellant/  
Cross-Respondent,

v.

VERNETT SHAW,

Defendant-Respondent/  
Cross-Appellant,

and

PAUL GREEN,

Defendant-Respondent.

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Submitted February 2, 2009 - Decided March 19, 2009

Before Judges Lisa and Reisner.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 07-08-1252.

Robert D. Bernardi, Burlington County Prosecutor, attorney for appellant/cross-respondent (Rebecca Berger, Assistant Prosecutor, of counsel and on the brief).

Yvonne Smith Segars, Public Defender, attorney for respondents and cross-appellant (Robert L. Sloan, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

By leave granted, the State appeals from a trial court order dated April 25, 2008, granting the defendants' motion to suppress evidence seized during a search of their car. Defendant Vernet Shaw cross-appeals, also by leave granted, from the denial of his motion to suppress evidence seized during a search of his person following his arrest. We affirm the trial court's order suppressing evidence found during the vehicle search. We remand for reconsideration of Shaw's suppression motion concerning the search of his person.

I

Defendants were arrested on February 24, 2007, after the State Police found marijuana in a car driven by defendant Green and in which defendant Shaw was a passenger. Following their arrest, they were taken to the State Police barracks, where a search of Shaw's person also revealed a small quantity of marijuana hidden in his socks. Defendants moved to suppress the evidence.

At the suppression hearing, the State presented one witness, the State Trooper who first stopped defendants' automobile. The State also presented a videotape of the stop, recorded from the trooper's vehicle.

On direct examination, Trooper Lewis Locchetto testified that on February 24, 2007, he was patrolling the Turnpike on the

night shift, from 6:00 p.m. to 6:00 a.m. At about 9:40 p.m.,<sup>1</sup> he was driving down a specially-designated entrance ramp leading from the barracks to the southbound Turnpike when he observed defendants' car tailgating another vehicle in the far left lane of the Turnpike. Believing that defendants' vehicle was being driven in an unsafe manner, Locchetto waited for the vehicle to move into the center lane, and then signaled defendants' car to pull over by activating his overhead lights. After "about a minute and a half," defendants' vehicle pulled over onto the right shoulder of the Turnpike, at a point about "a mile and a half" from the State Police barracks and not far from Turnpike Exit 4. According to Locchetto, it was dark out and the traffic was "light."

Locchetto approached the passenger side of the car, using his flashlight to look for possible weapons in the car and also looking for places where drugs might be hidden. He signaled the passenger to roll down his window, and, as soon as the window was open, the trooper "immediately" detected a "very strong" odor of raw marijuana. After obtaining the driver's license and registration, and further visually inspecting the car's interior

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<sup>1</sup> The trooper initially testified that he left the barracks at about 9:00 p.m., but the videotape of the stop showed it occurred at 9:40 p.m.

through the open window, the trooper "got the driver out of the vehicle" and searched him "for CDS."

Locchetto also called for back-up officers, based on the strong smell of marijuana coming from the car. After searching the driver, Locchetto secured him in the back seat of his patrol car. He then approached the passenger, removed him from the vehicle and searched him as well. At that point, the trooper told the passenger that he "smelled the odor of raw marijuana in the car" and advised him that "I'm gonna search you and I'm gonna search the car." The trooper then secured the passenger in the rear of the patrol car, while he waited for back-up to arrive. Neither defendant was handcuffed at that point, although they were both placed in the back of the patrol car "for [the trooper's] safety."

During this entire time, including while the passenger was alone in defendants' car, the trooper left the key in the ignition of defendants' car and left the engine running. He testified that it was part of his training to leave the heat or air-conditioning on in a suspect vehicle, because sometimes marijuana is hidden in the vents and the flowing air would assist the troopers in detecting the smell. Two back-up troopers arrived at about 10:00 p.m. and at that point, without seeking a search warrant, Locchetto and Trooper Howell began

searching defendants' car.<sup>2</sup> Locchetto and Howell initially found a small amount of marijuana in the front of the car, after which they returned to Locchetto's patrol car, handcuffed the two defendants, and formally placed them under arrest.

According to Locchetto, even with the doors open to the night air and even after the small amount of drugs was removed, the car continued to emit a strong smell of raw marijuana. They continued their search and eventually found a much larger package of marijuana hidden in the trunk. The troopers also suspected that drugs might be hidden in the console. Accordingly, during the search which lasted about forty minutes, Locchetto took the time to telephone, from the roadside, a "fellow trooper in Maryland who knows about center consoles and traps. And I asked him questions about that." Acting on this trooper's advice, he continued the search but found no drugs in or around the console.

On cross-examination, defense counsel asked the trooper about his "understanding of the procedure of the State Police of New Jersey in obtaining a warrant to search an automobile?" The trooper explained that "during a roadside stop, when you smell the odor of raw marijuana and/or burnt marijuana, you can search

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<sup>2</sup> On cross-examination, Locchetto explained that during the search, the third trooper stood guard over the patrol car in which defendants were confined.

that car" without a warrant. Accordingly, neither Locchetto nor either of the two backup officers considered the possibility of applying for a search warrant. Asked if he felt "in danger" at any time during the search, he responded that his backup was "20 miles away" and until they arrived, he secured defendants in the rear of his patrol car for his own safety and to prevent them from possibly destroying evidence inside their vehicle. However, he did not start to search the car until the backup officers arrived, fifteen to twenty minutes later. He did not think of calling for a warrant during that hiatus "because that's not our procedure."

Asked again if he felt "in . . . danger, that the search had to be done right then and there," he responded that one is "always in danger with the traffic going by." However, he also admitted it was a rural section of the Turnpike, traffic was light, and the officers were searching the car "for about an hour" on the side of the highway. When asked why they did not have the car towed to the State Police barracks and searched there, he responded "that's not what we do."

In arguing the suppression motion, the defense contended that the State had not presented evidence of exigent circumstances to justify the warrantless search, as required by State v. Dunlap, 185 N.J. 543 (2006), and State v. Cooke, 163

N.J. 657 (2000). They also contended that the State Police policy to never apply for a warrant, telephonic or otherwise, was contrary to well-established case law. Further, they argued that the manner in which the troopers conducted their search demonstrated that they had no real safety concerns about spending extended amounts of time on the shoulder of the Turnpike, and they were not "even thinking of exigent circumstances." Based on State v. Birkenmeier, 185 N.J. 552 (2006), and prior cases, the State argued that the fact of a "roadside stop" always provides the necessary exigent circumstances to justify a warrantless search.

In a lengthy oral opinion placed on the record immediately after the hearing, the trial judge concluded that the State had failed to prove exigent circumstances so as to justify searching the car without a warrant. Based on a detailed review of the facts before her, the judge's analysis contrasted the theoretical reasons for allowing warrantless roadside searches with the reality of what she saw on the videotape and what she heard from the trooper.

She credited Locchetto's testimony that he smelled raw marijuana, thus creating probable cause to search the car. However, focusing on State v. Cooke, supra, she reasoned that "the smell of raw marijuana in a motor vehicle" did not

necessarily constitute exigent circumstances. That issue required analysis of "officer's safety, . . . destruction of evidence, and . . . the inherent mobility of a motor vehicle."

The judge then undertook a detailed analysis of the specific facts of the case before her. She credited Locchetto's testimony that traffic was "light" in his judgment, and that the stop was very close to the Moorestown barracks and exit 4. Addressing the safety issue, she noted that the manner in which the search was performed was inconsistent with a claim that it had to be performed without waiting for a warrant, to ensure the officers' safety. The troopers searching the vehicle kept its doors open, and seemed to have no concern for their own safety as they walked around the open car doors, "right at the shoulder line." She also found that

in terms of officer's safety, searching this vehicle on the side of the road was completely anathema to . . . officer's safety for ten minutes, much less for the 35 or 45 minutes that it went on. And this was not a cursory search. This was at night in the winter. The backseat was taken out.

There was a call made to a trooper in Maryland to find out about this console. The console was lifted up and searched . . . .

This was not just a cursory search. This was a thorough taking apart of this motor vehicle to see what was in it. All the while, on the side of the road, at

night, the doors open, most of the time the engine was running.

Addressing the concern for third persons possibly destroying evidence, she noted based on her review of the videotape that before his backup arrived, Locchetto spent "about ten minutes" searching the driver. But

[a]ll the while, the car is on the side of the road, the engine is going, the keys are in the car and the passenger is alone in the vehicle.

The case law tells us that one of the things that we need to worry about is whether third persons are able to come and get the car . . . or destroy evidence.

Well, if that's what the concern is, why we would leave the passenger in a running vehicle on the side of the road?

. . . if you want to talk about officer's safety and why you allow these searches to go on without the need of taking a half an hour or an hour to get a warrant because of the officer's safety, here we have this whole issue, just this playing out right here.

. . . .

[Further,] there's no testimony from anybody that there was a concern that somebody was gonna come and take anything out of the car, or move it.

The judge also reasoned that, under the specific facts of the case before her, it would have been practical to have the

car towed or driven the short distance to the nearby barracks or a nearby gas station for purposes of a search:

What is clear to me is that this vehicle was stopped on the side of the road, almost within plain sight . . . of the trooper barracks. And . . . of exit 4. And at some point in [the video], you see a sign that says, "Service Station 5 miles ahead."

So . . . in a very short distance, this car could have been taken to the service station, it could've gotten off at exit 4 and come around and come back to the trooper barracks.

And there's no explanation, other than, "That's not our practice," about why the car wasn't simply impounded and taken back to the barracks where, in a parking lot, or in a garage with lighting facility and everything else, this car could've been searched in the same thorough way it was on the side of the road.

Based on the specific facts before her, the judge concluded that the State failed to meet its burden of proving exigent circumstances:

And I find that there were no exigent circumstances. That this is a situation in which the driver and the passenger were secured in the back of the trooper car. There were two troopers there as backup. One was charged with guarding the two defendants who were sitting in the back of the trooper car. The other was assisting in the search.

There's no explanation whatsoever for why someone couldn't have — if they wanted to remove . . . the defendants from the scene, why they couldn't have been removed

and somebody stay with the car until a tow truck came or it was impounded . . . .

And there is no evidence whatsoever in this case that this vehicle was accessible to anybody else, that there was any opportunity for the evidence to be destroyed, or the evidence to be removed from it . . . .

Therefore, she granted the motion to suppress all of the evidence seized from defendants' vehicle. However, the judge did not suppress the evidence found on Shaw's person, concluding that it was "a search incident to arrest and . . . not subject to this ruling."

## II

Our review of a trial judge's decision on a motion to suppress evidence is limited and deferential, particularly when the decision is based on the judge's factual findings made after a testimonial hearing:

Our analysis must begin with an understanding of the standard of appellate review that applies to a motion judge's findings in a suppression hearing. . . . [A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record."

An appellate court "should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy."

An appellate court should not disturb the trial court's findings merely because "it might have reached a different conclusion were it the trial tribunal" or because "the trial court decided all evidence or inference conflicts in favor of one side" in a close case. A trial court's findings should be disturbed only if they are so clearly mistaken "that the interests of justice demand intervention and correction." Ibid. In those circumstances solely should an appellate court "appraise the record as if it were deciding the matter at inception and make its own findings and conclusions."

[State v. Elders, 192 N.J. 224, 243-44 (2007)(citations omitted).]

Accordingly, we must apply this deferential standard to a trial court's determination as to exigent circumstances. See State v. Stott, 171 N.J. 343, 359-60 (2002).

We begin by considering the trial judge's ruling on the search of defendants' car. As the State concedes, warrantless searches are prima facie invalid, and "[w]here, as here, the State seeks to validate a warrantless search, it bears the burden of bringing it within one of those exceptions." State v. Patino, 83 N.J. 1, 7 (1980). It is equally fundamental that the police may not conduct a warrantless search pursuant to the automobile exception without proving that the stop is unexpected, that there is probable cause, and that "exigent circumstances exist under which it is impracticable to obtain a

warrant." State v. Pena-Flores, \_\_\_ N.J. \_\_\_, \_\_\_ (2009)(slip op. at 28); State v. Cooke, supra, 163 N.J. at 670-71.

In its most recent decision on the issue, the Supreme Court reaffirmed the automobile exception to the warrant requirement, as well as the absolute necessity that the State prove exigent circumstances to justify a warrantless search pursuant to that exception:

[I]n accordance with "our unwavering precedent," the warrantless search of an automobile in New Jersey is permissible where (1) the stop is unexpected; (2) the police have probable cause to believe that the vehicle contains contraband or evidence or a crime; and (3) exigent circumstances exist under which it is impracticable to obtain a warrant. The notion of exigency encompasses far broader considerations than the mere mobility of the vehicle.

[Pena-Flores, supra, slip op. at 28 (citations omitted).]

Whether exigency existed to justify a warrantless search is determined case-by-case in light of "the totality of the circumstances," but the critical issues to consider are "officer safety and the preservation of evidence." Ibid. "There is no magic formula - - it is merely the compendium of facts that make it impracticable to secure a warrant." Ibid. The Court listed a non-exclusive set of considerations in making the determination:

They include, for example, the time of day; the location of the stop; the nature of the neighborhood; the unfolding of the events establishing probable cause; the ratio of officers to suspects; the existence of confederates who know the location of the car and could remove it or its contents; whether the arrest was observed by passersby who could tamper with the car or its contents; whether it would be safe to leave the car unguarded and, if not, whether the delay that would be caused by obtaining a warrant would place the officers or the evidence at risk. As we have previously noted, "[f]or purposes of a warrantless search, exigent circumstances are present when law enforcement officers do not have sufficient time to obtain any form of warrant."

[Id. at 29-30 (emphasis added and citations omitted).]

In light of well-established precedent, we begin our analysis of this appeal by noting what is obvious from the record: the State made no effort to prove exigent circumstances. Rather, consistent with the State Police "policy" on searches, the State took the position that on any and all roadside stops, searches could be conducted without a search warrant as long as the trooper making the stop smelled marijuana in the stopped car. That is not the law. Id. at 28.

In this case, the State simply did not prove that the troopers did not have time to apply for a warrant, consistent with preserving their safety and the evidence. The trooper who made the stop could have called for a warrant while he had

defendants locked in the back of his patrol car and was waiting for backup to arrive. Or he could have called after the backup officers arrived. The situation was not so urgent that no phone calls could be made from the scene of this roadside stop. In fact, Trooper Locchetto had enough time to call a colleague in Maryland to discuss search techniques.

Moreover, the officers were not out-numbered by the suspects here. They had enough officers on the scene to assign one of them to stand guard over the patrol car in which defendants were confined. The State offered no testimony as to any staffing shortages that might have made the situation exigent.

As the trial judge found, the scene of the stop was minutes away from the State Police barracks and from a service station. The troopers could have had the car towed or driven to either place, where, as the judge noted, they could have conducted a search in complete safety. Instead, they spent almost an hour tearing the car apart on the side of the Turnpike. The State failed to present evidence explaining how the troopers were faced with "exigent circumstances" making it "impracticable" to wait for a warrant before beginning the search. Pena-Flores, supra, slip op. at 28.

In short, we find no basis in this record to depart from the deference we owe the trial judge's decision. See Elders, supra, 192 N.J. at 243-44. The trial judge was neither required nor permitted to fill in gaps in the State's case, nor to speculate as to the existence of proofs the State did not present. See Stott, supra, 171 N.J. at 358 (police officer's perception of exigent circumstances "must be based on more than mere speculation"). We conclude that the trial judge correctly found, based on her careful review of the specific facts of this case, that the State did not carry its burden to prove exigent circumstances. Therefore, we affirm the trial court's decision to suppress the evidence found in defendants' vehicle.

We turn next to the contraband found in defendant Shaw's socks during a search at the State Police barracks following his arrest. At the barracks, the police evidently made Shaw take off his shoes and socks, and the marijuana was found between his feet and his socks. Dealing with this issue very briefly, the trial judge held that the search was justified because it was incident to an arrest.

On this appeal, Shaw contends, as he did in the trial court, that the evidence must be suppressed under the "fruit of the poisonous tree" doctrine, because his arrest was premised on drugs found during the illegal search of the car. See Wong Sun

v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The trooper's testimony clearly established that Shaw was arrested based on the discovery of marijuana in the car. Apparently, both sides accepted the view that the admissibility of the drugs in Shaw's socks would stand or fall on the validity of the vehicle search. That was the only issue they briefed to the trial court. Moreover, the State did not file a brief in opposition to Shaw's cross-appeal, and we will not sua sponte address legal issues the State did not present to us or to the trial court.

However, we also recognize that in her very brief ruling upholding the search of Shaw's socks at the police barracks, as a search incident to arrest, the trial judge did not address Shaw's contention that the arrest itself was invalid. Because the trial judge did not address the legality of Shaw's arrest, and because there may be other grounds justifying the arrest, see State v. Judge, 275 N.J. Super. 194 (App. Div. 1994), we remand this issue to the trial court for reconsideration of Shaw's suppression motion respecting the contraband found in his socks.

Affirmed in part, remanded in part.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION