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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5821-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS J. SHANNON,

Defendant-Appellant.

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Submitted February 28, 2011 - Decided April 27, 2011

Before Judges Kestin and Newman.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Indictment No.  
07-07-0634.

Yvonne Smith Segars, Public Defender,  
attorney for appellant (Stefan Van Jura,  
Assistant Deputy Public Defender, of counsel  
and on the brief).

Theodore J. Romankow, Union County Prosecutor,  
attorney for respondent (Sara B. Liebman,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Following the denial of his motion to suppress, defendant  
pled guilty to third-degree possession of a controlled dangerous  
substance (CDS) with intent to distribute, pursuant to a plea

agreement. Defendant was sentenced, in accord with the agreement, to a six-year term of imprisonment with a three-year period of parole ineligibility, to run concurrent with an unrelated sentence out of Monmouth County. We reverse.

The relevant facts, which are straightforward, may be summarized as follows. State Trooper Scott Sanders was on road duty, monitoring traffic, on the New Jersey Turnpike on May 16, 2007. Operating a laser, he measured the speed of a blue Dodge Durango at eighty-six and eighty-seven miles per hour. Trooper Sanders followed the vehicle and "paced" the Durango, which was traveling approximately seventy-five miles per hour in a fifty-five mile-per-hour zone, tailgating other cars. Trooper Sanders activated his overhead lights and pulled the Durango over.

Upon approaching the passenger side of the vehicle, Trooper Sanders saw defendant and smelled raw marijuana and air sanitizer through the passenger-side window, which was rolled down. After calling for assistance, and upon returning to defendant's vehicle, Trooper Sanders saw defendant speaking on a cell phone. Trooper Sanders testified that, when asked, defendant said that "he was talking to the rental [car] company," and handed the cell phone to Trooper Sanders. Trooper Sanders then spoke with an unknown female who said she was an employee of the rental car company. Trooper Sanders ordered defendant out of the vehicle, and conducted a search of him,

finding approximately \$1,600 in his pockets. Defendant was then instructed to sit on the guardrail near the front of the Durango and was observed by backup State Trooper Micewicz, who had arrived on the scene.

Trooper Sanders conducted a search of the Durango. In the vehicle's center console, under the removable tray, he found five dime bags of high-grade marijuana, approximately half an ounce of cocaine, seven bricks of heroin, and five sealed blunts containing tobacco.

Defendant was then placed under arrest, given his Miranda<sup>1</sup> rights, and placed in the back of Trooper Sanders's police car. Trooper Micewicz waited at the scene for a tow truck while Trooper Sanders escorted defendant to the Newark State Police barracks.

In denying the motion to suppress, the motion judge understood that there must be probable cause and exigent circumstances in order to conduct a search of a vehicle without a search warrant. The judge also pointed out that probable cause furnished the right to request a warrant to search a vehicle. The motion judge, based on the facts, was satisfied that the State Trooper had probable cause. In addressing the exigent circumstances, the court recognized that this was not a

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

high-narcotics area; that the officer was alone when he made the observations and smelled the marijuana; and had called for backup assistance. The motion judge considered the New Jersey Turnpike an inherently dangerous location, considering that there were traffic safety factors at that location, and that the other officer was subject to responding to another emergency should it arise, leaving Trooper Sanders alone. The safety factors and the inability to properly secure and protect the automobile led the motion judge to conclude that there were exigent circumstances to conduct an immediate search of the vehicle.

On appeal, defendant raises the following issue for our consideration:

THE LOWER COURT'S FINDING OF EXIGENT CIRCUMSTANCES JUSTIFYING THE WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE SHOULD BE REJECTED, AND THE CONTRABAND SUPPRESSED.

In arguing that the contraband was unlawfully seized, defendant does not contest the finding that the State Trooper had probable cause or that the vehicle contained evidence of criminality, but asserts that exigent circumstances did not exist to dispense with the warrant requirement. Recognizing that a case-by-case analysis is necessary, defendant, citing, inter alia, State v. Pena-Flores, 198 N.J. 6, 29-30 (2009), contends that the State failed to establish that there was

insufficient time to obtain a warrant, whether by telephone or through the more traditional means of appearing before a judge if the Durango had been impounded. Defendant also maintains that the trooper was more concerned with his own convenience, which was not a justifiable reason to fail to secure a warrant.

It is clear that "the warrantless search of an automobile" is permitted "where (1) the stop is unexpected; (2) the police have probable cause to believe that the vehicle contains contraband or evidence of a crime; and (3) exigent circumstances exist under which it is impracticable to obtain a warrant." Id. at 28. See also State v. Cooke, 163 N.J. 657, 667-68 (2000). Policy rationales of "[p]olice safety and the preservation of evidence" are "the 'preeminent determinants' of exigency for purposes of applying the automobile exception." Pena-Flores, supra, 198 N.J. at 28 (alteration in original) (emphasis omitted) (quoting State v. Dunlap, 185 N.J. 543, 551 (2006) (per curiam)). "The notion of exigency encompasses far broader considerations than the mere mobility of the vehicle." Ibid. Recognizing that exigency must be decided on a case-by-case basis, ibid. (citing Dunlap, supra, 185 N.J. at 551), our Court in Pena-Flores set forth some of the "[l]egitimate considerations" that should be taken into consideration:

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.

[Id. at 29.]

Here, defendant does not contest that the stop was unexpected, nor does he argue that the trooper lacked probable cause. Everything turns on whether there were sufficient circumstances that ripened into the exigency necessary to conduct a warrantless search. In Pena-Flores, which involved two consolidated appeals, id. at 11, the facts pertaining to one appeal also showed that the stop was unexpected and was occasioned by motor vehicle violations. Id. at 30. There, the stop took place late at night on a heavily traveled road. Id. at 13, 30. The vehicle's windows were darkly tinted so police were not able to look through them for weapons or contraband. Id. at 12, 30. Only two police officers were available to guard the two occupants of the car. Id. at 12, 30. In finding exigent circumstances, the court noted that the suspects were not arrested or secured after being removed from the vehicle, and "[t]he ratio of police officers to suspects was two-to-two." Id. at 30-31.

Unlike in Pena-Flores, see id. at 12-13, 30-31, there is no indication that the State Trooper lacked sufficient time to obtain a telephonic warrant pursuant to Rule 3:5-3(b). It was not late at night, nor was Trooper Sanders impeded by tinted windows. Indeed, he did not have to look through any windows because the odor of raw marijuana apparently was pungent enough for him to smell. No one approached the vehicle during the stop. Nor was there any suggestion that any confederates were aware of the stop. The notion that the State Trooper did not know if defendant was really speaking to a representative of the rental car company is purely speculative, especially when the person identified herself as a representative of the company. Much emphasis is placed on the fact that this daytime stop occurred on the New Jersey Turnpike, which concededly is a busy, heavily traveled superhighway. While the safety of the officer is a factor to consider under Pena-Flores, it remains only one of the circumstances to be considered in making the exigency determination. See Pena-Flores, supra, 198 N.J. at 30-31.

Here, the officer did not even confiscate the contraband once he located it in the center console, but left it to be later secured. Obviously, there was no concern that the evidence would not be preserved. The alleged safety factor had nothing to do with the fear of confederates or of defendant himself, but rather the traffic along the Turnpike.

The State did not even attempt to show that it was impracticable to obtain a telephonic warrant or that defendant could not have been placed under arrest, as he later was, in the rear of Trooper Sanders's vehicle, and driven to the Newark State Police barracks while a tow truck could have towed the Durango to a location where it could have remained secure while a search warrant was obtained.

The State did not show that the exigent circumstances were such that "law enforcement officers [did] not have sufficient time to obtain any form of warrant.'" Pena-Flores, supra, 198 N.J. at 30 (emphasis omitted) (quoting State v. Johnson, 193 N.J. 528, 556 n.7 (2008)).

We fail to see how there was an urgent need for the State Trooper to conduct a full search of the automobile during this daylight stop with another State Trooper assisting while defendant was outside of the vehicle and being watched over by the second trooper. The State made no effort to show that a telephonic warrant could not have been sought with expedition.

Reversed and remanded.