
CRIMINAL LAW UPDATE

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cases

“Pragmatic necessity requires that we uphold the validity and reasonableness of a search incident to arrest” so long as the “arrestee and a container in his or her possession is made at the location of the arrest while the arrestee is still on the scene.” This is the reasoning that the New Jersey Appellate Division gave in *State v. Oyenusi* (387 N.J. Super. 146, 8/3/06) for validating searches conducted in clear contravention of the constitutional protections against unreasonable searches and seizures. In *Oyenusi*, defendant was arrested while walking and carrying two white bags. There was no separate probable cause for the search of the bags. After he was handcuffed and secured, the police, without a warrant, opened and searched the bags. The State sought to uphold the search as being valid to a lawful arrest. The Appellate Division paid lip service to the theory allowing such a presumptively unconstitutional warrantless search by acknowledging that “the authorization to search incident to an arrest is based on the need to disarm the arrestee and preserve evidence for later use at trial.” Absent those factors, each citizen has a right to privacy that cannot be invaded. *Not so fast on that assumption, pardner.* The magic talisman the State only need wave to make the constitution disappear is the invocation of “pragmatic necessity,” whatever *that* means. Reading the decision will not help, as it does not begin to define it, only to invoke it. And how do you do an end-run around the need to demonstrate the defendant is still in a position to grab a gun or eat the evidence? By ruling that the requirement of *contemporaneity* of the arrest and search—the lynchpin of the exception—really only means “substantially contemporaneous.” Er, to be true to its *raison d’être*, actually, it doesn’t. If

defined that way, the legal theory justifying the search dissipates. The definition of “substantially contemporaneous?” In simple terms, it means that all the parties are still at the scene—and yes, even if the defendant is handcuffed and securely in the back seat of the patrol car. In *State v. Eckel*, 185 N.J. 523 (2006), the NJ Supreme Court, in invalidating a search of a car undertaken after the defendant was safely handcuffed, said this kind of reasoning no longer holds water. So maybe the fat lady has yet to sing.

Defendant was charged with physical abuse of his girlfriend's three-year-old son and convicted of second degree Endangering the Welfare of a Child. While the boy did not testify at the trial, certain statements made by him were allowed into evidence over objection. One of the statements was made to a DYFS investigator who responded to the ER upon a report of possible child abuse and questioned the child about the allegations. The Appellate Division analyzed the admissibility of those hearsay statements pursuant to the United States Supreme Court's mandate in *Crawford v. Washington*, which prohibits the admission of hearsay statements which are deemed “testimonial” where there was no opportunity for cross-examination. In *Davis v. Washington*, 126 S.Ct 2266 (2006), the US Supreme Court defined “testimonial” hearsay, there holding that statements made to a governmental agent or witness investigating an allegation of abuse are “testimonial” because of the potential for a criminal prosecution. In such instances, the declarant must testify at trial unless he or she is unavailable and the defendant had a prior opportunity for cross-examination. Relying on *Davis* and *Crawford*,

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the Appellate Division held the statements to DYFS were testimonial, that is, taken in preparation for prosecution, and therefore inadmissible. The statement to DYFS was not heard at the scene or while the abuse was occurring; rather, it was taken when the victim was no longer in danger and there was no "ongoing emergency." Statements made during an ongoing emergency are deemed "non-testimonial." An earlier statement, "Daddy beat me," was made unsolicitedly when the child's mother was driving him to day care. This statement was admitted as an excited utterance because it was voluntarily made to a family member in close proximity to the event in question, thereby rendering it non-testimonial. See *State in the Interest of J.A.*, 385 N.J. Super. 544 (App. Div. 2006). Perhaps, upon reflection and meditation, this defendant will learn to maintain the equanimity, serenity and calm of his namesake. *State v. Buda* (App.Div., 12/20/2006)

As criminal lawyers, we increasingly represent individuals who are not citizens of this country, many of them here legally. Under federal law, many criminal offenses, including most drug offenses, qualify as "aggravated felonies" and convictions for these crimes render non-citizens almost automatically deportable. The United States Supreme Court gave non-citizens criminal defendants an early Christmas present when it ruled last month that a state court conviction for simple possession of cocaine did not qualify as an offense involving "illicit trafficking" and therefore, since the crime in question was a misdemeanor and not a felony under the CSA (*Controlled Substances Act*-the federal statute governing drug crimes), the offense did *not* qualify as an aggravated felony. This change in the interpretation of the law allows such defendants to apply to stay in this country. The Court's decision still requires a lawyer to carefully read the CSA to determine whether the conduct in question would be a felony or a misdemeanor under Federal law. This is no easy task, and criminal attorneys should encourage the client to hire an immigration attorney to consult on whether the offense itself is a felony or a misdemeanor under federal law prior to advising the client on any plea offers. Remember, the concept of a PCR is not alien to immigrants. *Lopez v. Gonzales* (12/5/06).

miscellaneous

The British are such a "stiff upper lip" people, eh what? So dignified and understated, an attitude that seems to extend to criminal investigations also. The American Foreign Press reported that Detective Chief Superintendent Stewart Gull of Suffolk, England, who is leading the investigation into the murder of five local women, would address the killer thusly: "My appeal is simple: give yourself up. Make contact with Suffolk police. You have a significant problem. Give me a call." *Bloody good, no?* Might be something we should try here: shortly thereafter, the police announced an arrest.

The Alcotest litigation, *State v. Chun*, is drawing to a close. Testimony before the Special Master, Judge King, ended December 19th. Judge King has scheduled summations to begin January 9th. Judge King will then have 30 days to submit his factual findings to the Supreme Court, which will essentially be sitting as the trial court. *Query*: where do you go to appeal *that* decision? The briefs of counsel will be due in the Supreme Court two weeks thereafter, likely late February. Oral argument will then be scheduled.

Meeting of the Criminal Practice and Municipal Court Committees

Tuesday January 16th, 4:00 pm
Bergen County Bar Association HQ

Guest Speaker: Hon. Roy F. McGeady
Presiding Judge of the Municipal
Courts, Vicinage II.

Agenda

New Case Law
New Legislation
Seminar Topics

The observation was made about boxing, but it applies equally to verdicts: "*You can sum up this sport in two words: you never know.*" Lou Duva,

famed boxing trainer, proving to be more adept at social commentary than mathematics.