

Criminal Procedure

Introduction

The first New Jersey constitution, adopted in 1776, was a brief document setting up the structure of the government. As with the federal constitution adopted in 1789, it did not include a list of personal rights. Although the federal constitution swiftly remedied this omission, it was not until New Jersey's second constitution, adopted in 1844, that New Jersey set forth an explicit listing of a criminal defendant's rights. These included the right to be free from unreasonable searches and seizures; the right to have a grand jury determine whether there was sufficient evidence to initiate criminal proceedings against a defendant; the right to be tried by a jury, in proceedings that were speedy and public; and the right not to be placed in criminal jeopardy twice for the same offense. This explicit listing was continued in our 1947 constitution.

Although New Jersey has recognized these rights as constitutionally required for more than 170 years, it is only recently that our Supreme Court has looked to our own constitution to assess whether a defendant's rights have been protected. For many years it was guided by the approach taken by the United States Supreme Court, which originally held the view that the provisions of the federal Bill of Rights governed proceedings in the federal court but were not applicable to proceedings in state courts. That view changed dramatically in the 1960s when the United States Supreme Court, under Chief Justice Earl Warren, held that certain of these rights were indeed applicable in state court proceedings. It did so by utilizing the incorporation doctrine, ruling that the due process and equal protection clauses of the Fourteenth Amendment incorporated certain of the federally-guaranteed rights of the first ten amendments. The Supreme Court's process of incorporation was incremental, rather than blanket.

New Jersey's Response to U.S. Supreme Court Rulings

One of the first examples was the Court's decision in *Miranda v Arizona*, 384 U.S. 436 (1966) in which the Court required the police to advise a defendant, prior to any questioning, that he did not have to answer any questions, that anything he said could be used against him as evidence, that he had the right to consult with a lawyer before being questioned and that if he could not afford a lawyer, one would be appointed for him. This explicit enunciation required a significant transformation in police interrogation procedures.

Joseph Weintraub was Chief Justice of our Supreme Court at the time of the *Miranda* decision. The Weintraub Court recognized, of course, that the *Miranda* ruling was binding and controlling, despite his view that it was "not at all compelled by 'my copy' of the Constitution." While the Warren Court took an expansive view of a criminal defendant's rights, the Weintraub Court showed little appetite to adopt, on its own, a similarly expansive approach.

In time, these approaches changed as court membership changed. *State v. Johnson*, 68 N.J. 349 (1975) (by which time Richard J. Hughes had become Chief Justice). In that case, the defendant challenged the admissibility of evidence obtained in a search conducted without a warrant but to which he had apparently consented; the evidence was used at trial, at which he was convicted. Johnson appealed and contended that his consent was not voluntary and thus the evidence should have been excluded at trial. The United States Supreme Court had held, in a similar context, that if a defendant had not voluntarily consented to a search, such a search would be unconstitutional. It noted that a defendant's knowledge that he could refuse to consent was but one factor in deciding whether consent had been given voluntarily.

Johnson's appeal was argued twice before the New Jersey Supreme Court. At the first argument, one of the justices asked whether this search would violate

the New Jersey Constitution, even if it did not violate the United States Constitution. That approach was entirely novel and led to the case being argued a second time. The result was a holding, resting on our state constitution, that a defendant had to be aware that he had a right not to consent to a warrantless search before the search could be deemed to be voluntary.

Our supreme court has remained committed to the principle that for a consent to search to be deemed truly voluntary, a suspect has to be aware of the right to withhold consent. The state has the burden of establishing that the individual was, in fact, aware. *State v. Hagans*, 232 N.J. 43 (2018).

Rights of Citizens Under the N.J. Constitution

The New Jersey Supreme Court continued under subsequent chief justices to accord greater rights to a defendant under our Constitution than had the United States Supreme Court under the federal constitution. Several cases are illustrative. In *State v. Novembrino*, 105 N.J. 95 (1985) our Supreme Court declined to follow the path laid down by the U.S. Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). In that case, the Court had upheld the validity of a warrantless search which the officers in question had conducted in good faith. Rather, in *Novembrino*, our Supreme Court held that the exclusionary rule, unmodified by a good faith exception, is an integral element of our state's constitutional guarantee that search warrants will not issue in the absence of probable cause.

State v. Hemepele, 120 N.J. 182 (1990) is another example. The United States Supreme Court, in *California v. Greenwood*, 486 U.S. 35 (1988) had held that the Fourth Amendment did not preclude police search and seizure of garbage left for collection in a place to which the public had access. Our Supreme Court, based upon our Constitution came to a different conclusion, finding that an individual retained a reasonable expectation of privacy in trash placed out for collection.

State v. Reed, 133 N.J. 237 (1993) is another example. The defendant in that case was being questioned by the police after having been fully advised of his rights under *Miranda v. Arizona*, supra, and waiving those rights. He was not advised, however, that during that questioning, a lawyer arrived on his behalf and asked to speak with him. Our Supreme Court held that under the New Jersey constitution, the defendant had to have been informed of the lawyer's availability for his waiver to be deemed valid. The United States Supreme Court had reached a different conclusion in *Moran v. Burbine*, 475 U.S. 412 (1986), holding that a failure to inform a suspect that an attorney seeks to communicate with him did not render the suspect's waiver of the right to counsel involuntary.

Some of the most vexing issues of criminal procedure arise in the context of automobile search and seizure for they present questions with respect to the validity of the stop itself as well as the reasonableness of the actions of the officers. The various contexts in which these questions are presented are seemingly limitless. In *State v. Pena-Flores* 198 N.J. 6 (2009) the Court attempted to strictly circumscribe the circumstances under which the police could conduct a warrantless search of an auto, ruling that both probable cause to believe the car contained evidence and the existence of "exigent circumstances" were needed. This dual linkage proved controversial and cumbersome and in *State v. Witt*, 223 N.J. 409 (2015) the Court obviated the requirement to demonstrate the presence of exigent circumstances.

The New Jersey Supreme Court has been in the forefront of other aspects of protecting a defendant's right to a fair trial. In *State v. Cromedy*, 158 N.J. 112 (1999), for instance, it recognized the inherently problematic nature of cross-racial identifications. In an attempt to protect defendants from the risks posed by such identifications, it mandated that juries be instructed as to the danger of misidentification that is present in such a situation.

In *State v. Henderson*, 208 N.J. 208 (2011), it confronted the problem of false identifications in situations in which a witness may honestly identify a person as the culprit but be mistaken. Drawing upon an extensive record of scientific studies and reports, the Court laid down a new framework to assess the reliability of eyewitness identification testimony in New Jersey courts.