SURVEY OF RECENT DEVELOPMENTS IN NEW JERSEY LAW

In this section, the Seton Hall Law Review *presents synopses of recent New Jersey cases of interest to practitioners. In so doing, we hope to assist the legal community in keeping abreast of some of the more interesting changes in significant areas of practice.*

TABLE OF CONTENTS

ADMINISTRATIVE AGENCIES—JURISDICTION—STANDARDS ENUNCIATED FOR RESOLUTION OF JURISDICTIONAL DISPUTES BETWEEN ADMINISTRATIVE AGENCIES—*City of Hackensack v. Winner*, 82 N.J. 1, 410 A.2d 1146 (1980).

Petitioners, William Krejsa and Nicholas Sarapuchiello finished fourth and sixth, respectively, in a promotional examination administered for the position of fire lieutenant in Hackensack. Both men, however, were bypassed for promotions, while other persons, ranked lower, were promoted. Petitioners challenged the action before the Civil Service Commission (CSC), which denied relief in May, 1976 because petitioners "failed to show by a preponderance of the evidence that they had been denied promotions for unlawful reasons." 82 N.J. at 11, 410 A.2d at 1150. Concurrent with the complaint filed with the CSC, petitioners filed unfair practice charges with the Public Employment Relations Commission (PERC). In July, 1976 a PERC hearing examiner determined that the City of Hackensack had committed unfair practices in violation of N.J. STAT. ANN. § 34:13A-5.4a (1), (3) (West Cum. Supp. 1979-1980), since the City's decision to deny promotion to the petitioners had been motivated by a desire to discourage employees from participating in union activities. PERC issued a "cease and desist" order to the City, and recommended other remedial action. This decision was adopted in March, 1977. The City of Hackensack appealed the decision. 162 N.J. Super. 1, 392 A.2d 187 (App. Div. 1978).

The Superior Court of New Jersey, Appellate Division, held that in the context of a civil service proceeding, the CSC possessed jurisdiction over anti-union discrimination. The court, however, also determined that both the CSC and PERC had concurrent jurisdiction over the current dispute. Reasoning that the CSC "had properly exercised its jurisdiction," 82 N.J. at 13, 410 A.2d at 1151, and that PERC was precluded from rendering a decision on the issue since it had been fully litigated by the CSC, the Appellate Panel reversed PERC's cease and desist order. 162 N.J. Super. at 33, 392 A.2d at 203. The Supreme Court of New Jersey granted certification, 78 N.J. 404, 396 A.2d 591 (1978), in order to determine which agency should exercise jurisdiction over the subject matter of the appeal, assuming that the unfair labor practice charge had been considered by both agencies.

Justice Handler, writing for the majority, first examined the nature of the jurisdiction of the agencies. The CSC claimed a statutory basis granting broad powers from which it could judge merit and fit-

ness in connection with public employment appointments and promotions. However, PERC also asserted a statutory right to aid public employees who claimed they were wrongfully denied promotions due to organizational activity within the public work force. The court acknowledged the statutory authority of both agencies and then addressed the issue of whether or not each agency's jurisdiction was mandatory or discretionary. 82 N.J. at 13–20, 410 A.2d at 1152–55. PERC's claim of exclusive mandatory jurisdiction was based upon N.J. STAT. ANN. § 34:13A-5.3 (West Cum. Supp. 1979-1980).

An examination of the legislative history of that statute revealed that PERC had been given exclusive administrative power to deal fully with complaints of unlawful practices regarding employee rights not specifically covered by other laws. *Id.* at 24, 410 A.2d at 1157. However, this power did not diminish employee rights under civil service laws. The court stated that the CSC possessed jurisdiction over allegations of improper employment activity when that complaint was integral to the CSC claim, and that PERC had exclusive jurisdiction over unfair practice allegations only when they constituted the sole or major complaint of the employee. *Id.* at 26–27, 410 A.2d 1158–59.

The court noted that the functions of these administrative agencies may overlap at times. In this case, PERC's jurisdiction was not exclusive because the civil service grievances were not limited to employer misconduct primarily involving unfair practice under PERC. The unfair practice issue was only a secondary matter. Thus PERC possessed discretionary power to abstain from the controversy and defer its jurisdiction to the CSC. *Id.*

In evaluating whether or not PERC was bound by the final decisions of the CSC, the court decided that administrative agencies function in a quasi-judicial capacity. Consequently, they are governed by theories of judicial doctrine. *Id.* at 28–34, 410 A.2d at 1159–61. Collateral estoppel, therefore, was applicable and precluded PERC from adjudicating the issue. Justice Handler enunciated several standards that PERC should have utilized to stay "its hand at the threshold stages of the case." *Id.*

In a concurring and dissenting opinion, Justice Schreiber noted that courts do not have the authority to prohibit an administrative agency from exercising its jurisdiction. Since there could be found no statutory or constitutional basis for doing this, Justice Schreiber analyzed Petitioner's claims as two distinct issues, and stated that the claims should have been handled by both CSC and PERC. *Id.* at 47–50, 410 A.2d at 1169–71 (Schreiber, J., concurring in part, dis-

senting in part). The CSC was responsible for enforcing the constitutional obligation that promotions of civil service employees be made according to merit and fitness, determined by examination. PERC was responsible for determining whether an employer had been guilty of discrimination against an employee in regard to employment or any condition of employment. Consequently, to hold that the CSC had the power to determine the unfair practice issue would be contrary to PERC's vested power. *Id.*

Justice Schreiber noted that conflicting findings from different agencies may result. This possibility, however, did not necessitate an application of collateral estoppel, or any other judicial doctrine. The Justice noted that the agencies are only quasi-judicial, and therefore are not bound by judicial doctrine. Justice Schreiber stated that it would not be practical for an agency to hear a case based upon the major dominant issue theory, since it is impossible to determine what the major issue is before hearing and evaluating all the evidence. *Id.* at 51–52, 410 A.2d at 1171–72 (Schreiber, J., concurring in part, dissenting in part).

The opinion of the court illustrates the need for a standard procedure in the rendering of decisions among administrative agencies, when these agencies are involved in the same controversy. The New Jersey supreme court's opinion was an attempt to enunciate certain standards which aid the resolution of this problem.

ADMISSIBILITY OF EVIDENCE—IN ABSENCE OF BAD FAITH, VIOLATION OF PROPHYLACTIC RULES ANNOUNCED IN *MIRANDA V. ARIZONA* DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED AS A RESULT—*State v. Cook*, 170 N.J. Super. 499, 406 A.2d 1340 (Law Div. 1979).

Herbert Cook, the driver of a car, and Benjamin Jackson, his passenger, were ordered out of their vehicle by Newark police officers after the officers observed the car being operated in an erratic manner. Unable to produce either license or registration, Cook was "frisked and placed into custody on suspicion of being in possession of a stolen vehicle." 170 N.J. Super. at 501, 406 A.2d at 1341. During the search of Jackson for weapons, one of the officers observed money protruding from the defendant's pocket, and asked what it was. After Jackson answered, the officer again inquired about it. Jackson then "replied that he didn't want to waste time and that he was a numbers runner and indicated he wanted to make a deal." *Id.* Based upon this

response, currency and gambling slips were seized. During this sequence of events, neither Jackson nor Cook was free to leave the area. *Id.* at 502, 406 A.2d at 1341.

The trial judge initially determined that the stop of the automobile comported with the standard announced in *Delaware v. Prouse*, 440 U.S. 648 (1979), in that the irregular driving furnished the officers with an " 'articulable and reasonable suspicion' " of a traffic violation. 170 N.J. Super. at 501, 406 A.2d at 1341. Additionally, in light of Jackson's inability to produce requisite identification, probable cause existed for believing that the vehicle was stolen. This legitimated the limited protective pat down search. *Id.* at 501–02, 406 A.2d at 1342.

The primary issue to be determined by the court was whether the statements made by the defendant were violative of the fifth amendment's protection against compulsory self-incrimination and, if so, whether physicial evidence obtained as a result should have been suppressed. *Id.* at 500, 406 A.2d at 1341. The latter question was one of first impression in New Jersey. The court concluded that both defendants were in "custody" and that the officer's questioning, characterized as a "demand for an explanation," constituted an "interrogation" within the parameters of *Brewer v. Williams*, 430 U.S. 387 (1977). 170 N.J. Super. at 502–03, 406 A.2d at 1342. Therefore, the inculpatory statements were excluded, since a custodial interrogation had ensued without a reading of the *Miranda* warnings. *Id.*

In considering whether the tangible evidence should have been suppressed, the court rejected a per se application of the exclusionary rule, holding that in the absence of bad faith on the part of the investigating officers "[a] violation of the prophylactic rules announced in *Miranda* does not automatically require suppression of evidence seized as a result." *Id.* at 506, 406 A.2d at 1344. The court found itself controlled by the decision in *Michigan v. Tucker*, 417 U.S. 433 (1974), in which the Supreme Court distinguished between a direct encroachment upon a constitutional right and a violation of a rule designed to protect that right. The court, in *Tucker*, declined to extend *Miranda*'s scope to bar the testimony of a third party witness whose identity was gained through an admission, itself inadmissible under *Miranda*. 170 N.J. Super. at 503–04, 406 A.2d at 1343. Based upon *Tucker*, Judge Walsh recognized that the efficacy of the exclusionary rule was predicated upon its ability to deter unlawful police conduct and that only when this societal interest can be promoted should the rule prevail. *Id.* at 504, 406 A.2d at 1343.

The court's decision is indicative of the trend, within the court system, eroding a mechanical application of the exclusionary rule, especially in circumstances such as these, where the deterrent value of the rule would not be served.

CHILD CUSTODY—PUBLIC POLICY CONSIDERATION OF BEST INTERESTS OF CHILDREN WARRANTS COURT'S REFUSAL TO ACCORD FOREIGN STATE'S CUSTODY DECREE FULL FAITH AND CREDIT—*Van Haren v. Van Haren*, 171 N.J. Super. 12, 407 A.2d 1242 (App. Div. 1979).

Diane and James Van Haren were married in 1970, and two children were born of the marriage. The marriage was not harmonious, and "following a domestic dispute" in 1974, both parents sought custody of the children. Temporary custody was granted to the wife, due to the young age of the children. 171 N.J. Super. at 14, 407 A.2d at 1243. The husband subsequently removed the children to South Carolina, and the plaintiff, Diane Van Haren, instituted divorce proceedings in New Jersey. In June, 1975, the divorce was granted, and custody was given to the plaintiff, even though her husband and children were residing in South Carolina.

Meanwhile, James Van Haren instituted divorce and custody actions in South Carolina. *Id.* at 15, 407 A.2d at 1243. Upon learning of the New Jersey divorce decree, the South Carolina court struck that demand from the husband's claim, but granted child custody to him. The court provided visitation rights for the plaintiff, and on one of these visits, she removed the children from South Carolina and brought them to New Jersey with her. *Id.* at 14, 407 A.2d at 1244.

A series of custody hearings brought by the defendant in New Jersey denied full faith and credit to the South Carolina decree, and in May 1978, full custody was granted to the plaintiff. The trial judge determined that it was in the best interests of the children to keep them with their mother. *Id.* at 16–17, 407 A.2d at 1244. Defendant appealed the decision, claiming enforcement of the South Carolina decree.

In an opinion authored by Judge Polow, the appellate court recognized the growing concern for a child's need of a stable home environment. The court also noted that the process of awarding custody to parents is complicated by attempts at child snatching. *Id.* at 17–18, 407 A.2d at 1245. In formulating its decision, the court cited

the Uniform Child Custody Jurisdiction Act, N.J. STAT. ANN. §§ 2A:34-28 to -52 (West Cum. Supp. 1980-1981), noting that the aim of the Act was to "minimize relitigation of custody awards and child abduction." This is achieved by litigating all custody actions in the jurisdiction in which the child and family have closest ties. 171 N.J. Super. at 18, 407 A.2d at 1245. The Act also aims at avoidance of jurisdictional conflict and competition with other states to prevent the shifting of children from state to state. The court noted that the children had spent most of their years growing up in New Jersey and that more litigation in another state or removal of the children to another state would frustrate the goals of the Act. *Id.* at 19–20, 407 A.2d at 1246. Consequently, the court ruled that it was in the best interests of the children to remain with their mother in New Jersey.

The court's decision was based upon a consideration of the best interests of the children. The reliance upon the Uniform Child Custody Jurisdiction Act and the acceptance of this Act by the State legislature exhibited a primary concern for the welfare of the child. The Act serves as a shield against parents who use children as weapons in divorce and custody actions.

CRIMINAL PROCEDURE—DEFENDANT DEPRIVED OF RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN REQUIRED TO ACCEPT ASSIGNED COUNSEL OR PROCEED PRO SE—*State v. McCombs*, 81 N.J. 373, 408 A.2d 425 (1979).

Samuel McCombs was tried and found guilty of offenses contained in a thirteen-count indictment, including breaking and entering with intent to steal, larceny, assault with intent to kill, armed robbery, and assault and battery on a police officer. 171 N.J. Super. 161, 164, 408 A.2d 434, 435 (App. Div. 1978). The defendant appealed his conviction and asserted that he had been deprived of his right to the effective assistance of counsel at a critical stage of the trial, contrary to the sixth amendment of the United States Constitution as well as article I, paragraph 10 of the New Jersey Constitution. The appellate division, in a per curiam opinion, accepted the defendant's argument, reversed the conviction and remanded for a new trial.

On the first day of his trial, McCombs had told the court that he did not wish to be represented by the public defender assigned to the case. Rather, the defendant stated that he had spoken to his mother " 'the other night' " and was informed that " 'she [was] going to get me my private attorney.' " 171 N.J. Super. at 164, 408 A.2d at 435.

The appellate division found that the trial judge "properly declined to delay the trial until private counsel could be engaged." However, an "error of constitution[al] dimension was committed when, after defendant obdurately persisted in his unwillingness 'to go to trial with' [the public defender], the trial judge issued an ultimatum that if the services of the public defender were rejected, the defendant would have to try the case himself." *Id.* at 165, 408 A.2d at 436. It was clear from the record that from the time jury selection began until completion of the prosecutor's opening statement, the defendant neither defended himself nor was represented by counsel. Citing *State v. Wiggins*, 158 N.J. Super. 27, 31, 385 A.2d 318, 321 (App. Div. 1978), the appellate division held that the trial court should have ordered the public defender to participate as vigorously as possible in McComb's defense. The failure of the trial judge to act in this manner constituted reversible error in that it resulted in "a critical gap in the trial during which a jury was selected with the defendant unrepresented and refusing to defend himself." 171 N.J. Super. at 169, 408 A.2d at 438.

In an opinion by Justice Clifford, the New Jersey supreme court affirmed the judgment of the appellate division. 81 N.J. 373, 408 A.2d 425 (1979). The court stressed that a defendant cannot be "left adrift" during so critical a phase of the trial as jury selection. *Id.* at 374, 408 A.2d at 425. The court then pointed to the impact the absence of defense counsel had upon the composition of the jury which sat in judgment. The court suggested that even a slightly experienced criminal trial attorney would have exercised peremptory challenges, thereby altering the composition of the jury. *Id.* at 377, 408 A.2d at 426. Further, the court observed that the time in which the defendant was unrepresented could not be "bridged through any notion of defendant's 'waiver' of his right to counsel." *Id.* at 377, 408 A.2d at 427. The appellate division was correct in looking to *Wiggins* for the proposition that counsel should have been ordered to participate once it became clear that the defendant was not going to conduct his own defense.

Justice Schreiber dissented from the majority opinion, stating that McCombs had effectively waived his right to the assistance of counsel. *Id.* at 388, 408 A.2d at 433 (Schreiber, J., dissenting). McCombs was not only dilatory in protesting his representation by assigned counsel, but he made no showing that he had retained an attorney and that he or his mother had the financial means to compensate counsel. *Id.* at 382–83, 408 A.2d at 430 (Schreiber, J., dissenting). Chief Justice Hughes summarized his displeasure with the

majority's opinion in a separate dissent by stating "the result leaves me with the uneasy feeling that an adroit and courtwise defendant, in a serious case of alleged criminal violence, has been successful in hoodwinking both trial and appellate courts, to the disadvantage of the true administration of justice." *Id.* at 390, 408 A.2d at 434 (Hughes, C.J., dissenting).

CRIMINAL PROCEDURE—IDENTIFICATION—COURT LACKS JURISDICTION TO COMPEL PARTICIPATION BY SUSPECT IN LINE-UP REQUESTED BY PROSECUTOR—*State v. Schweitzer*, 171 N.J. Super. 82, 407 A.2d 1276 (Law Div. 1979).

In July 1978, Peter Leone was the victim of a "vicious attack." William Lancaster was subsequently indicted and charged with atrocious assault and battery in connection with the incident. In investigating the crime, there were indications that there was a second, as yet unidentified, participant in the attack. The State believed that either Leone or another witness to the incident might have been capable of identifying Mark Schweitzer as the other assailant if provided with the opportunity to view him in a line-up. Therefore, the State moved for an order compelling Schweitzer to participate in a line-up, though he had neither been arrested nor formally charged in the case. 171 N.J. Super. at 84, 407 A.2d at 1277–78.

Judge McGann initially stated his displeasure with the prosecutor's application for the order, stating that it evinced "a lack of appreciation of the proper role of the judiciary in the broad picture of law enforcement." *Id.* at 85, 407 A.2d at 1278. He then approached the novel issue at hand by examining whether the court had jurisdiction to act in this case. He had no doubt that the court would have subject matter jurisdiction over an indictment charging the crime of atrocious assault and battery, but only after an indictment was returned. Even if such subject matter jurisdiction were obtained by the filing of an indictment, the court would not have the jurisdiction over Schweitzer's *person* necessary to compel him to do some act. The only manner in which to achieve such personal jurisdiction would be to serve "process" on him, usually done by issuing a warrant for arrest following indictment. *Id.* at 86, 407 A.2d at 1278. Because there was no matter pending before the court, compliance with the order requested by the prosecutor would constitute "the deprivation of liberty without due process." *Id.*

Although lacking the ability to show probable cause for a complaint against Schweitzer and probable cause for the issuance of a warrant for his arrest, the State nonetheless asked the court to order the line-up based upon "the hearsay affidavit of the prosecutor." *Id.* at 87, 407 A.2d at 1279. Judge McGann found that even if such an affidavit comprised probable cause, which was not the case, the court still lacked subject matter and personal jurisdiction.

The court distinguished decisions wherein orders were granted by courts to compel the fingerprinting of persons. Such cases could be distinguished by "the very slight intrusion into personal security which . . . [that] represents." *Id.* at 89, 407 A.2d at 1280. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969).

This decision reaffirmed the proposition that "the court is not an investigative tool of the prosecutor." 171 N.J. Super. at 90, 407 A.2d at 1280. The court suggested that a grand jury, not a court, would be the proper body to accomplish what was sought by the State.

CRIMINAL PROCEDURE—LEGAL ETHICS—ABSENT INFORMED WAIVER, REPRESENTATION OF MULTIPLE CRIMINAL DEFENDANTS BY SINGLE ATTORNEY OR BY ATTORNEY AND HIS PARTNERS, AT PRE-TRIAL STAGE, CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL—*State v. Bellucci*, 81 N.J. 531, 410 A.2d 666 (1980).

The criminal act out of which this case arose involved four co-defendants indicted for operating an illegal lottery: George Bellucci, Primas Johnson, and Mildred and Anthony Commandatore, husband and wife. John Russell, Esq. represented Bellucci and the Commandatores. Johnson was represented by Dennis McAlevy, Esq., Russell's law partner. After an "unsuccessful bid for a bargained plea," the Commandatores pleaded guilty. Bellucci's motion to sever his trial from that of Johnson, the remaining co-defendant, was denied. The Commandatores, awaiting sentencing during the trial of Bellucci and Johnson, did not testify in Bellucci's defense, nor were they called as witnesses by attorney Russell, despite the fact that Bellucci's defense "could have been bolstered by testimony of either or both Commandatores." Bellucci and Johnson were found guilty and Bellucci appealed. 81 N.J. at 535-37, 410 A.2d at 668-69.

The Appellate Division, inferring that attorney Russell's failure to call the Commandatores as witnesses was intended to protect the couple prior to their sentencing, presumed the existence of prejudice in the absence of a waiver by Bellucci of his right to indepedent

counsel. Additionally, since different amounts of evidence incriminated Bellucci and Johnson, "the professional association of Bellucci's trial attorney with counsel for an 'apparently guilty' co-defendant may have swayed the jury." Because the aggregate effect of the two sources of likely prejudice was found to deny Bellucci effective assistance of counsel, a new trial was required. *Id.* at 537, 410 A.2d at 669.

The New Jersey supreme court granted the State's petition for certification. 81 N.J. 49, 404 A.2d 1149 (1979). Writing for a majority of the court, Justice Pashman first reviewed the relevant case law in New Jersey, including *State v. Land*, 73 N.J. 24, 372 A.2d 297 (1977). That case held that if a potential conflict of interest results from the representation of co-defendants in a criminal prosecution by a single attorney, prejudice is presumed in the absence of the defendant's waiver. The effect of such a potential conflict of interest is to deny the defendants their fundamental right to effective assistance of counsel as protected by the United States and New Jersey constitutions. 81 N.J. at 538–39, 410 A.2d at 669–70.

In *Bellucci*, the court was presented with two sources of potential conflict of interest, each raising a related but distinct issue. Turning to the first source of conflict, the joint representation of Bellucci and the Commandatores, the court noted that since an attorney's representation of his client " 'should not be compromised before, during or after trial,' " the conflict which is credited by joint representation need not be grounded in a joint trial. *Id.* at 539, 410 A.2d at 670. The duties of an attorney owed to his client "attach at the outset of their relationship" and continue even after the formal termination of that representation to preserve the client's secrets and confidences. Thus, the court found a potential conflict of interest arising from Russell's pretrial representation of the Commandatores for a bargained plea and from Russell's ethical inability to call, without permission, the Commandatores as witnesses for Bellucci's defense. Since his "independent professional judgment" was so compromised and his loyalties so divided, there existed "the potential for Russell to be less than a vigorous partisan for Bellucci." *Id.* at 539–41, 410 A.2d at 670–71.

The second source of conflict arose from the representation of Bellucci by Russell at the same trial in which Russell's law partner represented co-defendant Johnson. Noting that concepts of professional responsibility forbid an attorney from accepting employment from which his partner or associate was obligated to decline or withdraw, the court "conclud[ed] that a partnership must be considered

as a single attorney in determining whether a defendant has received the effective assistance of counsel." Thus, there existed a potential conflict of interest stemming from the representation of Bellucci and Johnson by a "single" attorney. *Id.* at 543, 410 A.2d at 672.

Adhering to the principle enunciated in *Land*, the court held that "once a potential conflict exists, prejudice will be *presumed* in the absence of waiver, even if associated attorneys are involved instead of the same attorney." The court found such a presumption "necessary to protect adequately the . . . right to effective assistance of counsel." *Id.*

The court observed that constitutional rights may be surrendered if an intelligent, knowing waiver of the right to assistance of counsel is secured by following the procedure outlined in *Land*. The failure to follow these procedures results in "an absolute bar to multiple representation." Because Bellucci was not advised as to the possible consequences of the problems inherent in joint representation, the court held he had been denied the effective assistance of counsel and a new trial was thus warranted. *Id.* at 545, 410 A.2d at 673.

Concurring in the result, Justice Handler was "troubled" by the majority's resort to "a *per se* categorization of multiple representation as constituting ineffective assistance of counsel" unless a waiver is secured. *Id.* at 546, 410 A.2d at 674 (Handler, J., concurring). Rather than such an absolute rule, the Justice preferred a conditional rule, whereby a strong likelihood of actual prejudice to the defendant shown by a potential conflict of interest gives rise to a presumption that both an actual conflict of interest and actual prejudice will arise. Such prejudice need not be specifically proved and may be rebutted. Justice Handler believed that a conditional rule would avoid the rigidity of an absolute rule, would safeguard the constitutional right to effective assistance of counsel, and would not serve to reverse a conviction "fairly founded" and "not truly tainted" by multiple representation. *Id.* at 546–47, 410 A.2d at 674 (Handler, J., concurring).

The application of the proposed conditional rule to the facts would not alter the outcome of the case. Although the presence of a potential conflict of interest created a presumption of an actual conflict of interest and actual prejudice, the state failed to rebut the presumption. Accordingly, Bellucci would still have been denied his constitutional right to effective assistance of counsel and a new trial would be required.

CRIMINAL PROCEDURE—SEARCH AND SEIZURE—DRIVER'S INABILITY TO PRODUCE AUTOMOBILE REGISTRATION DOES NOT JUSTIFY WARRANTLESS SEARCH OF TRUNK OF VEHICLE TO LOCATE IT—*State v. Hayburn*, 171 N.J. Super. 390, 409 A.2d 802 (App. Div. 1979).

While operating a vehicle bearing out-of-state license plates on April 16, 1976, Joseph Hayburn was stopped by a New Jersey State trooper for travelling "63 M.P.H. in a 55 M.P.H. zone." Defendant possessed a valid driver's license, but failed to produce the vehicle's registration certificate. When the trooper suggested that the registration might be found in the trunk, Hayburn, knowing that "[t]he trunk contained a large quantity of marijuana in black plastic bags," stated that "he did not think so." However, at the trooper's insistence, Hayburn opened the trunk, whereupon the marijuana was discovered, resulting in defendant's arrest. 171 N.J. Super. at 392, 409 A.2d at 803.

The trial court found that the State failed to prove that the defendant had consented to a warrantless search of the vehicle's trunk. Because there was no reason to believe that the vehicle was stolen or that it contained contraband, no probable cause existed to support the warrantless search. *Id.* at 392–93, 409 A.2d at 803. The sole issue presented on appeal was the validity of a warrantless search of an automobile's trunk when the auto was stopped for speeding. The Superior Court of New Jersey, Appellate Division, concluded that given the reason for the stop and the lack of probable cause, the defendant "could not be compelled to submit to a search of the trunk of the car [for its registration] against his will." Such traffic violations by themselves are incapable of supporting a search of all parts of a vehicle. *Id.* at 393, 409 A.2d at 804.

The court reviewed and distinguished cases containing dicta to the effect that an automobile may be searched for evidence of ownership when the driver is unable to offer such evidence. *Id.* at 393–97, 409 A.2d at 804–05. Because these cases either did not involve registration certificates or involved circumstances justifying the searches, the cases could not be said to stand for "the broad, bare proposition that all parts of a car can be searched for a registration certificate which a driver cannot produce after being stopped for an ordinary traffic violation." *Id.* at 394, 409 A.2d at 804. Accordingly, the court reversed the conviction and directed that the evidence obtained by the unauthorized search be suppressed. *Id.* at 397, 409 A.2d at 806.

TORTS—GOVERNMENT IMMUNITY AND LIABILITY—LIABILITY FOR NEGLIGENT DISCHARGE OF LAW ENFORCEMENT FUNCTIONS—*Suarez v. Dosky*, 171 N.J. Super. 1, 407 A.2d 1237 (App. Div. 1979).

On August 3, 1974, at approximately 10:30 P.M., the plaintiff's decedent and seven other individuals were traveling in an eastbound automobile on Interstate Route 80. When their car was approximately 500 feet from an exit ramp, it went out of control "and came to rest on the shoulder and grass berm adjacent to the . . . side." 171 N.J. Super. at 5, 407 A.2d at 1239. A short time after the car left the highway, State troopers Dosky and Weisert arrived at the scene. The officers discovered that although no one had been injured, the car was disabled. The troopers then issued a summons to the car's driver and called for a truck to remove the vehicle. As they left the scene, the officers refused "to escort the now stranded occupants" off the highway, or to radio for a taxi. Rather, the officers suggested that the eight people walk to the exit. *Id.* at 5–6, 407 A.2d at 1239.

Having no alternative, the eight people, including children ages two and three, began the walk down the shoulder of the road. Before the group reached the exit, however, one of the children wandered onto Route 80, where an unidentified vehicle struck and killed her. In an attempt to aid the child, the plaintiff's decedent rushed onto the highway where she was struck and killed by a second vehicle. *Id.* at 6, 407 A.2d at 1239.

As the result of these tragic events, the plaintiff instituted a wrongful death action against troopers Dosky and Weisert, and their employer, the State of New Jersey. A jury returned a verdict for the plaintiff and the State appealed. *Id.* at 6–7, 407 A.2d at 1239.

On appeal, the State contended that it and the troopers were absolutely immune from liability in this case by virtue of N.J. STAT. ANN. § 59:5-4 (West Cum. Supp. 1979-1980). 171 N.J. Super. at 7, 407 A.2d at 1239. This section of the New Jersey Tort Claims Act provides that: "Neither a public entity nor a public employee is liable for failure to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service." The appellate division rejected the State's proffered interpretation of section 59:5-4, after examining prior case law involving the type of malfeasence present here. The court noted that the legislature had not intended section 59:5-4 to overrule prior precedents in this area. 171 N.J. Super. at 8, 407 A.2d at 1240. Looking at the legislative intent behind section 59:5-4, the court concluded that this

statute, like the California law after which it was modeled, was intended to provide immunity to public entities for the results of decisions allocating resources to police enforcement agencies. 171 N.J. Super. at 8–10, 407 A.2d at 1240–41. Noting that such personnel decisions are political, the court held that section 59:5-4 was intended solely to remove such decisions from the scrutiny of judges and juries. *Id.*

The appellate division thus held that section 59:5-4 was inapposite to the case at bar. Holding that police officers are liable for malfeasence in discharging their duties once they have embarked upon performance, the court refused to extend the cloak of immunity to officers who fail to exercise reasonable care. This case restricts the immunity granted by section 59:5-4 to cases where police protection is insufficient, while allowing tort liability where the protection afforded is wanting of reasonable care.