Garden State CLE Presents:

N.J.S.A. 2C:40-26 Defense Update

Lesson Plan

Statute

2C:40-26. Driving while license is suspended or revoked; degree of crime; minimum sentence

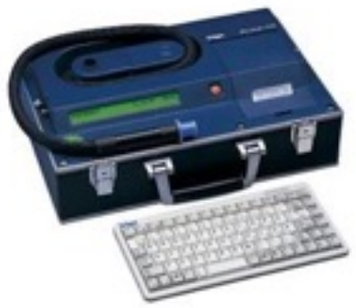
a. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of R.S. 39:3-40, if the actor's license was suspended or revoked for a first violation of R.S. 39:4-50 or section 2 of P.L.1981, c. 512 (C. 39:4-50.4a) and the actor had previously been convicted of violating R.S.39:3-40 while under suspension for that first offense. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

b. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of R.S. 39:3-40, if the actor's license was suspended or revoked for a second or subsequent violation of R.S.39:4-50 or section 2 of P.L. 1981, c. 512 (C.39:4-50.4a). A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

c. Notwithstanding the term of imprisonment provided under N.J.S.2C:43-6 and the provisions of subsection e. of N.J.S.2C: 44-1, if a person is convicted of a crime under this section the sentence imposed shall include a fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole.

a. Enacted into law on January 18, 2010:
b. Became effective August 1, 2011
c. Vast majority of prosecutions take place under 2C:40-26(b).

Jury Charge



DRIVING WHILE LICENSE IS SUSPENDED OR REVOKED FOR DWI OR REFUSAL TO SUBMIT TO A CHEMICAL BREATH TEST[1]
(N.J.S.A. 2C:40-26)

Count ____ of the indictment charges the defendant with:

(Read indictment)

The statute upon which this charge is based provides:

> It shall be a crime to operate a motor vehicle during a period of license suspension if the actor's license was:
>
> (a) suspended or revoked for a first[2] violation of [driving while intoxicated][3] or [refusal to submit to a chemical breath test][4] and the actor had previously been convicted of operating a motor vehicle during the period of license suspension while under suspension for that first offense;
>
> **OR**
>
> (b) suspended or revoked for a second[5] or subsequent violation of [driving while intoxicated] or [refusal to submit to a chemical breath test].

---

1 If the defendant is charged with other offenses, such as eluding or assault by auto or vessel, consider bifurcation if such evidence is not otherwise admissible under N.J.R.E. 404(b). See State v. Ragland, 105 N.J. 189, 193-94 (1986). (The charge of Certain Persons Previously Convicted of a Crime Not to Possess a Weapon, N.J.S.A. 2C:39-7, to be bifurcated from any substantive weapons possessions charge).

2 N.J.S.A. 2C:40-26a.

3 N.J.S.A. 39:4-50.

4 N.J.S.A. 39:4-50.4a.

5 N.J.S.A. 2C:40-26b.

In order for defendant to be convicted of this offense, the State must prove the following elements beyond a reasonable doubt:

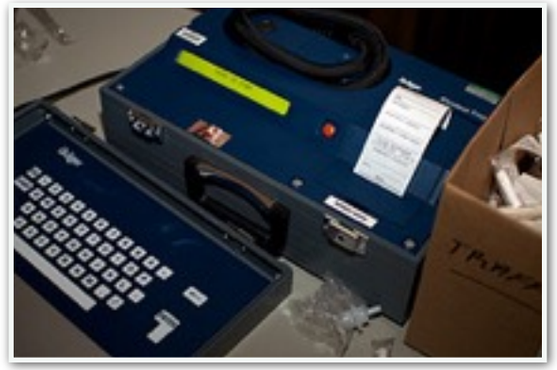
1. That the defendant knowingly operated a motor vehicle;

2. That the defendant's license was suspended or revoked for his/her

   (a) first violation of [driving while intoxicated] or [refusal to submit to a chemical breath test] and the actor had previously been convicted of operating a motor vehicle during the period of license suspension while under suspension for that first offense;
   OR
   (b) second or subsequent violation of [driving while intoxicated] or [refusal to submit to a chemical breath test]; and

3. That the defendant knew that his/her license was suspended or revoked.

The first element the State must prove beyond a reasonable doubt is that the defendant knowingly operated a motor vehicle. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature or that such circumstances exist or if he/she is aware of a high probability of their existence. Knowledge is a condition of the mind that cannot be seen and that can often be determined only from inferences from conduct, words, or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference, which may arise from the nature



of the defendant's acts and conduct, from all that he/she said and did at the particular time and place, and from all surrounding circumstances.[6]

A motor vehicle is defined as any vehicle propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks and motorized bicycles.[7]

The second element that the State must prove beyond a reasonable doubt is that the defendant's license was suspended or revoked for a:

> (a) first violation of [driving while intoxicated] or [refusal to submit to a chemical breath test] and the actor had previously been convicted of operating a motor vehicle during the period of license suspension while under suspension for that first offense;
>
> **OR**
>
> (b) second or subsequent violation of [driving while intoxicated] or [refusal to submit to a chemical breath test].

A driver's license is suspended or revoked from the day that a court imposes the suspension or revocation, until the court-imposed period of suspension ends.[8]

---

6 Though the statute does not specifically say so, knowingly is the required mental state. See N.J.S.A. 2C:2-2c(3). If attempted operation of a motor vehicle is at issue in your case, the jury must be instructed, consistent with the Model Criminal Jury Charge on Attempt, see N.J.S.A. 2C:5-1, that the mental state is purposeful.

7 N.J.S.A. 39:1-1.

8 State v. Perry, 439 N.J. Super. 514 (App. Div.), certif. denied, 222 N.J. 306 (2015).

Normally, evidence of a defendant's prior motor vehicle violations is not permitted under our rules of evidence. This is because our rules specifically exclude evidence that a defendant has committed prior motor vehicle violations when it is offered only to show that he/she has a disposition or tendency to do wrong and therefore must be guilty of the present offense. However, our rules do permit such evidence when the evidence is used for some other purpose.

In this case, the evidence has been introduced for the specific purpose of establishing an element of the present offense. You may not use this evidence to decide that defendant has a tendency to commit crimes, or that he/she is a bad person. That is, you may not decide that, just because the defendant has committed prior motor vehicle violations, he/she must be guilty of the present crime. The evidence produced by the State concerning prior motor vehicle convictions for [driving while intoxicated] or [refusal to submit to a chemical breath test] is to be considered only in determining whether the State has established its burden of proof beyond a reasonable doubt of the present offense.

The third element that the State must prove beyond a reasonable doubt is that the defendant knew that his/her license was suspended or revoked. I have already defined knowing for you.

If you find that the State has proven each of these elements beyond a reasonable doubt, then you must find the defendant guilty. If, however, the State has failed to prove any element beyond a reasonable doubt, then you must find the defendant not guilty.

[Charge if appropriate]

As I have previously mentioned, you have also heard testimony that [a] [several] motor vehicle summons[es] [was] [were] issued in this case. Whether the defendant is guilty or not guilty of those offenses will be determined by the Court after you return your verdict. In other words, it is not your job to decide whether the defendant is guilty or not guilty of these motor vehicle offenses.

Part II. "During period of suspension"

a.) Length of suspension term

Generally speaking, a license suspension continues beyond the determinate term imposed by the sentencing court and continues indefinitely until the driver has been officially restored by the Chief Commissioner of the MVC. See State v. Zalta, 217 NJ Super. 209, 213-214 (1987)

> **We are satisfied that implicit in this pervasive power over the licensing and suspending of driving privileges is a right to keep a license in suspension until it is restored after appropriate application for restoration by the licensee. The suspension of driving privileges is not necessarily punitive in purpose. It is a measure for the prospective safety and protection of the traveling public in the nature of an auxiliary remedial sanction. The determinate suspension period imposed under the Act or regulations is a mandatory consequence of a conviction, not a measure of the maximum period of time the director may keep a license in suspension on any "reasonable grounds" under his distinct statutory powers.**

The difficult nature of the director's task in maintaining the records of motor vehicles and licensees in [New Jersey] is a matter of public record. It is perfectly reasonable to require the licensee to come forward and prove that he has not suffered additional violations and to pay a fair restoration fee before the license is restored. This procedure gives the director a uniform and simplified tool to assure that the licensee has not had additional violations, and that restoration is appropriate.

b.) Operation during the determinate suspension term

State v. Perry, 439 NJ Super. 514 (2015)

We conclude that [NJSA 2C:20-46] criminalizes the operation of a motor vehicle only while the operator is serving the court-imposed term of suspension, and not thereafter. Note that Perry can also affect sentences for driving on the revoked list under NJSA39:3-40(f)(2) and (3).

Perry **Timeline examples**

1/10/17----------8/08/17----------9/15/17----------1/13/18------→

DWI Suspension	**Term ends**	**39:3-40**	**39:3-40**
7 months	**remains revoked**	**first offense**	**second offense**

1/10/17----------3/08/17----------7/15/17----------8/08/17------→

DWI Suspension	**39:3-40**	**39:3-40**	**Term ends**
7 months	**first offense**	**Second offense**	**Remains revoked**

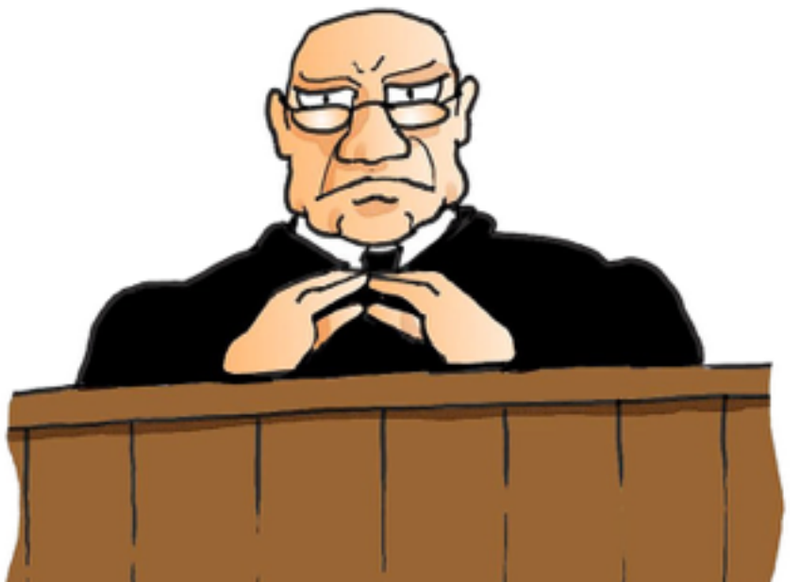
1/10/15----------3/08/15----------1/10/17----------8/08/17------→

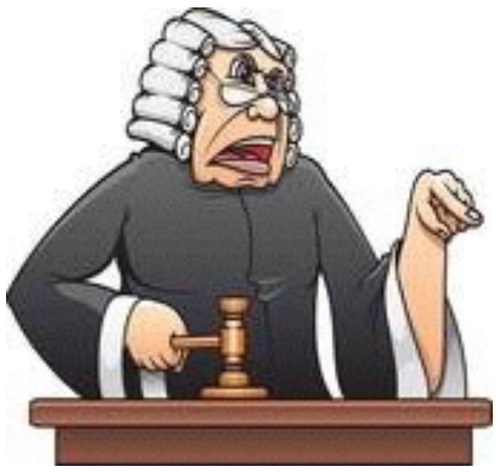
2 yr DWI Suspension	**39:3-40**	**Term ends**	**39:3-40**
2nd offense	**first offense**	**Remains revoked**	**Second offense**

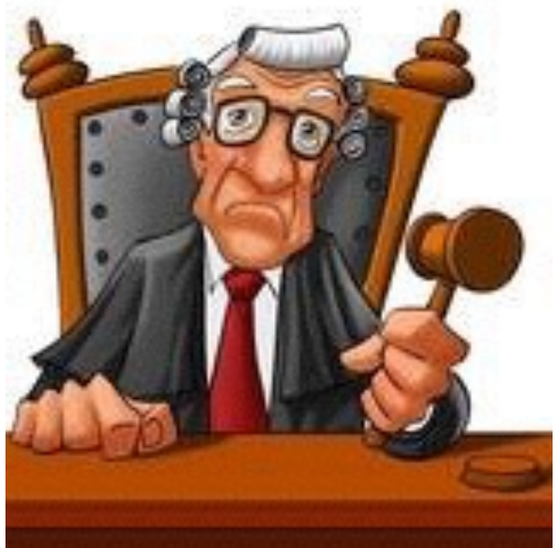
c.) Multiple suspensions terms imposed at one time:

Defendant under suspension for DWI/Refusal - Defendant is deemed to be immediately under suspension for DWI/Refusal upon imposition of sentence even though he is serving an unrelated, previously imposed suspension at that time. State v. Cuccurullo, 228 NJ Super. 517, 521 (App. Div. 1988).

> **Defendant contends that the Legislature did not intend that a person receiving a DWI driver's license suspension be subject to the enhanced penalties of the DWS statute for a period longer than the DWI period of suspension. He argues from that premise that his exposure to enhanced penalties may not begin before the DWI suspension period begins. We reject the premise. There is no evidence of such legislative intent in the language of the DWI or DWS statute, nor would such intent be consistent with the legislative policies those statutes advance.**







Part III. Defenses

a.) Collateral attacks on underlying convictions - the goal is to either eliminate a predicate offense under NJSA 2C:40-26(b) or take the driving conduct outside the range of a determinate suspension. All sentence changes should be reported to the MVC with a corrected MF-1 card submitted by the court administrator.

1.) Motion to vacate guilty plea under Rule 7:6-2(b).

> **Withdrawal of Plea. A motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice.**

Usually requires a transcript of the plea colloquy and an argument that the plea was not supported by a factual basis.

State v. Barboza, 115 N.J. 415, 420-21 (1989).
State vs. Gregory, 220 N.J. 413 (2015)
State vs. Perez, 220 N.J. 423 (2015)
State vs. Tate, 220 N.J. 393 (2015)
See also State v. Watson unpublished App. Div. 2015 WL 1809111 (No factual basis)

2.) Motion to reconsider sentence under Rule 7:9-4(a) –

> **The court, in its discretion, may reduce or change a sentence, either on its own motion or on the motion of defendant, which may be either oral or written, at any time during which the court retains jurisdiction over the matter.**

Useful when the sentence was legally incorrect or expanded beyond the minimum terms.

3.) Post-conviction relief - Rule 7:10-2 can be raised within a five-year window following conviction to attack a denial of petitioner's constitutional rights. e.g ineffective assistance counsel. For example, see State v. Jones unpublished App. Div. 2015 WL 5603612

4. Underlying conviction was among the class of cases subject to review under State v. Cassidy.

Notice to the Bar - December 6, 2017 (Judge Grant)

On November 2, 2017, Judge Lisa issued an Order (attached) requiring a stay in all open DWI cases where the Alcotest reading was taken using a machine serviced by Sergeant Dennis ("Dennis" cases). That same order provides that a stay is also to be granted, unless the defendant expressly waives his or her right to the stay, on any new case (e.g., new DWI, refusal or driving while suspended charge) where an original "Dennis" DWI conviction constitutes a predicate offense to enhance the gradation or applicable punishment in that subsequent proceeding. Finally, judges handling these cases have the discretion to stay outstanding sentence provisions pending the Supreme Court's ultimate decision in State v. Cassidy. Additionally, on November 28, Judge Lisa issued a Supplemental Order (attached) providing that the burden for determining whether or not the defendant provided a breath sample on an Alcotest device calibrated by Sergeant Dennis rests with the prosecutor handling the case. The prosecutor is also required to produce and provide documentary evidence of that determination to the defendant and the court. Further, in any proceeding in any court involving a prosecution for an offense in which a prior "Dennis" DWI conviction constitutes a predicate offense that can enhance the gradation or applicable punishment in that new case, or involving a sentence emanating from such a case that has been adjudicated, the burden rests with the prosecutor to determine whether or not the defendant provided a breath sample on an Alcotest device calibrated by Sergeant Dennis in that prior DWI case, and to produce documentary evidence of that determination to the defendant and the court.

Prepared by the Court

SUPREME COURT OF NEW JERSEY
M-244/245/246 September Term 2016
078390

STATE OF NEW JERSEY,

Plaintiff-Movant

v.

EILEEN CASSIDY,

Defendant-Respondent.

Order Supplementing Order Granting Stay of Proceedings in Other Courts that Raise Issues Potentially Affected by the Supreme Court's Determination in this Case

This matter being opened on the court's own initiative and being entered, after notice to all parties, as a supplement to the November 2, 2017 order of this court staying certain proceedings in other courts, for the purpose of effectively identifying cases in which breath samples were provided on an Alcotest device calibrated by New Jersey State Police coordinator Marc Dennis, to which the November 2, 2017 stay order applies,

It is on this 28th day of November, 2017, ORDERED AS FOLLOWS:

1. In any proceeding in any court involving a prosecution, conviction or sentence for a DWI offense for which the offense date was between January 1, 2008 and September 30, 2016, it shall be the affirmative obligation of the prosecutor in that

proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by coordinator Marc Dennis, and to produce documentary evidence of that determination to the defendant and the court;

2. In any proceeding in any court involving a prosecution for an offense in which a prior DWI conviction constitutes a predicate offense to enhance the gradation or applicable punishment in that subsequent prosecution for another charge, or involving a sentence emanating from such a case that has been adjudicated, it shall be the affirmative obligation of the prosecutor in that proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by coordinator Marc Dennis in that prior DWI case, and to produce documentary evidence of that determination to the defendant and the court.

IT IS FURTHER ORDERED that the Attorney General shall forthwith provide a copy of this order to all county and municipal prosecutors.

Joseph F. Lisa, P.J.A.D.
(retired and t/a on recall)

Dated: November 28, 2017

5.) Suppression of MV stop - Since a motor vehicle stop is a seizure within the meaning of the 4th Amendment (See Brendlin v. California, 551 US 249 (2007)) the objective reasonableness of motor vehicle stop can be challenged by way of a motion to suppress evidence. A few common examples are:

Unreasonable Mistake of Law - State v. Sutherland, 231 NJ 439 (2018),
License plate look-up – State v. Parks, 288 NJ Super. 407 (App. Div. 1996),
Traffic Violation Probable Cause – US v. Whren v. US, 517 US 806 (1996).
Credential Violation Reasonable suspicion – Delaware v. Prouse, 440 US 648 (1979).
Emissions Inspection – State v. Kadelak, 280 NJ Super.349 App. Div. (1995).
Community caretaking – State v. Goetaski, 209 NJ Super. 362 (App. Div. 1986)
DWI Roadblock – State v. Kirk, 202 NJ Super. 28 (App. Div. 1985)
MV accident – NJSA 39:4-129, NJSA 39:4-130, NJSA 39:3-29
Mechanically disabled vehicle – State v. Elders, 192 NJ 224 (2007).

6. Double jeopardy following a plea to NJSA 39:3-40. Same elements test under State v. Miles, 229 NJ 83 (2017). See State v. Koerner unpublished App. Div. 2018 WL 345827, (merger of 3-40 and 40-26 proper.)

7. Operation of a motor vehicle - State v. Watson unpublished App. Div. 2015 WL 1809111 (ATV and bad grand jury instructions); Operation sitting behind the wheel State v. Mersmann unpublished App. Div. 2018 WL 4531770

8. There does not appear to be any case (among dozens of appeals) where PTI has been granted over the prosecutor's objection.

b.) Effect of a successful collateral attack

1. State v. Sylvester, 437 NJ Super. 1 (2014):

> **Defendant nevertheless argues, as she did before Judge Reed, that the post-conviction relief granted by the Mendham Municipal Court vacating her February 17, 2011 DWI conviction voided that conviction *ab initio,* thus precluding the State from relying on this conviction to meet its burden of proof under *N.J.S.A.* 2C:40–26b. This argument is without merit. As our Supreme Court has made clear:**
>
> **We insist on compliance with judicial orders to promote order and respect for the judicial process. Compliance is required, under pain of penalty, unless and until an individual is excused from the order's requirements. Thus, as long as a court order exists and a defendant has knowledge of it, the defendant may be prosecuted for a violation thereof, regardless of its deficiencies.**
>
> **We must emphasize that defendant stipulated she knew her license was *suspended pursuant to a presumptively valid court order* when she drove her car on March 25, 2012. Defendant has not come forward with any explanation that would mitigate her decision to defy this order by driving her car on the day in question. This was not a case in which an unforeseen emergency compelled defendant to undertake a course of action that she would not have taken under ordinary circumstances. Absent any mitigation, her actions can be reasonably characterized as contemptuous of the court's authority. As Judge Reed correctly noted in his memorandum of opinion, "[a]llowing a defendant to evade prosecution by going back to the municipal court and having the underlying conviction vacated would frustrate the legitimacy of legislation and reliability of court orders."**

2. State v. Faison, 452 NJ Super. 490 (App. Div. 2017)

The facts here are distinguishable from Sylvester because, by the time of defendant's trial on the N.J.S.A. 2C:40–26(b) charge, he had only one prior DWI conviction. Here, defendant initially plead guilty to two DWI charges. Like Sylvester, defendant obtained PCR, vacating his DWI convictions. However, unlike Sylvester, defendant was not re-convicted of both DWI charges; the court dismissed one and he plead guilty to the other. Therefore, at the time the Law Division convicted defendant of violating N.J.S.A. 2C:40–26(b), his second DWI conviction had been vacated. Accordingly, the State could not prove an element of the crime charged—a second DWI conviction—a prerequisite to the mandatory 180–day incarceration period imposed by N.J.S.A. 2C:40–26(b) and (c).

Our holding is consistent with State v. Laurick, 120 N.J. 1, 16, 575 A.2d 1340, cert. denied, 498 U.S. 967, 111 S.Ct. 429, 112 L.Ed. 2d 413 (1990), where our Supreme Court held "a prior uncounseled DWI conviction may establish repeat-offender status for purposes of the enhanced penalty provisions of the DWI laws"; however, "a defendant may not suffer an increased period of incarceration as a result of ... an uncounseled DWI conviction." The court provided guidance for future cases, stating that unless the lack of counsel results in a "miscarriage of justice," the court should not grant relief.

Here, we conclude that convicting defendant of driving while suspended for a second or subsequent DWI conviction when he only has one prior DWI conviction would constitute a miscarriage of justice. Furthermore, sentencing defendant to the minimum imprisonment of 180 days under N.J.S.A. 2C:40–26(c) would bring about "an increased period of incarceration as a result of ... an uncounseled DWI conviction." Although counsel technically represented defendant, the representation was allegedly ineffective, and the Law Division later vacated both convictions and the municipal court then dismissed one of the two prior DWI charges.

Part IV. Technical Issues

Ex post facto **– State v. Carrigan, 428 NJ Super. 609 (App. Div. 2012)**

No in-patient program in lieu of jail – State v. French, 437 NJ Super. 333 (App. Div. 2014)

Jail term must be served in jail – State v. Harris, 439 NJ Super. 150 (App. Div. 2015)

Out of state convictions for DWI count – State v. Luzhak, 445 NJ Super. 241 (App. Div. 2016). Two out-of-state DWI convictions count – State v. Spears unpublished App Div. 2017 WL 632441

MV abstract admissible as a business record under NJRE 803(c)(6) and is not testimonial in nature - State v. Luzhak, 445 NJ Super. 241, 249 (App. Div. 2016).

No presumption against admission into PTI – State v. Rizzitello, 447 NJ Super. 301 (App. Div. 2016)

Combo package – driving during suspension for 2nd offense DWI or refusal – State v. Barber unpublished App. Div. 2017 WL 4171510; State v. Salazar App. Div. 2017 WL 1953214

A step-down constitutes a second offense for NJSA 2C:40-26(b) – State v. Fletcher unpublished App. Div. 2017 WL 3495783; State v. Lilly, unpublished App. Div. 2017 WL 770989; State v. Virginia unpublished App. Div. 2015 WL 5971382

Merger of NJSA 39:3-40 proper but mandatory penalties survive. State v. Koerner unpublished App. Div. 2018 WL 345827 (Note that this case is important when advancing a double jeopardy defense under State v. Miles, 229 NJ 83 (2017). See also 39:3-40 merger case State v. Rivera unpublished App. Div. 2017 WL 4655090

NJSA 2B:12-22. Periodic service of imprisonment: A court may order that a sentence of imprisonment be served periodically on particular days, rather than consecutively. The person imprisoned shall be given credit for each day or fraction of a day to the nearest hour actually served.

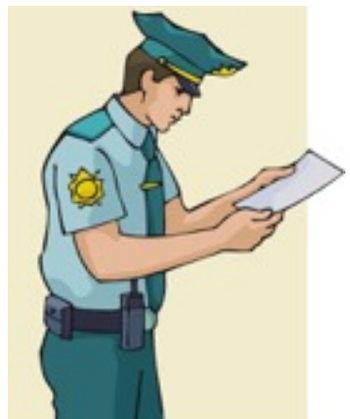
State v. Grabowski, 388 NJ Super. 431 (Law Div. 2006)
But see State v. Kotsev, 396 NJ Super. 389 (App. Div. 2007).

Jail term could be as long as 18 months with a 180- day parole disqualifier – NJSA 2C:43-6(a)(4);

License suspension under NJSA 2C:43-2(c) probably not permitted. See State v. Gross, 225 NJ Super. 28 (App. Div. 1988);
No drug court diversions due to *Harris* and *French* – State v. Murrar unpublished App. Div. 2016 WL 3582118.

No statement of reasons necessary for consecutive 3rd offense DWI and 2C:40-26 sentences - State v. Casado unpublished App. Div. 2017 WL 104594.

No harm with judge informing police that defendant should be charged with 2C:40-26 – State v. Munico unpublished App. Div. 2018 WL 1122337.



Need to sanitize motor vehicle abstracts

Part V. Ethical Issues

a. Relationship between NJSA39:3-40, NJSA 2C:40-26 and double jeopardy

RPC 3.3(a) A lawyer shall not knowingly:

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

See In re Seelig, 180 NJ 234 (2004).

State v. Kane, 2015 WL 657667 - UNPUBLISHED App. Div.

There also was nothing "illegal" about defendant pleading guilty to the *Title* 39 violation as a lesser-included offense of NJSA 2C:40-26

To be sure, *N.J.S.A.* 2C:40–26(b) was a relatively new statute as of March 2012, and it is conceivable that the court and the municipal prosecutor may not have been well-attuned to its potential application in DWI cases. Nevertheless, we reject the State's claim that defense counsel was obligated under *R.P.C.* 3.3(a)(5) or other ethical rules to spotlight the statute's potential application adverse to his client's interests. The situation here is markedly distinguishable from *In re Seelig*, 180 *N.J.* 234 (2004), in which a defense attorney affirmatively misled a municipal judge about the facts in a vehicular case, i.e., whether the victims had died. As the municipal prosecutor honestly acknowledged here, it was his responsibility to be aware of the *Title* 2C provision's potential applicability, and to refrain from participating in the entry of a guilty plea to a lesser charge that would have double jeopardy implications for a future prosecution for an indictable offense. The fact that the municipal prosecutor accepted that the original plea was his mistake and decided not to file an application or pursue means to have the plea vacated speaks volumes. There was no "fraud" or unethical behavior by the defense here. Instead, as Judge Wild aptly found, defendant's first attorney was deficient in advising her to withdraw the plea to her detriment without explaining to her the consequences of that course of action. Even giving all due respect to the court and cooperating with its request to have the case re-listed, a proper advocate for defendant would have politely resisted the efforts to have the plea withdrawn.

---

b. Attorney discipline – In re McLaughlin, 223 NJ 243 (2015) (Reprimand) (2C:40-26 and DWI)

Garden State CLE Presents:

N.J.S.A. 2C:40-26 Defense Update

Lesson Plan