New Jersey Continuing Legal Education Services presents:

Serious Motor Vehicle Accidents under New Jersey Law

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Part I
Legal Update

a. New Rules of Court

Rule 7:7-10 – Subpoenas

(a) Issuance. Except as otherwise provided in paragraph (d), upon the issuance of process on a complaint within the trial jurisdiction of the municipal court, a subpoena may be issued by a judicial officer, by an attorney in the name of the court administrator, or, in cases involving a non-indictable offense, by a law enforcement officer or other authorized person. The subpoena shall be in the form approved by the Administrative Director of the Courts. In cases involving non-indictable offenses, the law enforcement officer may issue subpoenas to testify in the form prescribed by the Administrative Director of the Courts. Courts having jurisdiction over such offenses, the Division of State Police, the Motor Vehicle Commission, and any other agency so authorized by the Administrative Director of the Courts may supply subpoena forms to law enforcement officers.

(d) Investigative Subpoenas in Operating While Under the Influence Cases. When the State demonstrates to the court through sworn testimony and/or supporting documentation that there is a reasonable basis to believe that a person has operated a motor vehicle in violation of N.J.S.A. 39:4-50 or N.J.S.A. 39:3-10.13, a vessel in violation of N.J.S.A. 12:7-46, or an aircraft in violation of N.J.S.A. 6:1-18, a municipal court judge with jurisdiction over the municipality where the alleged offense occurred may issue an investigative subpoena directing an authorized agent of a medical facility located in New Jersey to produce medical records related to the presence of alcohol, narcotics, hallucinogens, habit-producing drugs or chemical inhalants in the operator's body. If no case is pending, the subpoena may be captioned "In the Matter" under investigation.

State vs. Bodtmann, 239 N.J.Super 33(App.Div.1990)

We believe the *Dyal* court also intended that a subpoena *duces tecum* for the records of a blood alcohol test may be issued on less than probable cause since the *Dyal* court requires the investigating police to establish a "reasonable basis to believe that the operator was intoxicated." This appears to be even less than the "reasonable and well grounded basis to believe" requirement in *Hall* by the absence of the words "well grounded."

Our conclusion that less than probable cause is required for the issuance of a *Dyal* subpoena is fortified by the settled law that a driver arrested with probable cause to believe he or she is intoxicated has no constitutional right to prevent the involuntary taking of a blood sample, provided the sample is taken in a medically acceptable manner, at a hospital or other suitable health care facility

b. Cases

1. State v. Buczkowski, 395 N.J. Super. 40 (App. Div. 2007)

N.J.S.A. **39:5-3a, in terms, expressly establishes a thirty-day deadline "after the commission of [an] offense" for the issuance of process. In *State v. Fisher*, 180 *N.J.* 462, 852 *A.*2d 1074 (2004), the Supreme Court expressed the view, albeit in *dictum,* that the provisions of *N.J.S.A.* 39:5-3a require "service of process" within the thirty-day period provided. The Court held, however, that once service of process occurs within the mandated time, *i.e.,* "timely notice of the allegations charged" is received by the defendant, formal errors or omissions may be corrected within a reasonable time The Supreme Court stated that construing *N.J.S.A.* 39:5-3a to impose a deadline for service of process "ensures that a defendant receives timely notice of the allegations charged...." It protects the accused from the hazards of defending against stale allegations**

In the instant matter, the date of the charged offense was October 30, 2004. The charge arose from a motor vehicle accident in which a fatality had occurred. No traffic ticket, *i.e.,* "complaint-summons, was issued at the scene. Following investigation of the accident, the complaint-summons in the matter issued with a date of November 29, 2004, the thirtieth day following the accident. However, defendant was not notified, within the thirty-day period, either that a charge was being filed against her or what that charge entailed. Under date of December 1, the thirty-second day, a notice captioned "Transfer to the County Prosecutor," addressed to defendant in Bayonne, Hudson County, was generated in the Winslow Township Municipal Court in Camden County for mailing.

Manifestly, this mailed service of a document dated December 1, containing notice only that a charge had been filed, even if mailed the same day, was not within the thirty-day period required by *N.J.S.A.* 39:5-3a.

2. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)

c. Statutes

2B:12-17.2. Death or serious bodily injury; jurisdiction of superior and municipal courts; procedural guidelines for prosecution of certain offenses

a. In any matter concerning Title 39 of the Revised Statutes where death or serious bodily injury has occurred, regardless of whether the death or serious bodily injury is an element of the offense or violation, the Superior Court shall have exclusive jurisdiction over the offense or violation until such time that the Superior Court transfers the matter to the municipal court. For the purposes of this section, the term "serious bodily injury" shall have the meaning set forth in subsection b. of N.J.S.2C:11-1.

("Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ)

Related cases :

State v. Dively, 92 N.J. 573 (1983)
In re Seelig, 180 N.J. 234 (2004)

N.J.S.A. 2C:12-1.1

➡2C:12-1.1. Leaving the scene of a motor vehicle accident

A motor vehicle operator who knows he is involved in an accident and knowingly leaves the scene of that accident under circumstances that violate the provisions of R.S.39:4-129 shall be guilty of a crime of the third degree if the accident results in serious bodily injury to another person.

For the purposes of this section, neither knowledge of the serious bodily injury nor knowledge of the violation are elements of the offense and it shall not be a defense that the driver of the motor vehicle was unaware of the serious bodily injury or provisions of R.S.39:4-129.

N.J.S.A. 2C:12-1.2

➡2C:12-1.2. Endangering an injured victim

a. A person is guilty of endangering an injured victim if he causes bodily injury to any person or solicits, aids, encourages, or attempts or agrees to aid another, who causes bodily injury to any person, and leaves the scene of the injury knowing or reasonably believing that the injured person is physically helpless, mentally incapacitated or otherwise unable to care for himself.

b. As used in this section, the following definitions shall apply:

(1) "Physically helpless" means the condition in which a person is unconscious, unable to flee, or physically unable to summon assistance;

(2) "Mentally incapacitated" means that condition in which a person is rendered temporarily or permanently incapable of understanding or controlling one's conduct, or of appraising or controlling one's condition, which incapacity shall include but is not limited to an inability to comprehend one's own peril;

(3) "Bodily injury" shall have the meaning set forth in N.J.S.2C:11-1.

("Bodily injury" means physical pain, illness or any impairment of physical condition)

c. It is an affirmative defense to prosecution for a violation of this section that the defendant summoned medical treatment for the victim or knew that medical treatment had been summoned by another person, and protected the victim from further injury or harm until emergency assistance personnel arrived. This affirmative defense shall be proved by the defendant by a preponderance of the evidence.

Related case – Podias v. Mairs, 394 N.J. Super. 338 (App. Div. 2007)

N.J.S.A. 39:4-129 – Leaving the scene of an accident

(e) There shall be a permissive inference that the driver of any motor vehicle involved in an accident resulting in injury or death to any person or damage in the amount of $250.00 or more to any vehicle or property has knowledge that he was involved in such accident.

For purposes of this section, it shall not be a defense that the operator of the motor vehicle was unaware of the existence or extent of personal injury or property damage caused by the accident as long as the operator was aware that he was involved in an accident.

There shall be a permissive inference that the registered owner of the vehicle which was involved in an accident subject to the provisions of this section was the person involved in the accident; provided, however, if that vehicle is owned by a rental car company or is a leased vehicle, there shall be a permissive inference that the renter or authorized driver pursuant to a rental car contract or the lessee, and not the owner of the vehicle, was involved in the accident, and the requirements and penalties imposed pursuant to this section shall be applicable to that renter or authorized driver or lessee and not the owner of the vehicle.

Any person who suppresses, by way of concealment or destruction, any evidence of a violation of this section or who suppresses the identity of the violator shall be subject to a fine of not less than $250 or more than $1,000.

Part II
Prosecutor's Perspective

"Police officers are usually the first witnesses to arrive at the scene of an automobile accident. Before physical evidence at the scene is removed, distorted, or tampered with, they have the unique opportunity to observe it."

Justice Garibaldi

State v. LaBrutto, 114 N.J. 187, 191 (1989)

Assistant Prosecutor Steve Janosko, Ocean County (ret)

Deputy First Assistant Prosecutor William A. Zarling, Mercer County (ret)

Part III
Proof of Recklessness & Causation

a. Introductory Video

b. Reckless & Negligence Defined – NJSA 2c:2-2(b)

(3) *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Recklessness," "with recklessness" or equivalent terms have the same meaning.

(4) *Negligently.* A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. "Negligently" or "negligence" when used in this code, shall refer to the standard set forth in this section and not to the standards applied in civil cases.

c. Causation Defined

➡2C:2-3. Causal relationship between conduct and result; divergence between result designed, contemplated or risked and actual result

a. Conduct is the cause of a result when:

(1) It is an antecedent but for which the result in question would not have occurred; and

(2) The relationship between the conduct and result satisfies any additional causal requirements imposed by the code or by the law defining the offense.

b. When the offense requires that the defendant purposely or knowingly cause a particular result, the actual result must be within the design or contemplation, as the case may be, of the actor, or, if not, the actual result must involve the same kind of injury or harm as that designed or contemplated and not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense.

c. When the offense requires that the defendant recklessly or criminally negligently cause a particular result, the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or dependent on another's volitional act to have a just bearing on the actor's liability or on the gravity of his offense.

d. Required Culpability for Criminal Offenses

Vehicular manslaughter requires Recklessness

Manslaughter requires Enhanced Recklessness

Aggravated manslaughter requires recklessness under circumstances manifesting extreme indifference to human life.

Explanation

A person who causes the death of a human being by operating a motor vehicle in a reckless manner is guilty of the second-degree crime of death by auto. Prior to the amendments to the statute made by the Legislature in 1995, death by auto constituted a crime of the third degree. In those cases where prosecutors had evidence of additional acts of recklessness by the defendant, over and above the driving conduct, the State would attempt to prosecute the defendant for the second-degree crime of manslaughter. In those instances where the defendant's reckless driving conduct caused the death of the victim under circumstances manifesting an extreme indifference to human life, the first degree charge of aggravated manslaughter could be prosecuted.

The 1995 amendments to N.J.S.A. 2C:11-5 have all but eliminated these fine legal distinctions. Death by auto is now a second-degree crime, just as is manslaughter. However, when the death of the victim is caused by the reckless operation of a motor vehicle by the defendant, the appropriate charge is death by auto rather than manslaughter. The first-degree crime of aggravated manslaughter is still available for prosecutors in those cases involving circumstances manifesting an extreme indifference to human life.

e. Criminal Homicide Defined

NJSA 2C:11-2

Criminal Homicide defined

A person is guilty of criminal homicide if he purposely, knowingly, recklessly or, under the circumstances set forth in section 2C:11-5, causes the death of another human being.

f. Manslaughter Defined

➡2C:11-4. Manslaughter

a. Criminal homicide constitutes aggravated manslaughter when :

(1) The actor recklessly causes death under circumstances manifesting extreme indifference to human life; or

(2) The actor causes the death of another person while fleeing or attempting to elude a law enforcement officer in violation of subsection b. of N.J.S.2C:29-2. Notwithstanding the provision of any other law to the contrary, the actor shall be strictly liable for a violation of this paragraph upon proof of a violation of subsection b. of N.J.S.2C:29-2 which resulted in the death of another person. As used in this paragraph, "actor" shall not include a passenger in a motor vehicle.

b. Criminal homicide constitutes manslaughter when:

(1) It is committed recklessly;

g. Vehicular homicide Defined

➡2C:11-5. Death by vehicular homicide

a. Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly.

Proof that the defendant fell asleep while driving or was driving after having been without sleep for a period in excess of 24 consecutive hours **may give rise** to an inference that the defendant was driving recklessly.

Proof that the defendant was driving while intoxicated in violation of R.S.39:4-50 or was operating a vessel under the influence of alcohol or drugs in violation of NJSA 12:7-46 shall give rise to an inference that the defendant was driving recklessly. Nothing in this section shall be construed to in any way limit the conduct or conditions that may be found to constitute driving a vehicle or vessel recklessly.

b. Except as provided in paragraph (3) of this subsection, vehicular homicide is a crime of the second degree.

State v. Jamerson, 153 N.J. 318, 334-335 (1998)

The recklessness required for manslaughter is not the same as that required for death by auto. For reckless manslaughter, the State must prove beyond a reasonable doubt causative acts of recklessness that are different in kind from the acts involved in reckless driving that support a conviction for death by auto. Those additional acts of recklessness must also contribute to causing the death of a victim.

Although driving while intoxicated may alone satisfy the recklessness required by the death by auto statute, more is required for reckless manslaughter. When, as here, the State relies on the extent of drinking as one of "the additional act[s] of death causative recklessness," that drinking must "be more than casual drinking and more than mere intoxication, rather, it would have to be exceptional drinking to a marked extent." In other words, a defendant's pre-driving conduct, such as drinking, and conduct associated with the driving must be so extraordinary and extreme as to satisfy the reckless manslaughter standard. That standard is "quantitatively greater than the recklessness contemplated in a death-by-auto charge and qualitatively less than the recklessness required to support an aggravated manslaughter case." That is so because "[t]he practice in our State implicitly recognizes that only a gross deviation from reasonable care amounts to recklessness" required in a reckless manslaughter case.

h. Aggravated Assault and Assault by Auto - Defined

NJSA 2C:12-1(b)(1)

b. Aggravated assault. A person is guilty of aggravated assault if he:

(1) Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury;

NJSA 2C:12-1(c) Assault by Auto

c. (1) A person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto or vessel is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results.

Part IV
Blood and Urine Evidence

a. Extraction of Blood Sample - Medically Acceptable Manner

Schmerber vs. California, 384 U.S. 757(1966)

Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'Breathalyzer' test petitioner refused. We need not decide whether such wishes would have to be respected.

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment-for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

b. Use of Force

State vs. Ravotto, 169 N.J. 227
Graham vs. Connor, 490 U.S. 386(1989)

With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." More specifically, *Graham* instructs courts to employ a balancing test to determine whether the use of force in a given case is reasonable. The Supreme Court explained that the proper application [of the balancing test] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

In applying those tenets, we conclude that the force used by the police to extract defendant's blood was unreasonable under the totality of the circumstances. Defendant was terrified of needles and voiced his strong objection to the procedures used on him. He shouted and flailed as the nurse drew his blood. Several persons, including the police, and mechanical restraints were needed to hold defendant down. Defendant's fear is relevant to our analysis. A suspect's reaction to law enforcement officials is part of the fact pattern considered by a reviewing court when it determines whether police behavior was objectively reasonable. We also consider the offense that was under investigation as part of the totality of the circumstances. Although the Court does not diminish defendant's suspected offense or in any way condone driving while intoxicated, we note that the charge against defendant is quasi-criminal rather than criminal in nature. Moreover, defendant had been in a one-car accident and was not under suspicion for causing the death of or injury to any other person.

State vs. Ravotto, 169 N.J. 227
Graham vs. Connor, 490 U.S. 386(1989)

Nor do we suggest that the right to be free of unreasonable searches turns solely on whether a defendant objects to police conduct or resists an otherwise legitimate law enforcement action. To the contrary, the same or even greater level of force than was used here could be reasonable in a different setting. We emphasize that the reasonableness inquiry we employ is fact sensitive and offers no sure outcomes in future cases. As this case demonstrates, the quantum of force used by the police, although significant to the analysis, is not the sole factor to be considered.

Refusal to Provide Sample/Adverse Inferences/Fear of Needles

State vs. Cryan, 363 N.J. Super 442 (App.Div.2003)

There is also strong support in the record for the Law Division's finding that defendant's refusal to consent to the taking of his blood for BAC analysis was an intentional and calculated act designed to prevent law enforcement authorities from obtaining conclusive evidence of his intoxication. His proffered explanation for his refusal, his alleged fear of needles, is patently specious in light of the medical treatment he received without objection at the emergency room. In this context, defendant's refusal to consent to the blood test was properly considered by the trial court as evidence of a consciousness of guilt. That is, that defendant believed himself to be intoxicated and that an analysis of his blood would have confirmed this.

c. Prosecutions based upon Urine Sample

1. State v. Malik, 221 N.J. Super. 114, 118-122(App. Div. 1987)

Initially, we are entirely satisfied that there existed sufficient exigent circumstances warranting the police demand for a urine specimen. Searches conducted under exigent circumstances have long been considered constitutionally permissible notwithstanding the absence of a warrant.. This exception is applicable when the search is supported by probable cause and is necessary to prevent disappearance of the suspect or destruction or secretion of evidence and the circumstances are such, as a practical matter, to prevent expenditure of the time necessarily consumed in obtaining a warrant

In that context, we are fully convinced that the arresting officer "might reasonably have believed he was confronted with an emergency, in which the delay necessary to obtain a warrant, threatened 'the destruction of evidence.' In our view, it was reasonable for the police officer to assume that the presence of drugs in urine gradually diminishes with the passage of time. The evidence is thus evanescent and may disappear unless prompt investigative action is taken. Given these facts, we conclude that the attempt to secure evidence of controlled dangerous substances was entirely reasonable and an appropriate consequence of the circumstances surrounding defendant's arrest.

We are also convinced that the seizure was reasonably incidental to a valid arrest. Our courts have long recognized that when an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove weapons and evidence that might otherwise be hidden or concealed. If the arrest is lawful, the search and seizure are not invalidated solely because the officers had adequate time to procure a warrant. Of course, the right to arrest must pre-exist the search. So, too, the validity of the search depends upon the lawfulness of the arrest which, in turn, hinges upon whether the facts and circumstances within the knowledge of the officers and of which they have trustworthy information are sufficient to warrant a prudent person in believing that the arrestee had or was committing an offense. It is also plain that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention "[O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest ... and the taking of the property for use as evidence...."

2. Jiosi v. Township of Nutley, 332 N.J. Super. 169 (App. Div. 2000)

Use of Force

We believe, however, that an additional fact question was raised as to whether the urine was obtained in a medically acceptable manner. In our view it is not enough to demonstrate that the procedure can be accomplished without harm to the "patient." Under the present circumstances where the sample is being taken, not for an accepted medical purpose but to further a criminal prosecution, constitutional rights of privacy are implicated "[b]ecause it is clear that the collection and testing of urine intrudes upon the expectations of privacy that society has long recognized as reasonable ... these intrusions must be deemed searches under the Fourth Amendment. In this context the question of whether the procedure was done in a "medically accepted manner" entails more than the mechanics of the procedure. It must also encompass the question of whether the procedure was necessary for its intended purpose. The record before the motion judge was not fully developed in this regard, but on the proofs provided a jury could find that the period of time plaintiff was given to voluntarily urinate was insufficient to justify involuntary catheterization. The time lapse between plaintiff's last glass of water and the involuntary catheterization may have been as little as sixteen minutes. ***137* Overall, the time between when plaintiff began taking water and the catheterization was only around forty-six minutes. What problems might have arisen by allowing plaintiff more time to voluntarily urinate were not explored at the summary judgment hearing.

d. Narcotic, Hallucinogen, Habit Producting Drug or Chemical Inhalant - Lay Opinion, Expert Opinion and & Drug Recognition

By the same token, the driving while intoxicated statute "does not require that the particular narcotic, hallucinogen or habit-producing drug be identified." The statute also does not define the quantum of narcotics, hallucinogens or habit-producing drugs required in order to violate its prohibition. Instead, as with alcohol intoxication, the issue is simple: was the defendant "under the influence" of a narcotic, hallucinogen or habit-producing drug while he operated a motor vehicle.

We have described generally the term "under the influence" as "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit producing drugs." We also have explained that the term "under the influence" means "a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway. In the specific context of narcotic, hallucinogenic or habit-producing drug intoxication, we have held that a driver is "under the influence of a narcotic drug ... if the drug produced a narcotic effect 'so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.' "

Part V - Specialized Lay Witness

a. Point of Impact

114 N.J. 187, 553 A.2d 335, 81 A.L.R.4th 853

Supreme Court of New Jersey.
STATE of New Jersey, Plaintiff-Appellant and Cross-Respondent,
v.
Jack LABRUTTO, Defendant-Respondent and Cross-Appellant.

Argued Oct. 25, 1988.
Decided Feb. 16, 1989.

SYNOPSIS

Defendant was convicted of violation of death-by-automobile statute by the Superior Court, Law Division, and defendant appealed. The Superior Court, Appellate Division, reversed. On petition for certification, the Supreme Court, Garibaldi, J., held that: (1) investigating state trooper, not qualified as expert, was properly permitted to testify regarding vehicles' point of impact based on his own observations; (2) trial court adequately charged jury; and (3) expert was properly permitted to testify on behalf of State in rebuttal.

Appellate Division's judgment reversed, judgment of conviction reinstated.

The opinion of the Court was delivered by

GARIBALDI, J.

Police officers are usually the first witnesses to arrive at the scene of an automobile accident. Before physical evidence at the scene is removed, distorted, or tampered with, they have the unique opportunity to observe it. The primary issue in this appeal is whether an investigating state trooper, not qualified as an expert, may testify about the vehicles' point of impact based on his own observations. We hold that the state trooper's testimony is admissible under *Evid.R.* 56(1).

Secondary issues in this appeal raised in defendant's cross-petition are whether the trial court adequately charged the jury, improperly permitted an expert to testify in rebuttal, and committed errors in denying defendant's motions for a mistrial, acquittal, and a new trial because of the above and other perceived errors.

I

In the early morning of December 1, 1984, New Jersey State Troopers Eric Mutter and Thomas Mikoljczyk were dispatched to the scene of a motor vehicle accident on the Garden State Parkway, arriving a few minutes after 4:00 o'clock. The Parkway near the accident scene consists of four straight clearly marked lanes in either direction, each with shoulders consisting of ten feet of paved macadam followed by a grassy dirt area or berm. There are no street lights in the area. On that morning the weather was clear and cold and the road was dry.

On arrival at the scene of the accident, Trooper Mutter observed two vehicles off the side of the road. The first of these, a Lincoln, was parked facing northward on the berm and dirt portion of the roadway shoulder. The second, a Chevrolet Camaro, was located further up on the embankment facing **192* southeast. Trooper Mutter first examined the Camaro, finding it abandoned and extensively damaged in the rear. He then approached the Lincoln, which was also extensively damaged in its right front. He observed a man, later identified as defendant, Jack LaBrutto, standing outside the rear of the car. Defendant had blood on his face. In the front seat of the Lincoln, Trooper Mutter observed a second man, later identified as James Calavano, who was apparently unconscious.

Trooper Mutter asked defendant what had happened. Defendant replied, "I looked up and the car was there." The trooper later testified that he detected an odor of alcohol on defendant's breath, that defendant's eyes were bloodshot and watery, and that he staggered when walking and swayed while standing. When told that the unconscious passenger would have to be taken to a hospital, defendant reportedly became extremely agitated and began yelling. The trooper then continued his investigation. Soon after, he found the driver of the Camaro, later identified as Michael R. Pignatelli, underneath the Lincoln, face down with his head near the left front wheels and his feet near the right front wheels. Mr. Pignatelli, an off-duty police officer for the Parsippany-Troy Hills Police Department, was dead.

After securing the area, Trooper Mutter placed defendant in a police car. Later, defendant was sent to an area hospital. After he had been treated for cuts on his head and other minor injuries, blood was taken from him at 5:26 a.m. Meanwhile, at ***338* the request of Trooper Mutter, a police photographer took eight photographs of the accident scene. Trooper Mutter took notes of what he observed at the accident scene and later filed a police report. He also prepared a diagram of the accident scene based on his own observations.

On December 3, 1984, defendant voluntarily gave a written statement to the State Police about the accident. According to his recounting of the events, after he and Mr. Calavano had consumed four vodka and tonics, they got into his car. He then **193* drove onto the Parkway. Later, while proceeding at approximately fifty miles per hour on the extreme right lane, he observed a car parked in the shoulder and sticking out into the right lane immediately after an underpass. Defendant stated that as he stuck his right arm out to protect Calavano, who was asleep, his car collided with the other vehicle. He denied having left the paved roadway prior to the accident.

Defendant was charged with violating the death-by-auto statute, *N.J.S.A.* 2C:11-5, by causing another's death due to his reckless driving. At trial the first witness to testify was Trooper Mutter, a seven-year veteran of the New Jersey State Police and a general-duty road trooper. His duties consisted primarily of investigating motor vehicle-related incidents on the Parkway. Prior to the time of the accident in question, he had investigated approximately 400 motor vehicle collisions. In addition, he had completed a two-week course in accident investigations at the State Police Academy.

Trooper Mutter drew a diagram of the scene of the accident in front of the jury based on his earlier diagram. He testified that he observed approximately ninety feet of tire tracks on the grassy berm area alongside the roadway leading to a point at which there were scuff marks on the grass and widespread debris. He also noticed two sets of tire marks leading away from this point, one set leading eighty-four feet to the Camaro, the other leading fifty-four feet to the Lincoln. Over the objection of defendant, Trooper Mutter stated his view that the point of impact of the two cars was at the end of the ninety-foot tire track. His opinion was based on personal observations of the tire tracks, scuff marks, debris, the position of the two vehicles, and the nature of the vehicles' damage. The trial court permitted this testimony, stating that it would allow "any opinions which are supported by lay perceptions of physical evidence at the scene."

The State also presented witnesses who demonstrated that on the night of the accident, defendant had a blood-alcohol level **194* of .120, well above the .100 level required for finding that defendant was driving while intoxicated. *See* N.J.S.A. 39:4-50(a). Dr. Charles Tindall, Jr., qualified as a forensic expert in chemistry, testified that this was a high enough blood-alcohol level to affect one's driving ability. He also testified that defendant's blood-alcohol level indicated that defendant had imbibed substantially more on the night of the fatal accident than he claimed. In addition, Dr. Kong L. Tan, a Middlesex County Medical Examiner, qualified as an expert in the field of pathology, testified that decedent's injuries, the grass stains on his clothing, and the grass found in his mouth were consistent with someone who died after being hit by a car while standing on grass. Under cross-examination Dr. Tan stated that his findings did not preclude the possibility that decedent had been struck while standing at the end of the grass.

In his defense, defendant produced Dr. Mark Marpet, who qualified as an expert in the field of forensic-engineering science. Dr. Marpet provided a reconstruction of the accident based on a site inspection six months after the crash, photographs, police reports, and defendant's version of the facts. He disputed Trooper Mutter's claim that the grass shoulders contained debris, tire tracks, and scuff marks following the collision, noting that none of this could be observed in photographs taken at the scene. Dr. Marpet also testified based on his own observations that when driving down the Parkway the accident scene appears shortly after an underpass, supporting defendant's version of the sudden appearance of decedent's car. In addition, he ***339* testified that a reflector post located off the side of the road near the accident scene, which the State claimed had been driven over by defendant, was not damaged enough for that to have occurred. Hence, Dr. Marpet concluded that the physical evidence supported defendant's version of the facts, *i.e.,* that defendant hit decedent's car only because it stuck out into the roadway, and that defendant's car did not go onto the road shoulder prior to the collision.

In response to Marpet's testimony, the State provided its own expert rebuttal witness, Investigator Rocco Mazza of the Middlesex Prosecutor's Office, who was trained in automobile-collision reconstruction. Defendant objected to permitting this testimony because although he had been advised that Mazza would be used to rebut Marpet's testimony, the State had not provided a report for Mazza or a statement of the facts and opinions on which Mazza was expected to testify, as required by *Rule* 3:13-3(a). The trial court, however, noting the limited rebuttal nature of Mazza's testimony, permitted him to testify so long as he limited his testimony to the parameters of Marpet's testimony, finding that this could not surprise defendant and would have no prejudicial effect.

Investigator Mazza criticized Dr. Marpet's testimony. He noted that it would be "impossible" to reconstruct an accident based solely on photographs and a visit to the scene six months after the accident as Marpet claimed to have done. He disputed Marpet's analysis of the damaged reflector post, stating that damage of the kind done could indeed result from being driven over rather than just being hit. He also indicated that it was not unusual for photographs not to show signs of debris and tire marks in grass. Investigator Mazza stressed that tire marks and ground scuff marks were crucial to a reconstruction, and that he never would conduct a reconstruction based solely on photographs and debris. In addition, he noted that the grass stains and tears on decedent's clothes, as well as the grass found in decedent's mouth, were consistent with the view that decedent had been dragged through the grass and cast doubt on defendant's position that decedent was hit on the road or not dragged on the grass for some distance.

Investigator Mazza said Trooper Mutter's analysis of the accident scene was fully supported by the physical evidence. In response to cross-examination he admitted that he relied on Trooper Mutter not to have lied about the tire tracks, but stated that the condition of decedent's clothing and the nature of damage to the cars supported Mutter's accident report and diagram.

At the conclusion of Investigator Mazza's testimony both sides rested. Following summation, the court charged the jury. In so doing it refused to include a number of instructions requested by defendant: (1) that an adverse inference could be drawn from the fact that Trooper Mutter's partner, Thomas Mikoljczyk, had not been called by the State to testify despite being present on the morning of the accident; (2) that the jury could consider that if decedent's conduct was the efficient producing cause of death, defendant would be entitled to a "not guilty" verdict; and (3) that intoxication alone does not necessarily constitute recklessness.

After requesting and receiving a readministering of the instructions on the "death by automobile" statute, the jury rendered a verdict finding the defendant guilty. Defendant then made a motion for a new trial, arguing, among other points, that Trooper Mutter was not a reconstruction expert although he had testified as one. In denying defendant's motion, the trial court noted that Trooper Mutter had never been held out as a qualified reconstruction expert and was limited to layman's testimony. This was reflected by the fact that he "did not testify as to velocities including speed or direction from the mechanical damage that resulted from the impact as a reconstruction expert would do."

Defendant was sentenced to two-years probation with a special condition that he serve 120 days in jail. He appealed to the Appellate Division, which reversed his conviction in an unpublished *per curiam* decision. In so ruling the court specifically noted that the charge to the jury was "adequately and fairly set forth," and that there was sufficient evidence to sustain a guilty verdict even if the jury accepted defendant's version of the accident. Nonetheless, because State Trooper Mutter was not an accident reconstruction expert, the Appellate Division concluded that the trial court had committed reversible error by permitting him to testify about his opinion of the vehicles' point of impact. The Appellate Division found that Mutter's improperly-admitted opinion "could have led the jury to a result it otherwise might not have reached." Therefore, it reversed on the basis of Mutter's testimony. It concluded that all the other issues raised by defendant were without merit.

II

[1] The admissibility of opinion evidence rests within the discretion of the trial court. Our review of this record establishes that the trial court properly admitted Trooper Mutter's non-expert point of impact opinion testimony under *Evid.R.* 56(1).

***Evid.R.* 56(1), which applies to lay witnesses, provides:**

(1) If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.

It is well-established that a lay witness may give his opinion in matters of common knowledge and observation. *See* Biunno, *Current N.J.Rules of Evidence, Comment 2 to Evid.R. 56.*

[2] The first requirement of *Evid.R.* 56(1), expressed in (1)(a), is that a lay witness must have actual knowledge, acquired through his or her senses, of the matter to which he or she testifies.. The second requirement, expressed in (1)(b), is that the opinion of the lay witness must help the trier of fact to understand the witness' testimony or determine a fact in issue. Hence, in order to admit lay opinion the trial court must determine first that the witness' opinion is "rationally based" on the witness' personal perception, and then that the opinion will be helpful to an understanding of the witness' testimony or the case in general.

Courts in New Jersey have permitted police officers to testify as lay witnesses, based on their personal observations and their long experience in areas where expert testimony might otherwise be deemed necessary. In [a prior case], against her landlord to recover for injuries sustained when she was mugged in the hallway of her apartment building, the investigating detective was allowed to testify that the apartment building was located in a high crime neighborhood. The defendant argued that the detective's testimony should have been excluded because he had not been qualified as an expert. The court allowed the testimony under *Evid.R.* 56(1), noting that the detective had investigated approximately 75-100 crimes in the neighborhood over a three-year period, including many muggings.

Likewise, in *State v. Jackson*, 124 *N.J.Super.* 1, 304 *A.*2d 565 (App.Div.) , the court held that a detective was competent as a non-expert to offer his opinion that he had observed the defendant under the influence of narcotics. The detective's background included specific schooling and training in the field of narcotics and participation in 75-100 arrests and seizures of evidence pertaining to narcotics. The court concluded that a lay witness, such as the detective in that case, "if sufficiently experienced and trained, may testify generally as to the observable reaction of drug users and of the technique of the use." a detective was permitted to offer his opinion that the voice of the defendant taken from a voice exemplar matched a voice in a taped telephone conversation even though he had not been qualified as an expert in voice identification. The detective had previously monitored numerous telephone conversations involving the defendant. Moreover, the taped conversation and the voice exemplar were both played in front of the jury.

[3] We find no reason why an investigating police officer should not be allowed to testify as a non-expert based on his own observations regarding the point of impact of two vehicles in an automobile accident case. We find no merit in the position that the police officer's opinion on the point of impact should be excluded because it invades the province of the jury, or that the officer's testimony is unnecessary because the average juror can readily determine the point of impact from the officer's description of the physical evidence. Nor do we agree that only a police officer who is qualified as an accident reconstruction expert can give his opinion of the point of impact. We acknowledge that there may be some cases in which determining the point of impact of a collision will involve such complicated technical and scientific evidence that only a qualified reconstruction expert could rationally form an opinion about the point of impact. We anticipate that such complicated cases seldom will occur, and leave it to the trial courts to determine the necessity of having expert testimony in such cases.

Our holding that a police officer who is not qualified as an accident-reconstruction expert may testify based on his own observations of the point of impact is supported by many out-of-state cases. Most hold that an experienced police officer may properly testify on his or her "skilled" or "expert" opinion of the point of impact based on personal observations of physical evidence such as skid marks and debris found at the scene of an accident. *See* Annotation, "Admissibility of opinion evidence as to the point of impact or collision in motor vehicle accident case," These cases hold that it is unnecessary for the officer to possess a formal certificate qualifying him as an accident-reconstruction expert in order to offer his "skilled" or "expert" opinion so long as he is experienced and schooled in investigating motor vehicle accidents

Several other recent out-of-state cases hold that a police officer may testify as a lay witness and need not qualify as an expert to testify about the point of impact based on his personal observations. Most of those cases, nonetheless, consider the officer's experience to determine if a proper foundation had been laid for the officer's opinion. For example, the court found that an officer who had many years of experience in investigating accidents but had not been qualified to testify as an expert was nevertheless allowed to offer his opinion as a lay witness with respect to the point of impact.. The court concluded that the officer could testify as a lay witness because his opinion was based on his own observations of physical evidence from the accident scene and because it aided the jury in gaining a clearer understanding of the facts at issue.. At the same time, the court did not believe that the officer's testimony was overly dependent on scientific, technical, or other specialized knowledge..

Trooper Mutter was not presented as a qualified accident reconstruction expert. He did, however, have training and substantial experience in accident investigation, having been involved in the investigation of over 400 motor-vehicle accidents in his seven years as a state trooper. Moreover, he based his point-of-impact opinion on personal observations at the scene of the accident.

Trooper Mutter, together with his partner, Trooper Mikoljczyk, arrived shortly after the accident. For over two hours he conducted his own investigation of the scene. He observed the weather and visibility, the location of the cars, the damage to the cars, the location of Mr. Pignatelli's body, the defendant's condition, the tire marks in the grass and their direction, the uprooted grass and location of the debris, and the distance between the scuff marks in the grass and the location of defendant's vehicle. He made notes at the site, which he later incorporated into his police report. He also made a diagram incorporating his personal observations. He ordered police photographs. These observations provided sufficient evidence on which to base an opinion about the point of impact.

All these observations were disclosed to the jury. The trooper's opinion did not rest on any unknown assumptions. He was subject to extensive cross-examination, and his testimony was challenged by defendant's expert witness, Dr. Marpet. Mutter's testimony did not remain unchallenged or accepted because he was a police officer.

Accordingly, we conclude that the trial court properly admitted Trooper Mutter's point-of-impact testimony as it met both requirements of *Evid.R.* 56(1), namely, it was rationally based on what he observed at the scene of the accident and it was helpful to the jury's full comprehension of the facts in question.