

Garden State CLE presents:

DWI Marijuana:
Prosecution & Defense



Lesson Plan

Part I – Elements of offense under NJSA 39:4-50(a)

a.) [A] person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood shall be subject:



b.) Element of “under the influence” is not defined in the statute, but rather in the case law.

The seminal cases are:

**State v. Tamburro, 68 N.J. 414 (1975),
State v. DiCarlo, 67 N.J. 321 (1975) and
State v. Bealor, 187 NJ 574 (2006).**

In general, driving while under the influence of marijuana is defined as follows:

[T]he 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. State v. Bealor, 187 NJ *supra* at 589.



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.’ ” The question then is whether the proofs adduced in this case are sufficient to establish beyond a reasonable doubt that, at the time of his arrest, defendant suffered from “a substantial deterioration or diminution of the mental faculties or physical capabilities[,]” or was in a drug-induced state that “so affect[ed his] judgment or control ... as to make it improper for him to drive on the highway[,]” or whether defendant was under the effect of a drug that “so alter[ed] his ... normal physical coordination and mental faculties as to render [defendant] a danger to himself as well as to other persons on the highway.” Bealor, 187 NJ *supra* at 589-90



Part II - Holdings of the Supreme Court in *Bealor*:

a.) Lay Opinion evidence not permitted

We hold that, although evidentially competent lay observations of the fact of intoxication are always admissible, lay opinion in respect of the cause of intoxication other than from alcohol consumption is not admissible because, unlike alcohol intoxication, “[n]o such general awareness exists as yet with regard to the signs and symptoms of the condition described as being ‘high’ on marihuana.” However, we further hold that competent lay observations of the fact of intoxication, coupled with additional independent proofs tending to demonstrate defendant's consumption of narcotic, hallucinogenic or habit-producing drugs as of the time of the defendant's arrest, constitute proofs sufficient to allow the fact-finder to conclude, without more, that the defendant was intoxicated beyond a reasonable doubt and, thereby, to sustain a conviction under N.J.S.A. 39:4–50.

b.) Police officer as expert - That said, expert testimony remains the preferred method of proof of marijuana intoxication. We arrive at that conclusion in the knowledge that it is not too difficult a burden for the State to offer an expert opinion as to marijuana intoxication. Prosecutors in municipal courts throughout the State routinely qualify local and state police officers to testify as experts on the subject of marijuana intoxication. Expert testimony only requires that a witness be qualified “by knowledge, skill, experience, training, or education.” In view of their training, police officers in this State are eligible to qualify as experts on marijuana intoxication under N.J.R.E. 702.

c.) Judicial fact-finding

The rule adopted by the [Appellate Division]—that the nexus between the facts of intoxication and the cause of intoxication can only be proved by expert opinion—impermissibly impinges on the traditional role of the fact-finder and is explicitly disavowed. In these circumstances, determining whether defendant was under the influence of marijuana was not “beyond the ken of the average [finder of fact.]” Thus, we adopt the rationale employed by both the municipal court and the Law Division and hold that additional expert opinion was not necessary in order to sustain defendant's conviction for “operat[ing] a motor vehicle while under the influence of ... [a] narcotic, hallucinogenic or habit-producing drug” in violation of N.J.S.A. 39:4–50.

d.) Despite the foregoing, the preferred method of presenting proof of drug intoxication is to produce testimony from a qualified expert.





Part III - Securing Forensic Evidence: Urine

a.) New Jersey law does not mandate that intoxicated drivers submit a urine sample and there is no penalty for refusing such a request from the police, except perhaps an adverse inference at trial. A statute mandating a urine sample as part of an implied consent statutory scheme would likely be ruled unconstitutional. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

b.) The analysis of a urine sample by NJSP is qualitative and may produce evidence for the presence of THC. This constitutes direct evidence that at some time in the past, the subject had consumed marijuana (perhaps lawfully). See the CUMMA, NJSA 24:6I-1 et seq.) It is not direct proof of intoxication, but merely circumstantial evidence.

c.) Urine can be obtained from a person arrested for drunk-driving in the following manners:

1.) Consent - Probable cause is not required. Consent to a search must be given knowingly and voluntarily. *State v. Johnson*, 68 NJ 349 (1975). Implicit in the process of determining voluntariness is knowledge of the right to refuse to give consent. The Attorney General has promulgated a consent form which is to be used in blood and urine cases to support the "voluntary" requirement.

Intoxication by drugs may vitiate consent, but this is a fact-sensitive issue. The case law on this issue is sparse and relates to Miranda issues. See State v. Warnbrun, 277 NJ Super. 51, 64 (App. Div. 1994): "Finally, testimony indicated that, although defendant was very intoxicated, he was capable of communicating and that he was responsive in answering questions and could answer correctly questions such as his name, age, etc. The court found that this testimony was credible and that the evidence indicated a knowing and intelligent waiver given defendant's continued discussion of the matter. This finding is supported by substantial credible evidence in the record."

2.) Search Warrant - Probable cause required. Police may apply for a search warrant telephonically or otherwise to obtain a blood sample. State v. Adkins, 221 NJ 300 (2015) (Blood). Due to the intrusive nature of gathering the evidence, and the expectation of privacy in bodily functions, a search warrant is a viable alternative in urine cases. Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).

3.) Exigent Circumstances - Probable cause required. Exigent circumstances will excuse the police from obtaining a search warrant. State v. Jones, 441 NJ Super. (App. Div. 2014). However, due to the nature of urine evidence in a marijuana case, there is never likely to be an issue related to exigency. The holding of the Appellate Division in State v. Malik, 221 NJ Super. 114 (App. Div. 1987) (search justified as incident to arrest and exigency) is most likely no good law any longer due to subsequent rulings by the United States Supreme Court. (See Birchfield, *supra*.)

4.) Resistance by the defendant to the urine test : duty to act reasonably - State v. Ravotto, 169 NJ 227, 236-37 (2001).

With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person. *Graham v. Connor*, [490 U.S. 386](#), [109 S.Ct. 1865](#), [104 L.Ed.2d 443 \(1989\)](#). “[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.

Given the nature of the medical procedure, there is probably no "reasonable" way for the police to extract a urine sample from a resisting defendant. See *Jiosi v. Township of Nutley*, 332 NJ Super. 169 (App. Div. 2000).



Part IV - Confrontation clause issues

Under the 6th Amendment, defendants have a right to confront witnesses against them, Crawford v. Washington, 541 US 36 (2004), Davis v. Washington, 547 US 813 (2006). This right extends to scientists and laboratory personnel who test substances as an aid to prosecuting the defendant. State v. Berezansky, 386 NJ Super. 84 (App. Div. 2006); State v. Renshaw, 390 NJ Super. 456 (App. Div. 2007).

New Jersey case law requires that the state be put on notice if the defendant desires to cross examine laboratory personnel. In the absence of notice, the laboratory results become admissible as a public record under NJRE 803(c)(6).

See State v. Kent, 391 NJ Super. 352, 380-81 (2007):

[W]e deem it appropriate prospectively to require, as a condition of our treatment of lab reports and blood sample certificates as “testimonial” documents, that defense counsel provide reasonable advance notice to prosecutors that they wish to cross-examine the authors of those documents at trial. In the absence of such reasonable notice, a defendant shall be deemed to have waived his or her right to confrontation.



Part V - Chain of custody

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.” [N.J.R.E. 901](#). “A party introducing tangible evidence has the burden of laying a proper foundation for its admission. This foundation should include a showing of an uninterrupted chain of custody. The determination of whether the State sufficiently established the chain of custody is within the discretion of the trial court. Generally, evidence will be admitted if the court finds “in reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when the crime was committed.” “[A] defect in the chain of custody goes to the weight, not the admissibility, of the evidence introduced.” State v. Morton, 155 NJ 383 (1998)



Part VI - Delay in producing lab reports

a.) Delays affecting speedy trial - *State v. Cahill*, 213 NJ 253 (2013).

Sixty-day target disposition goal set forth in Supreme Court Directive under Directive 1-84 (and 60-day disposition goal on all municipal court cases) may be unrealistic in the age of the Alcotest. As a result of the fact-sensitive nature of speedy-trial applications, New Jersey courts are to follow the 4-part test in *Barker v. Wingo*, 407 US 514 (1972):

Length of Delay

Reason for Delay

Assertion of Right to speedy trial

Prejudice to Defendant

b.) A *Holup* motion can be brought at any time under Rule 7:7-7(j) seeking to bar the introduction at trial of the missing or delayed discovery.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide the discovery of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.



c.) Although most motions in municipal court must be argued orally and informally, *Holup* motions must be in writing.

The motion should be filed pursuant to Rule 1:6-2.

By way of clarification of the situation where discovery has not been provided, we would also recommend that defense counsel serve a motion, on the papers, with certification similar to *R. 1:6-2*, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting time for the production of discovery and upon the municipal prosecutor's failure to do so, dismissal of the action. Such an application and the ensuing order would alert the municipal prosecutor and enforcement authorities to their discovery responsibilities and avoid the inconvenience to litigants and witnesses that occurs with such frequency when all parties appear in court for trial. Another salutary affect of such a practice is to expedite the processing of cases by assuring both sides of the certainty of the trial date and eliminating the unnecessary work, expense and delay resulting from the continuance of a case because the discovery process has not been completed. *State v. Holup*, 253 NJ Super. 320, 325 (App. Div. 1992).



d.) Sample motion will read as follows:

Notice of motion under Rule 1:6-2 and Rule 7:7-7(j).

Please take notice that on October 19, 2017, the undersigned counsel will move before this court for an order barring the introduction in evidence at trial of the results of laboratory testing of a blood sample purportedly taken from his body on the date of his arrest. This motion is authorized under Rule 7:7-7(j) and through the case law as established by State v. Holup, 253 NJ Super. 320 (App. Div. 1992).

In support of this application, Defendant will rely upon the annexed affidavit and oral argument.

Robert Ramsey, attorney



e.) The affidavit of counsel should trace the procedural history in the case.

I, Robert Ramsey, of full age, do certify the following to be true.



1. I am counsel of record in the above-captioned case now pending in the Basin Municipal Court.

2. I entered my appearance on or about January 26, 2017.

3. Consistent with Rule 7:7-7(g), upon entry of my appearance with the Court, I sent a written demand for discovery to the municipal prosecutor, demanding all discovery to which Defendant is entitled pursuant to Rule 7:7-7(b). A copy of this demand is annexed hereto as exhibit A.

4. I also demanded production of the testing-results and forensic analysis from a urine sample purportedly taken from the body of my client on the date of his arrest. Defendant is entitled to this discovery.

5. Although I have received partial discovery from the prosecutor in the form of the results of laboratory results of the urine test, I have yet to receive the charts and graphs.

6. I have made applications for the receipt of this particular piece of discovery on three separate occasions, including by writing on April 7, 2017 (annexed hereto as exhibit B) and twice on the record before this Court (on March 31, 2017 and April 28, 2017).

7. Despite these requests, the required discovery has not been provided.

8. Accordingly, by way of the attached form of order, pursuant to the Court's authority under State v. Holup, 253 NJ Super. 320, 325 (App. Div. 1992) and Rule 7:7-7(j), Defendant will seek to bar the results of the laboratory report related to his urine-tests if the results have not been provided by November 1, 2017.

Pursuant to Rule 1:4-4(b), I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Robert Ramsey



f.) Contents of *Holup* order

This matter having been opened to the Court upon the application of Robert Ramsey, Esquire, and the Court having considered the associated moving papers and good cause appearing, It is this _____ day of _____, 2017 ORDERED

if that forensic laboratory results associated with the testing of Defendant's urine have not provided to Defendant by November 1, 2017, the results of such blood tests will be barred from introduction in evidence at trial.

Judge Dredd, JMC



Part VII - Evidence at Trial

a.) Admission of the results of urine analysis is admissible, subject to proper authentication as either a business record (NJRE 803(c)(6) or a public record (NJRE 803c)(8). A hearing under NJRE 104(a) should be held to establish the conditions of admissibility if hearsay exception are going to be used.

b.) The State's burden of proof at trial (consistent with the case law definition of under the influence) can be supported by the following circumstantial evidence:

- 1.) admissions**
- 2.) recovery of marijuana or paraphernalia from the vehicle**
- 3.) odor of marijuana on clothing or within vehicle**
- 4.) observed driving conduct**
- 5.) performance of SFT's**
- 6.) general demeanor of defendant**
- 7.) Expert opinion testimony following examination by a qualified DRE.**



c.) Other standard or affirmative defenses related to operation, necessity, jurisdiction, statute of limitations, service of process or the seizure of physical evidence in violation of the 4th Amendment can and should be raised where appropriate.

d.) It is critically important as part of discovery to demand and receive copies of the DRE's prior reports to see how accurate he has been in the past.



CHRIS CHRISTIE
Governor

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ELIE HONIG
Director

TO: All County Prosecutors

FROM: Elie Honig *EH*
Director, Division of Criminal Justice

DATE: October 30, 2015

RE: Universal "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Draw and Test Blood" and "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Obtain and Test Urine"

Effective December 1, 2015, the attached "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Draw and Test Blood" and "Consent Form for Use by Law Enforcement Officers When Requesting Consent to Obtain and Test Urine" should be used by all law enforcement officers in all of New Jersey's counties that authorize the use of the consent exception to the warrant requirement to obtain and test urine and/or blood in DWI prosecutions. These forms replace and supersede any consent form drafted by each individual county.

c: AAG Michael Williams, Counsel to the Director
AAG Philip S. Aronow, Chief, Prosecutors Supervision & Training Bureau



CONSENT FORM FOR USE BY LAW ENFORCEMENT OFFICERS WHEN REQUESTING CONSENT TO DRAW AND TEST BLOOD



I, _____, hereby voluntarily consent to allow
(Name of consenting party)

_____, a member of _____,
(Name of person drawing blood) (Name of agency)

and any other representative designated to assist, to take blood sample(s) from me, and I voluntarily consent to the testing of my blood sample(s).

I have been advised by _____ and fully understand that
(Officer and badge number)

I have the right to refuse giving my consent to the taking and testing of my blood sample(s).

I have been further advised that I may withdraw my consent at any time and for any reason up until the commencement of the taking of my blood sample(s).

I have knowingly and voluntarily given my written consent to the taking and testing of my blood sample(s).

(Signature of Consenting Party)

(Date)

(Time)

Witness: _____



CONSENT FORM FOR USE BY LAW ENFORCEMENT OFFICERS WHEN REQUESTING CONSENT TO OBTAIN AND TEST URINE



I, _____, hereby voluntarily consent to provide a
(Name of consenting party)

urine sample(s) to _____, a member of _____
(Name of person requesting urine sample), (Name of agency)

and any other representative designated to assist, and I voluntarily consent to the testing of my urine sample(s).

I have been advised by _____ and fully understand that I
(Officer and badge number)

have the right to refuse giving my consent to the providing and testing of my urine sample(s).

I have been further advised that I may withdraw my consent at any time and for any reason, up until the time that I give my urine sample(s) to _____,
(Name of person collecting sample)
or any other representative designated to assist.

I have knowingly and voluntarily given my written consent to the providing and testing of my urine sample(s).

(Signature of Consenting Party)

(Date)

(Time)

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