

# **GARDEN STATE CLE LESSON PLAN**

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## **NEW JERSEY DWI SCHOOL ZONE OFFENSES**

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**With**

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**And**

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### **Program description**

Even at 4am on Saturday morning, your client is not safe from the DWI school zone offense. Heck, there are some municipalities in New Jersey where basically the entire town is a school zone. This program will help you better serve clients charged with this offense, and also offers an in-depth analysis of the school zone language in Title 39.

## **I. Introduction**

- **John Menzel, Esq.**
- **Top 5 NJ Drunk Driving Attorneys**

## **II. DWI School Zone charges**

- **Most often used by municipal officers – not really used by NJ State Police**
- **Genesis of school zone offense comes as an extension of 1987 statute: NJSA 2C:35-7 School Zone distribution of drugs on or within 1000 feet of a school**
  - **To create a zone of safety for children**
  - **Drug business operates 24 hours a day**
  - **Safe haven within 1000 ft zone of school**
  - **“Drug Free School Zone”**
  - **Strict liability offense – police have no duty to give warnings to those within 1000 feet of a school – no *mens rea***
  - **Does not matter if you did not know you were within 1000 feet of a school**
  - **School zone signs are not accurate designations of where the boundaries of the 1000 foot zone starts and ends**
  - **Separate offense from other distribution offenses because there is an additional element of 1000 feet of a school**
  - **Required minimum sentencing for convictions under this statute – mandating state prison sentences – ½ to 1/3 the sentence before eligible for parole**
  - **Sentencing scheme mimicked that of NJSA 2C:43-6(c) The Graves Act – offenses involving firearms – mandatory jail**
- **2C:35-7 was designed to punish economic activity – takes place in high poverty areas – strong argument can be made that this statute was a war on poor people in NJ**
- **Given where school zones were in the state – largely focused on inner city as opposed to rural areas because higher concentration of schools in more urban areas**
  - **i.e. in Paterson – no area is not in school zone; same in Trenton and other urban areas**
  - **different population in more suburban areas – less concentration of schools and less school zones**
  - **attempt by legislature to more closely regulate behavior in urban areas because there is a higher potential of harm**

- **No empirical evidence that 1000 ft drug zones has improved safety for children**
- **Legislature believes school zones are a good idea**
- **Political aspects of 1000 foot school zones**
- **NJSA 39:5-50(g) DWI in a school zone or “Filomena’s Law”**
- **School zone drug distribution statute was targeted at economic activity with idea of protecting children**
- **School zone drunk driving law had to do with a tragic event that had nothing to do with children at all**
- **Preamble to DWI School Zone law**
  - **Victim was a crossing guard and was struck by drunk driver and killed**
  - **Legislative reaction to borrow heavily from 1000 foot drug laws and take philosophy and place onto drunk driving – which is not economic at all**
- **School zones in traffic laws are not new – used in speeding cases**
- **NJSA 39:1-1 Words and phrases defined. “School zone” means that portion of a highway which is either contiguous to territory occupied by a school building or is where school crossings are established in the vicinity of a school, upon which are maintained appropriate “school signs” in accordance with specifications adopted by the chief administrator and in accordance with law.**
  - **School is in session and children are present**
- **Importing a statute that is intended to address economic activity, i.e. 1000 ft drug statute, into a statute that has nothing to do with economics, i.e. DWI, does not make sense – does not promote public safety – drives traffic laws to be arbitrary**
- **Rational is to create a safe haven for children – but what about school zones that are no where near a school – is this arbitrary?**
- **Philomena’s law – creates around schools a zone that is intended 24/7 to create a safety zone to protect children b/c children would naturally congregate on school property after school hours**
- **Zone begins at outermost property of the school – not just the school building but the school property – then out 1000 feet from outermost line of property – the campus not just the building – property owned by the school board – can be athletic field, board of education – for purpose of school activities – concentric circle around property**
- ***State v. McDonald*, 211 NJ 4 (2012)**
- **Property owned or leased by the school for school purposes**

- **NJSA 2C:35-7.1 500 ft zone around public property, including parks**
- **School crossings – does not have to be within 1000 feet of school – can be anywhere – 2 different components: designated by local municipality as a school crossing; any school crossing falls within statute**
- **Strict liability offense – don’t need to “know” that you are within 1000 feet**
- **School zone and traffic law is not rationally related to the purpose for which it was intended**
- **No requirement that state prove knowledge of being in school zone**
- **State must prove that defendant knew there were children present – specific type of school zone offense**
- **If offense is occurring after hours when children are not present, an authorized plea agreement is to drop the school zone with plea of guilty to DWI**
- **Plea bargaining is not allowed if children are present or if there is an accident (regardless if children are present)**
- **NJSA 39:4-50.4(b)(3) driving through a school crossing as defined in R.S.39:1-1 knowing that juveniles are present if the municipality has not designated the school crossing as such by ordinance or resolution. A map or true copy of a map depicting the location and boundaries of the area on or within 1,000 feet of any property used for school purposes which is owned by or leased to any elementary or secondary school or school board produced pursuant to section 1 of P.L.1987, c.101 (C.2C:35-7) may be used in a prosecution under paragraph (1) of this subsection.**
  - **State would have to demonstrate knowledge that children were present**
- **NJSA 39:1-1 “School Crossing” means that portion of a highway where school children are required to cross the highway in the vicinity of a school.**
- **NJSA 39:4-50.4(b)(3) It shall not be relevant to the imposition of sentence pursuant to paragraph (1) or (2) of this subsection that the defendant was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property or while driving through a school crossing. Nor shall it be relevant to the imposition of sentence that no juveniles were present on the school**

- property or crossing zone at the time of the offense or that the school was not in session.**
- **Police do not have to catch the person in a school crossing – just have to drive through a crossing – circumstantial evidence – don't have to be in a school zone when stopped – just whether went through a school zone**
- **NJSA 39:4-50.4(b) (1) on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property;**
  - (2) driving through a school crossing as defined in R.S.39:1-1 if the municipality, by ordinance or resolution, has designated the school crossing as such;**
- **Elementary school, high school, parochial school or public school**
- **Doesn't apply to nursery schools, colleges and universities**

### **III. Process to prove the case**

- **NJSA 39:1-1 defines school crossing – state must prove whether it is pre-designated**
- **NJSA 39:4-50.4 A map or true copy of a map depicting the location and boundaries of the area on or within 1,000 feet of any property used for school purposes which is owned by or leased to any elementary or secondary school or school board produced pursuant to section 1 of P.L.1987, c.101 (C.2C:35-7) may be used in a prosecution under paragraph (1) of this subsection.**
- **State tries to introduce evidence that is self-authenticating as government document to establish school zone**
- **Since maps are prepared for purpose of prosecution – confrontation clause issue? *Crawford v. Washington* and *Davis v. Washington* apply?**
- **Should city engineer who creates the map be subject to cross examination? (*Crawford*)**
- **School zone charge provides the state with a hammer to negotiate pleas that they would not otherwise obtain – coercive effect of statute**
- **Sentencing under school zone doubles penalties – no step down, no 10 year gap between offenses – BAC does not matter**
- **3<sup>rd</sup> offender sentence is capped at 180 days jail – only part that is not doubled, as compared to DWI**

- **NJSA 39:4-50(g)(3) driving through a school crossing as defined in R.S.39:1-1 knowing that juveniles are present if the municipality has not designated the school crossing as such by ordinance or resolution, the convicted person shall: for a first offense, be fined not less than \$500 or more than \$800, be imprisoned for not more than 60 days and have his license to operate a motor vehicle suspended for a period of not less than one year or more than two years; for a second offense, be fined not less than \$1,000 or more than \$2,000, perform community service for a period of 60 days, be imprisoned for not less than 96 consecutive hours, which shall not be suspended or served on probation, nor more than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and have his license to operate a motor vehicle suspended for a period of four years; and, for a third offense, be fined \$2,000, imprisoned for 180 days in a county jail or workhouse, except that the court may lower such term for each day, not exceeding 90 days, served participating in a drug or alcohol inpatient rehabilitation program approved by the Intoxicated Driver Resource Center, and have his license to operate a motor vehicle suspended for a period of 20 years; the period of license suspension shall commence upon the completion of any prison sentence imposed upon that person.**
- **NJSA 39:4-50(a)(1)(i) “...in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of three months”**
- **Second offender sentence compared to first offender does not make sense – poorly written statute**
- **Doubling of all penalties – state must prove all elements of drunk driving and then one additional element that must be proven beyond a reasonable doubt: School zone or school crossing**
- **Normal statute of limitations is 90 days – school zone offense also**
- **If prosecutors don’t charge you but have as a threat, then can charge the client if the client does not plead guilty to DWI**
- **Look at characteristics of the case and you have those that are identified in plea bargaining guidelines – must advise client before you go to court, i.e. was there an accident, were children present**

- **Once client is charged with school zone, then you may lose your ability to negotiate – advise the client**
- **Be sure to advise the client before you go to court – client should be prepared to make a snap decision in court – so discuss possibilities in advance**
- **Map provided in discovery – it used to be that the “map was available to inspect”**
- **Know where client was and then compare to map – start measuring!**
- **If you can show prosecutor that there is sufficient evidence that client is out of school zone, then you may have the ability to get the charge thrown out**
- **School zone becomes the major issue – prosecutor can still charge client of school zone as long as 90 days have not passed and no BAC required**
- **Out of state licensees – you must find out what consequences in other state, and what is practical need for client to drive in NJ – practical difference between school zone penalty and DWI**
- ***State v. Reiner*, 180 NJ 307 (2004) – there was doubt about what constitutes a 1<sup>st</sup>, 2<sup>nd</sup>, or 3<sup>rd</sup> school zone offense**
  - **Issue: if you have a second offense DWI in a school zone, then you should get the 2<sup>nd</sup> offense school zone penalty OR are they separate offenses (must have prior school zone conviction to receive subsequent school zone penalties)**
  - **Court held that must have prior school zone offense in order to have subsequent offense penalties**
  - **To qualify as second offender, you must have prior school zone conviction 39:4-50(g) conviction – same with 3<sup>rd</sup> offender**
- ***Blockburger v. US*, 284 US 299 (1932) – whether there is merger; 4-50a is lesser offense of 4-50(g) because the elements are the same**
- ***Rule of Lenity* – In construing an ambiguous criminal statute, the court should resolve the ambiguity in favor of the defendant. *McNally v. US*, 483 US 350 (1987)**
- **If police write a DWI ticket and a school zone ticket – best practice because everyone is on notice and fair way – but is this required under *Reiner***
- ***Reiner* said that since the DWI said that defendant was in a school zone, client was on notice – fair notice**

- ***State v. Kashi*, 360 NJS 538 (App. Div. 2003) – drunk driving is all one offense, just a variety of ways to prove the charge**
- **If client is charged with 39:4-50, then cannot raise before 90 days but then after 90 days – due process argument; fundamental fairness issue; if complaint does not allege school zone then not on notice**
- **School zone is a subsection of 39:4-50 DWI**
- **Argue that sections are separate and therefore should be treated differently for charging**
- ***State v. Hessen*, 145 NJ 441 (1996) – separate offenses**
- **Inherent tension between *Kashi* holding and *Reiner* holding**
- **Filomena’s law was not limited to drunk driving – into areas that were not related to children:**
  - **Refusal to submit to a breath test – has its own school zone component but not clear whether you have to drive a vehicle in 1000 ft of school or school crossing or does the refusal have to be within the school zone**
  - ***State v. Potts*, 186 NJS 616 (Law Div. 1982) – refusal is a continuing offense; if any element occurs in a school zone**
  - **Refusal offense can follow underlying DWI**
  - **Continuing nature of DWI**
  - **39:3-40(f)(3) – driving on revoked list, school zone suspensions. “In addition to any penalty imposed under the provisions of subsections a. through e. of this section and paragraphs (1) and (2) of this subsection, a person shall have his license to operate a motor vehicle suspended for an additional period of not less than one year or more than two years, which period shall commence upon the completion of any prison sentence imposed upon that person, shall be fined \$500 and shall be imprisoned for a period of 60 to 90 days for a first offense, imprisoned for a period of 120 to 150 days for a second offense, and imprisoned for 180 days for a third or subsequent offense, for operating a motor vehicle while in violation of paragraph (2) of this subsection while:”**
  - **Penalties in addition to what you received under (f)(2) and in addition to penalties received for basic DWI**
- **NJSA 2C:40-26 Driving while license is suspended or revoked. State prison for no less than 6 months.**

- **NJSA 2C:12-1a has a Filomena's law part as well – assault by auto, depending on the level of injury in a school zone and intoxicated in school zone – can have crime of 2<sup>nd</sup> degree if in a school zone, serious bodily injury**
- ***State v. O'Driscoll*, 215 NJ 461 (2013) – under paragraph 36 does that cover 2<sup>nd</sup> degree crime? If you have something that is significant and the police should have advised, then would have taken the test**
- **NJSA 39:4-50.2 Implied consent law**

#### **IV. Defending school zone cases**

- **If you can get the DWI out, then school zone comes out**
- **If focus on school zone element, then attack resolution/ordinance that was enacted, if in school zone or crossing, whether children were present**
- ***Crawford* issues**
- **Discovery issues**
- **Bottom line is this is a DWI case with 1 additional element**
- ***State v. Chun* provides for right to confront and cross examine state's witnesses**
- **Does declarant need to testify?**

#### **V. What have we accomplished through the school zone charge?**

- **Less trials**
- **Guideline 4B (Plea bargaining) – NJ Supreme Court guidelines for Municipal Court Judges (amended September 1, 2007) provides for plea bargaining as long as there were no children present and no accident**
- **Good tool to resolve cases**
- **Is this all politics or have we accomplished anything? – probably not because too arbitrary – not an economic violation**