Garden State CLE presents:

Common Mistakes that Defense Attorneys Make in DWI Cases

Lesson Plan

I. In General

1. Lack of aggression - Take it to Trial!

a.) Except for a school-zone charge, there is never a downside to trying a first offender .08 - .09 case

b.) Except when there is a companion refusal charge, there is no downside to trying a second offense.

c.) Except when there is a companion refusal charge, there is no downside to trying a third offense.

d.) Prosecutor threaten a trial tax - When motor vehicle sentencing is confined to a range, the judge must sentence in conformity with a series of aggravating and mitigating factors:

1.) the nature and circumstances of the defendant's conduct, including whether the conduct posed a high risk of danger to the public or caused physical harm or property damage;

2.) the defendant's driving record, including the defendant's age and length of time as a licensed driver;

3.) the number, seriousness, and frequency of prior infractions;

4.) whether the defendant was infraction-free for a substantial period before the most recent violation;

5.) whether the nature and extent of the defendant's driving record indicates that there is a substantial risk that he or she will commit another violation;

6.) whether the character and attitude of the defendant indicate that he or she is likely or unlikely to commit another violation;

7.) whether the defendant's conduct was the result of circumstances unlikely to recur;

8.) whether a license suspension would cause excessive hardship to the defendant and/or dependants;

9.) the need for personal deterrence;

10.) Any other relevant factor clearly identified by the court may be considered as well.

It is not necessarily the number of factors that apply but the weight to be attributed to a factor or factors. State v. Moran, 202 NJ 311 (2010) (d/l loss); State v. Palma, 219 NJ 584 (2014) (jail term)

2. Lack of preparation

a.) Not calculating/checking work-sheet A calculations;
b.) Not matching up *Chun* documents or checking relevant expiration dates;
c.) Not reading police reports;
d.) Not viewing video evidence with client;

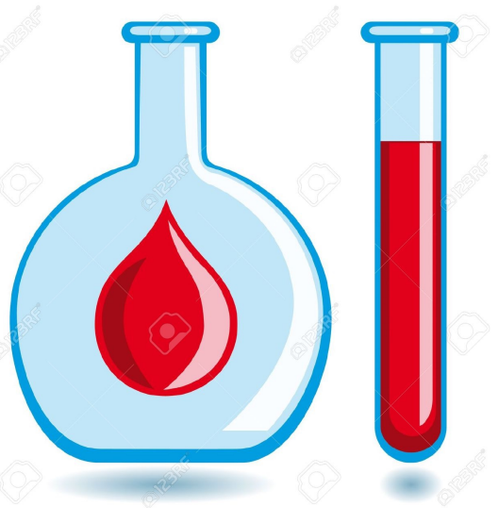
3.) Not properly preparing client for trial or plea.

a.) Interlock device and automobile ownership/re-licensing;
b.) MV Surcharges;
c.) Loss of liability insurance;
d.) Loss of ability to file civil suit (NJSA 39:6A-4.5);
e.) Possible immigration consequences;
f.) IDRC and associated fees.

II. Blood and Urine

a. Notice to prosecutor in blood, urine and drug cases

New Jersey requires advance notice to prosecutors when the appearance of a phlebotomist or lab technician is going to be required at trial. The failure to provide notice will allow the documents related to the testing of forensic evidence to be introduced under the usual hearsay exceptions. [NJSA 2A: 62A-11 and NJRE 803(c)(6) or (8).]



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

"That being stated, we 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.

By analogy, such a notice-demand requirement is contained within *N.J.S.A.* 2C:35-19(c). That statute allows lab certificates attesting to the composition of a controlled dangerous substance to be presented in court in lieu of the laboratory technician's live testimony, unless the defendant provides the State with advance notice of objection to the admission of the certificate and demands the technician's appearance at trial. *N.J.S.A.* 2C:35-19(c).

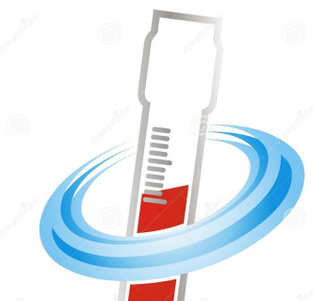
b. Blood Alcohol Level Conversions

Blood alcohol level that are tested in a hospital laboratory will be presented in the form of blood serum. This reported BAC must be converted to whole blood as follows:

Serum is derived when the tube containing whole blood is spun so that the solid and fluid portions separate. The fluid portion is then analyzed providing a "serum alcohol value." Serum contains more water than does blood, so that the resulting alcohol reading is sixteen percent higher in serum than it would be in blood. A serum alcohol value is therefore converted to blood alcohol by dividing the serum value by 1.16.

See State v. Lutz, 309 NJ Super. 317, 322 (App. Div. 1998) [footnote 2]

Also note that the testing of blood samples will be subject to error ranging from 1% to as high as 5%. The error factor should be reported on the lab report and adjusted downward.



c. Securing Blood & Urine Sampes

Blood samples may no longer be taken as a search incident to arrest. Birchfield v. North Dakota, 136 S.Ct. 2160. Accordingly, the former NJ law that held that people have no right to refuse to provide a blood sample is no longer good law, overruling State v. Woomer, 196 N.J.Super. 583 (App. Div. 1984); (no right to refuse a blood test); State v. Burns, 159 N.J.Super. 539 (App.Div.1978); State v. Macuk, 57 NJ 1 (1970);

Thus, blood may be extracted from a person arrested for DWI in the following ways:

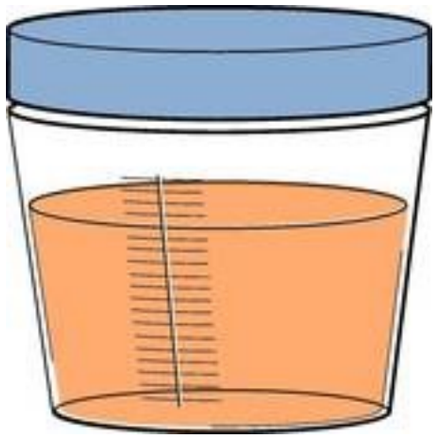
1.) Search warrant (Missouri v. McNeely, 133 S.Ct. 1552 (2013);

2.) Exigent circumstances warrant (Missouri v. McNeely, 133 S.Ct. 1552 (2013);

With or without a search warrant, the means used to extract the blood and the level of force must be reasonable. State v. Ravotto, 169 N.J. 227 (2001) (use of force).

3.) Consent - Must comply with waiver requirements in State v. Johnson, 68 NJ 349 (1975) (State has duty to demonstrate voluntary consent). [Clear and convincing evidence.]

<u>Urine samples</u> - Due to the holdings in *Birchfield* and *McNeely*, the taking of a urine sample either as a search incident to arrest or due to exigent circumstances as set forth under State v. Malik, 221 NJ Super. 114 (App. Div. 1987) is probably no longer good law. See generally State v. Verpent, 221 NJ 494 (2015).



d. Misunderstanding chain of custody

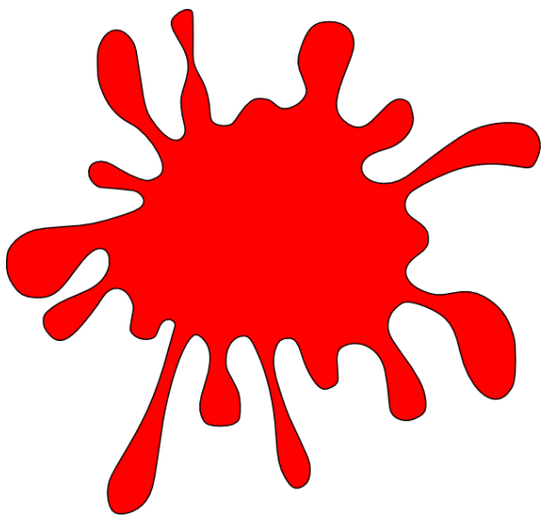
A defect in the chain of custody goers to the weight to the evidence and not to its admissibility. Moreover, the sufficiency of the chain of custidy evidence is a matter of judicial discretion that will not be disturbed on appeal unless clear a mistaken exercise thereof.

e.) Differences between "hospital" blood vs. "Police" blood.

Testimonial evidence:

Crawford v. Washington, 541 US 36 (2004).

Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). [NJRE 803(c)(6) and (8).]



III. DWI & Refusal Trials

a. Defendant's testimony during NJRE 104(a) hearing. Often the testimony of the defendant is essential during an NJRE 104(a) hearing. Defense attorneys must remember (and remind the municipal court judge) that the defendant's testimony is inadmissible as substantive evidence of guilty and that the scope of cross- examination is limited to direct testimony and credibility. (NJRE 104(d) - Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.)

b. Contesting prosecutor's errors in introducing Alcotest readings at trial.

Objections raised during an Evidence 104(a) hearing on the admissibility of Alcotest readings merely provides the prosecutor an opportunity to mop up his mess.

Better way to handle prosecutor errors during the 104(a) hearing is to do nothing, permit the evidence to be introduced and then, during closing argument, rely on the following:

See State v. Campbell, 436 N.J.Super. 264, 271-74 (App. Div. 2014)

Defendant presumes that once the trial court decides to admit Alcotest BAC results into evidence, a finding of guilt is automatic and there is nothing that the accused can do to prevent that outcome. This is not so.

A court's decision to admit proof into evidence against a party, even if it is over objection, does not preclude the party from disputing the strength of that evidence at the end of trial. *See N.J.R.E.* 104(e) (making clear that a court's ruling to admit proof into evidence does not limit the right of a party to contest the "weight or credibility" of such evidence); Before a final judgment of a defendant's guilt can be entered, the evidence must have shown beyond a reasonable doubt that he or she is guilty.

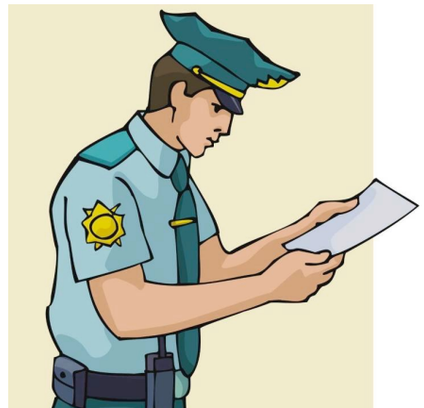
Thus, although Alcotest BAC results are admissible into evidence upon a proffer by the State satisfying the *Chun* conditions to a clear-and-convincing degree, the State's ultimate burden of proof at the end of trial is more rigorous.

After hearing all of the testimony and considering all of the admitted exhibits, the judge ultimately must be persuaded that the elements of the offense, including the defendant's offending BAC level, have been proven beyond a reasonable doubt.

In this hypothetical situation, it is conceivable that the trial judge might conclude, upon further reflection in light of the evidence as a whole, that the defendant's .08 percent BAC level was not sufficiently proven by the State beyond a reasonable doubt. The judge's earlier decision to admit the BAC proof—a ruling that is interlocutory in nature and surely can be reconsidered—does not prevent the court from doubting the strength of that admitted evidence at the end of the case. In fact, the court can even reconsider its previous decision to admit the evidence, if subsequent developments support such reconsideration.

To be sure, we are mindful that DWI defendants commonly do not "hang back" and save until the defense case at trial their competing witnesses and arguments challenging the prosecution's BAC results. Such a strategy may pose risk, perhaps depriving the defendant of a realistic chance to have the case dismissed at the suppression stage. Even so, regardless of the trial strategies that may bear on the actual flow of evidence, our conceptual point is simple and unassailable: the court's *threshold* decision to admit Alcotest results by clear-and-convincing evidence does not always dictate how the court *ultimately* will regard that same proof at the end of trial, when a more rigorous standard of persuasion applies.

The admissibility of Alcotest results depends upon the introduction into evidence during the prosecution's case of all the required core-foundational documents. Even one missing document is sufficient to bar the admissibility of Alcotest results. State v. Kuropchak, 221 N.J. 368 (2015).



C. Objecting to missing evidence during trial - Typically, in the absence of demonstrable prejudice to the defendant, judges will permit prosecutors to cure discovery defects during trial. State v. Wolfe, 431 N.J.Super. 356 (App. Div. 2013).

d.) "What discovery are you missing?"

See Rule 7:7-7(g) "If any discoverable materials known to a party have not been supplied, the party obligated with providing that discovery shall also provide the opposing party with a listing of the materials that are missing and explain why they have not been supplied."

e. *Holup* orders [State v. Holup, 253 NJ Super. 320 (App. Div. 1992)] - It is usually a strategic error to ask for too much in a *Holup* order. The better course is to ask for less and get more. For example, don't seek dismissal as a sanction - just preclusion of the missing evidence (blood results, urine tests, drug tests, video).

<u>e.) Refusal offense</u> requires operation on a street, highway or quasi-public area - not pure private property. <u>State v. Garbin, 325 N.J. Super. 521, 739 A.2d 1016 (App. Div. 1999)</u>.

<u>f.) Curing</u> - An initial refusal can not be cured. State v. Bernhardt, 245 NJ Super. 210 (App. Div. 1991).

IV. Sentencing

a.) Step-downs [NJSA 39:4-50(a)(3)]

1.) Statute - A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

2.) This section also applies to refusals.

State v. Fielding, 290 NJ Super. 191 (App. Div. 1996); State v. Taylor, 440 NJ Super. 387 (App. Div. 2015).

3.) *Laurick* relief [State v. Laurick, 120 NJ 1 (1990); State v. Revie, 220 NJ 126 (2014)] eliminates the prior conviction for step-down purposes

4.) Out-of-state violations - May be attacked as not substantially similar to New Jersey law. [NJSA 39:4-50(a)(3)]

A conviction of a violation of a law of a substantially similar nature in another jurisdiction, regardless of whether that jurisdiction is a signatory to the Interstate Driver License Compact pursuant to P.L.1966, c. 73 (C.39:5D-1 et seq.), shall constitute a prior conviction under this subsection unless the defendant can demonstrate by clear and convincing evidence that the conviction in the other jurisdiction was based exclusively upon a violation of a proscribed blood alcohol concentration of less than 0.08%.

See State v. Ripley, 364 NJ Super. 343 (App. Div. 2003) (not substantially similar)

State v. Zeikel, 423 NJ Super. 34 (App. Div. 2011) (NY driving while abilities impaired substantially similar)

<u>5.) Eliminating prior offenses</u> - The best procedure is to procure a transcript use Rule 7:6-2(b) to vacate the plea based upon lack of factual basis.

Advantages:

i.) No statute of limitations for Rule 7:6-2(b)
ii.) Simplicity of filing v. PCR
iii.) No need to review Slater factors (State v. Slater, 198 NJ 145 (2009);
iv.) Transcripts will frequently reveal inadequate factual basis for the guilty plea
v.) Plea is vacated and parties retuned to *status quo ante*.

Cases supporting vacating plea for lack of factual basis:
State v. Perez, 220 NJ 423 (2015)
State v. Tate, 200 NJ 393 (2015)
State v. Gregory, 220 NJ 413 (2015)
State v. Barboza, 115 NJ 415 (1989)

b.) Merger of offenses

Generally, it is a major mistake to seek a merger of offenses following a plea or finding guilt. Merger can only occur following a conviction on the underlying offense. Although the underlying offense is dismissed, the mandatory penalties (including points) survive the merger.

State v. Baumann, 340 N.J.Super. 553, 556-57 (App.Div.2001).

State v. Wallace, 313 N.J.Super. 435, 439 (App.Div.1998),

State v. Price (unreported) 2007 WL 3287844

c.) Retro-active Credit for time served in IDRC-approved alcohol/drug rehab

State v. Fyffe, 244 NJ Super. 310 (App. Div. 1990)

[Also, consider having judge issue a bench warrant with low bail to stop time running on the 60-day target disposition goal.]

<u>d.) Weekend jail</u> - NJSA 2B:12-22 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.

Contrast State v. Grabowski, 388 NJ Super. 431 (Law Div. 2006) with State v, Kotsev, 396 NJ Super. 389 (App. Div. 2007). See also State v. Toussaint, 440 NJ Super. 526 (App. Div. 2015) ("in the county jail").

e.) Eliminating fines and other sanctions.

Motion to reconsider sentence Rule 7:9-4 (no time limit)

NJSA 2B:12-23.1

a. Notwithstanding any other provision of law to the contrary, if a municipal court finds that a person does not have the ability to pay a penalty in full on the date of the hearing or has failed to pay a previously imposed penalty, the court may order the person to perform community service in lieu of the payment of a penalty; or, order the payment of the penalty in installments for a period of time determined by the court. If a person defaults on any payment and a municipal court finds that the defendant does not have the ability to pay, the court may:

(1) reduce the penalty, suspend the penalty, or modify the installment plan;

(2) order that credit be given against the amount owed for each day of confinement, if the court finds that the person has served jail time for the default;

(3) revoke any unpaid portion of the penalty, if the court finds that the circumstances that warranted the imposition have changed or that it would be unjust to require payment;

(4) order the person to perform community service in lieu of payment of the penalty; or

(5) impose any other alternative permitted by law in lieu of payment of the penalty.

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