

Garden State CLE

NJ DWI Trial Notebook



by Robert Ramsey

Part I - Proof of facts at trial



a.) Burdens of proof and production

i.) Proof beyond a reasonable doubt

A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt.

If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.” [State v. Medina, 147 N.J. 43, 61, 685 A.2d 1242 \(1996\)](#).

ii. When burden is required DWI Trial -

Proof in a DWI must satisfy each element beyond a reasonable doubt. [State v. Grant, 196 NJ Super. 470, 477 \(App. Div. 1984\)](#); [State v. Glynn, 20 NJ 20 \(1952\)](#);

***Miranda* hearings - Also required in a *Miranda* hearing conducted as a pretrial motion under Rule 7:7-5(b) as specified under NJRE 104(c). Note that the Rule of Evidence apply in this type of pretrial hearing**

iii. Clear and convincing evidence

Clear-and-convincing evidence is “that which ‘produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,’ evidence ‘so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.’ In re Seaman, 133 NJ 67, 74 (1993).

This is the level that is required of admissibility of Alcotest readings. Romano v. Kimmelman, 96 NJ 66 , 90 (1984); State v. Campbell, 436 NJ Super. 264 (App. Div. 2014).

[This is also the stand to be applied in considering the admissibility of searches based upon consent.]

iv.) Burden of production

The burden of going forward with the evidence is on the State. See Romano v. Kimmelman, 96 NJ 66 , 90 (1984); On the defense for affirmative defenses.

NJRE 101(b) -Definitions. As used in these rules, the following terms shall have the meaning hereafter set forth unless the context otherwise indicates:

(1) "Burden of persuasion" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be.

b.) Presumptions & Inferences

i.) Refusal to submit to a breath test allows the Court to draw an inference of guilt on the related DWI charge. *State v. Tabisz*, 129 NJ Super. 80 (App. Div. 1974); *State v. Stever*, 107 NJ 543 (1987).

ii.) Refusal to perform field sobriety tests allows the Court to draw an inference of guilt on the related DWI charge. *State v. Bryant*, 328 NJ Super. 379 (App. Div. 2000).

iii.) An unreasonable refusal to cooperate in a blood test allows the Court to draw an inference of guilt on the related DWI charge. *State v. Cryan*, 363 NJ Super. 442 (App. Div. 2003).

iv.) Consumption of while operating - An open, partially-consumed container of an alcoholic beverage found in the passenger compartment of a motor vehicle may allow the judge to infer that the beverage was drunk while the vehicle was being operated if appearance or conduct of the operator of the motor vehicle or a passenger may be associated with the consumption of an alcoholic beverage. NJSA 39:4-51a(b).

Note - Conclusive presumptions are unconstitutional in a criminal (or quasi-criminal) case. See [State v. Humphreys](#), 54 N.J. 406 (1969); See NJRE 303(b). A presumption merely establishes a permissive inference that the fact-finder may draw from the evidence.

c.) Weight and sufficiency of evidence:

i.) Late submission of evidence

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).

ii.) At the close of the proofs -

Defense may question sufficiency of the evidence at any time, especially during summation, after the case is over and both sides have rested.

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.

iii. On appeal – An appeal based upon “against the weight of the evidence” is inappropriate in a bench trial. The Appellate Division will defer the Law Division judge’s findings of fact provided they are supported by substantial credible evidence in the record. See *State v. Locurto*, 157 NJ 463 (1999). By contrast, the Law Division on appeal must make *de novo* findings of fact, giving due, but not necessarily controlling regard to the opportunity of the municipal court to judge the credibility of the witnesses. *State v. Johnson*, 42 NJ 146, 157 (1964).

Part II - Trial Evidence Check-list

The following list can be used in real time during the course of trial as a method for assuring that all the required documents and proofs have been properly submitted to the Court. Objection to missing or incorrect core foundational documents should be deferred until summation. See *State v. Campbell*, 436 NJ Super. 264 (App. Div. 2014), Part I, section c. ii *supra*.

CHAIN OF CUSTODY

Received From: _____
Received By: _____
Date: _____ Time: _____ am/pm

Received From: _____
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TRITECH-FORENSICS
400-438-7864 • info@tritechforensics.com
Reorder No.: TAGCC4X8

- EVIDENCE -

Submitting Agency: _____
Case No.: _____
Item No.: _____
Date of Collection: _____
Time of Collection: _____
Collected by: _____
Badge No.: _____
Description of Enclosed Evidence: _____
Location Where Collected: _____
Type of Offense: _____
Victim's Full Name: _____
Suspect's Full Name: _____

TRITECH-FORENSICS
400-438-7864 • info@tritechforensics.com
Reorder No.: TAGEV2X8

- EVIDENCE -

Submitting Agency: _____
Case No.: _____ Item No.: _____
Date of Collection: _____ Time of Collection: _____
Collected by: _____
Badge No.: _____
Description of Enclosed Evidence: _____
Location Where Collected: _____
Type of Offense: _____
Victim's Full Name: _____
Suspect's Full Name: _____

- CHAIN OF CUSTODY -

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Reorder No.: TAGEV4X8

a.) Alcotest Core Foundational Documents

h. - Alcotest Trial Check List

Client: _____

Part I - Core Foundational Documents

[Each of these must be in evidence to support admissibility of test results - State v. Kuropchak, 221 NJ 368 (2015)]

- ___ 1. Operator's Qualification Card**
- ___ 2. Most recent calibration report from NJSP -**
 - ___ Calibration Record - Cover sheet**
 - ___ Part I Control**
 - ___ Part II Linearity**
 - ___ New Standard Solution (if relevant)**
 - ___ Trooper's Alcotest Cards**
- ___ 3. Most recent standard solution change report**
- ___ 4. Cert. of analysis used in Def's control tests**
- ___ 5. The Alcohol Influence Report**
- ___ 6. Worksheet A Tolerance Calculations**



b.) Alcotest Official Testing Procedures

Part II - Alcotest Official Testing Procedures

Client: _____

___ **7. Last solution change card valid?**

___ **8. Twenty minute observation period**

___ **Began at:** _____

___ **Ended at:** _____

___ **No Mouth alcohol detected**

___ **Swallow**

___ **Regurgitate**

___ **Gum (restart)**

___ **Tobacco (restart)**

___ **Tongue rings & other oral devices**

___ **9. Administration of test sequences**

___ **Woman over age 60**

___ **New mouthpiece for each test**

___ **Cell phone/portable electronics**

___ **Proper test instruction (language)**

___ **10. Two proper samples (1.5 litres/4.5 seconds)**

___ **11. Test Administered within a Reasonable Time**

___ **12. Copy of Result to Defendant (requested)**



Part III. Driving while intoxicated

a.) Motor Vehicle- defined

NJSA 39:1-1 “Motor vehicle” includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks and motorized bicycles.

b.) Operation of a motor vehicle - Statutory

NJSA 39:1-1_“Operator” means a person who is in actual physical control of a vehicle or street car.

NJSA 39:1-1 “Driver” means the rider or driver of a horse, bicycle or motorcycle or the driver or operator of a motor vehicle, unless otherwise specified.



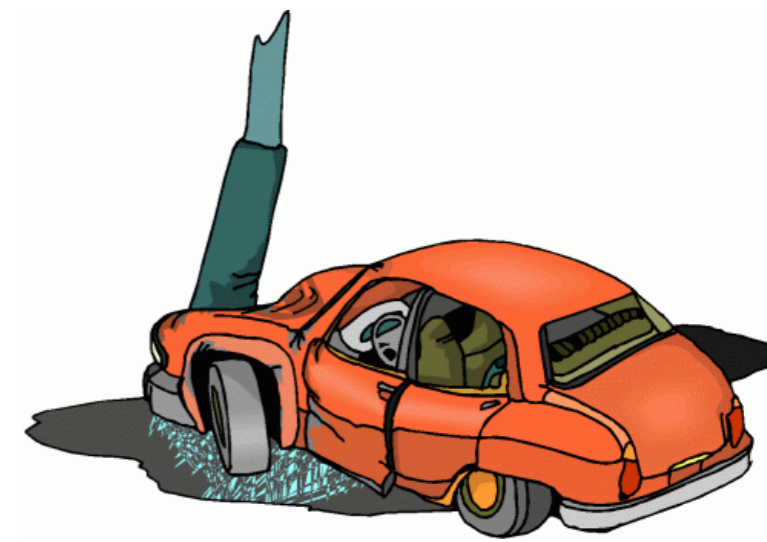
c.) Operation of a motor vehicle - Case law:

[W]hen one enters a car and puts one's self in the driver's seat, that person is in control of the car and an intention to drive the vehicle, combined with physical movements to put the car in motion, constitutes operation, at least sufficient to warrant an arrest for purposes of submission to the sobriety test required by [N.J.S.A. 39:4-50.4a](#). *State v. Mulcahy*, 107 NJ 467, 479 (1987)

Elements of operation—A person operates a motor vehicle under the influence of intoxicating liquor, within the meaning of [N.J.S.A. 39:4-50](#) when, in that condition, he or she “enters a stationary vehicle, on a public highway or in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle.” *State v. Sweeney*, 40 N.J. 359, 360, 192 A.2d 573 (1963).

Attempted operation—Defendant's attempt to start the engine of his car, which was thwarted when a police officer grabbed the keys from his hand, demonstrated an intent to operate a vehicle. The possibility of vehicle being put in motion, coupled with the defendant's intent to start the engine was sufficient evidence to constitute operation within the meaning of [N.J.S.A. 39:4-50\(a\)](#). *State v. Morris*, 262 N.J. Super. 413, 621 A.2d 74 (App. Div. 1993).

Intention to operate is a required element-*State v. Daly*, 64 NJ 122 (1973).



d.) Proving operation beyond a reasonable doubt

Proof may come in the form of:

Direct evidence

Circumstantial evidence

Admission

[Stipulation]

See State v. Prociuk, 145 NJ Super. 570 (App. Div. 1976).



e.) Under the influence drugs/alcohol

In a DWI trial, judges are required to make independent findings of fact on both driving while under the influence and the *per se* violation. State v. Sisti, 209 NJ Super.148 (App. Div. 1986)

The concept of driving while under the influence of alcohol or drugs is not defined with in the NJSA 39:4-50 statutes. Rather, the definitions come from the case law and must be proved as an element of the offense beyond a reasonable doubt.

This has long been recognized an area appropriate for lay opinion.

1.) Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.



i.) For alcohol, use the following definitions:

“Generally speaking, it means 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.” State v. Tamburro, 68 N.J. 414, 420 (1975)

“The expression, ‘under the influence of intoxicating liquor,’ covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental Or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.” State v. Rodgers, 91 N.J.L. 212, 215 (E & A 1917).

[NJSA 39:4-50] “Penalizes a person who drives ‘while under the influence of intoxicating liquor.’ Although prosecutions pursuant to its provisions are commonly and colloquially termed ‘drunken driving cases,’ it is settled that the statute does not require as a prerequisite to conviction that the accused be absolutely ‘drunk,’ in the sense of being sodden with alcohol. It is sufficient if the presumed offender has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected.” State v. Emery, 27 N.J. 348, 355 (1958).

At the one pole, since ‘intoxication’ is not the expression used, it is not requisite that the accused be absolutely ‘drunk,’ in the sense of being sodden with alcohol. [Citation omitted] At the other extreme, the described condition means something more than having partaken of a single drink even though, physiologically, the smallest amount of alcohol has some slight effect or influence on an individual. The obvious intention of the Legislature was to prescribe a general condition, short of intoxication, as a result of which every motor vehicle operator has to be said to be so affected in judgment or control as to make it improper for him to drive on the highways. State v. Johnson, 42 N.J. 146, 165 (1964)

ii.) Under the influence of drugs subsumes narcotics, hallucinogenic or habit-producing drugs and chemical inhalants. The definition of being under the influence of drugs is found in the case law:

“[A]n operator of a motor vehicle [is] under the influence of a narcotic drug within the meaning of [N.J.S.A. 39:4--50\(a\)](#) if the drug [produces] 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.’” State v. DiCarlo, 67 N.J. 321(1975).

iii.) No particular substance need be identified.

The statute does not require that the particular narcotic be identified. It is enough if, from the subject's conduct, physical and mental condition and the symptoms displayed, a qualified expert can determine that he or she is ‘under the influence’ of a narcotic. This, of course, would include a drug which produces a narcotic effect. State v. Tamburro, 68 NJ 414, 421 (1975).

iv.) Proof of intoxication by drugs – Expert testimony.

Proof of intoxication may be introduced through the testimony of a qualified expert. In marijuana cases, this can include a police officer who has received the requisite training in the police academy. Additionally, the fact-finder may also make a determination as to intoxication without regard to any expert testimony based upon the facts admitted in evidence.

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.” State v. Bealor, 187 NJ 574, 592 (2006)

Rule 702. Testimony by Experts. [S.K.E.E.T.]

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.



f.) Field Sobriety Testing

i.) Failure to voluntarily perform may be considered as consciousness of guilt: State v. Bryant, 328 NJ Super. 379, 383 (2000).

ii.) There is no right to refuse to perform field sobriety tests. State v. Macuk, 57 NJ 1 (1970);

iii.) Are considered to be non-testimonial – State v. Macuk, 57 NJ 1 (1970); State v. Green, 09 NJ Super. 347 (App. Div. 1986).

iv.) Have Long Considered as reliable evidence of intoxication –

“Our courts have long accepted the results of field sobriety tests as reliable evidence of intoxication.”

State v. Morton, 39 N.J. 512, 514-15 (1963);

State v. Higgins, 132 N.J. Super. 67, 70-71 (App. Div. 1975);

State v. Pichadou, 34 N.J. Super. 177, 180 (App. Div. 1955).

v. Admissible as lay testimony

It is entirely proper for [lay police officers] to describe the tests or maneuvers they had the defendant perform and then testify as to what his physical reaction was when he undertook to execute them. The reaction should be described in terms of what they observed when the tests were undertaken by defendant. Of course the ultimate determination of defendant's intoxication within the meaning of the statute rests with the trial court on all the evidence in the case. State v. Morton, 39 NJ 512, 514-515 (1963).

vi. HGN evidence is generally inadmissible as substantive evidence of guilt, although it may be used to establish other proofs in the case such as probable cause to arrest. State v. Doriguzzi, 334 NJ Super. 530 (App. Div. 2000)

vii.) Field sobriety testing - Issues for direct & cross-examination at trial

- a. Effects of alcohol on the human body**
- b. Relation between test and alcohol's effects**
- c. Instructions to subject**
- d. Demonstration of test & understanding**
- e. Environment, Weather and Lighting**
- f. Reporting Observed Results in Reports**
- g. Reporting Observed Results at Trial**



g.) Per se Violations – Alcotest 7110 MKIIIC Breath evidence

1.) Burden is on the State to establish blood alcohol evidence conditions of admissibility. - Romano v. Kimmelman, 96 NJ 66 (1984).

2.) Burden of Proof is by Clear and Convincing Evidence - Romano v. Kimmelman, 96 NJ 66, 90-91 (1984).

Clear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction, without hesitancy, of the precise facts in issue. In re Seaman, 133 NJ 67, 74 (1993).



3.) Evidence that the conditions of admissibility have been satisfied is accomplished during an NJRE 104(a) hearing. Rules of Evidence are relaxed except for NJRE 403 and a valid claim of privilege.

NJRE 104(a) Questions of admissibility generally. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for [Rule 403](#) or a valid claim of privilege. The judge may hear and determine such matters out of the presence or hearing of the jury.

Rule 611. Mode and Order of Interrogation and Presentation.

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

4.) To be considered as supporting admissibility, the proffered information need only appear to be relevant and trustworthy. NJRE 101(1)(2)(E).

See NJRE 101(a)(2) -

(2) Court proceedings; Relaxation. These rules of evidence shall apply in all proceedings, civil or criminal, conducted by or under the supervision of a court. Except as provided by paragraph (a) (1) of this rule, these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice:

5.) Although the burden of proof for admissibility is clear and convincing evidence, at the end of the trial, the judge must find the test results to be true and accurate beyond a reasonable doubt in order to support a guilty finding on the per se violation. State v. Campbell, 436 NJ Super. 264 (App. Div. 2014).

6.) General Conditions of Admissibility to be established by clear and convincing evidence during the NJRE 104(a) hearing, as per State v. Chun, 194 NJ 54, 134 (2008) are:

i. Device was in proper working order – Prove by Documents:

**Alcohol Influence Report
Six-month calibration documents from NJSP
Simulator Solution Certificate of Analysis**

ii. Operator was certified – Prove by Documents & Testimony:

**Operator card of officer who conducted the test
Operator card of trooper who performed six-month calibration
Operator card of officer who last changed simulator solution**



iii. Tests were administered according to official procedure – Prove by Testimony

Operators must wait twenty minutes before collecting a sample to avoid overestimated readings due to residual effects of mouth alcohol. The software is programmed to prohibit operation of the device before the passage of twenty minutes from the time entered as the time of the arrest. Moreover, the operator must observe the test subject for the required twenty-minute period of time to ensure that no alcohol has entered the person's mouth while he or she is awaiting the start of the testing sequence. In addition, if the arrestee swallows anything or regurgitates, or if the operator notices chewing gum or tobacco in the person's mouth, the operator is required to begin counting the twenty-minute period anew. State v. Chun, 194 NJ 54, 79 (2008) [See State v. Filson, 409 NJ Super. 246, 249 (Law Div. 2009) (State could not prove 20 minutes of continuous observation.); State v. Ugorvics, 410 NJ Super. 482 (App. Div. 2009) (Observation may be made by any police officer)]

Assuming that the results of the control test are within the established parameters, the instrument prompts the operator through a message on the LED screen to collect a breath sample. The operator then attaches a new, disposable mouthpiece and removes cell phones and portable electronic devices from the testing area. The operator is required to read the following instruction to the test subject: “I want you to take a deep breath and blow into the mouthpiece with one long, continuous breath. Continue to blow until I tell you to stop. Do you understand these instructions?” The arrestee then provides the first breath sample, which is measured in the IR and EC chambers. State v. Chun, 194 NJ 54, 80-81 (2008)

Test was administered within a reasonable period of time. [T]he statute prescribes an offense that is demonstrated solely by a reliable breathalyzer test administered within a reasonable period of time after the defendant is stopped for drunk driving, which test results in the proscribed blood-alcohol level. State v. Tischio, 107 NJ 504, 522 (1987).

No proof on reasonable time - The State presented no testimony on that issue and therefore failed to carry the burden of proof, making the breathalyzer test results inadmissible. State v. DiFrancisco, 232 NJ Super. 317, 321 (Law Div. 1988).



7.) Core foundational documents - All are required to be properly admitted and considered in evidence as a condition of admissibility.

The foundational documents that we conclude need to be entered into evidence therefore are few. They are: (1) the most recent calibration report prior to a defendant's test, with part I—control tests, part II—linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests. Absent a pre-trial challenge to the admissibility of the AIR based on one of the other foundational documents produced in discovery, we perceive of no reason to require that they be made a part of the record routinely. *State v. Chun*, 194 NJ 54, 145 (2008).

i. Operator's Qualification Card (additionally, operator must testify at the trial. *Chun* at 134)

[Good for the year granted + 2 calendar years]; (see NJAC 13:51-1.8(d))

ii. Most recent calibration report from NJSP - (*Chun* at 145);

iii. Most recent standard solution change report prior to defendant's test (*Chun* at 145) (Note – this document may sometimes be included as part of #2 above);

iv. Certificate of analysis used in defendant's control tests - (*Chun* 145);

v. The Alcohol Influence Report; (*Chun* at 134)

vi. Worksheet A Tolerance Calculations (*Chun* 150-151).

Note - Any attempt to introduce other foundational documents during the evidence Rule 104(a) hearing should be subject to objection as irrelevant and a waste of time under NJRE 403.

8.) Any missing, incomplete, or inaccurate core foundational documents render the Alcotest results inadmissible. State v. Kuropchak, 221 NJ 368, 385 (2015).

9.) Responsibility for tracking discovery -

"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."

10.) Defendant may testify during the NJRE 104(a) hearing.

His testimony is not admissible substantively and the scope of cross-examination is limited to scope of direct and credibility issues. Testimony may be used for impeachment purposes if defendant testifies during the defense case, but the evidence is never admissible to establish guilt. Harris v. New York, 91 S. Ct. 643 (1971). See State v. Petrovich, 125 NJ Super. 147 (Law Div. 1973)

NJRE (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.

h.) Per se violations - Blood evidence

i.) Samples may be obtained by:

Voluntary consent. See State v. Johnson, State v. Johnson, 68 NJ 349 (1975) (State has duty to demonstrate voluntary consent and know of right to refuse. Proof by clear and convincing evidence required.)

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

Exigent circumstances - State v. Jones, 437 N.J.Super. 68 (App. Div. 2014).

ii.) Required Notice to prosecutor

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



iii.) Converting serum to BAC

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]

[Note - As part of a published Appellate Division decision, this calculation is subject to judicial notice per NJRE 201]

iv.) Chain of custody

A defect in the chain of custody goes to the weight to the evidence and not to its admissibility. Moreover, the sufficiency of the chain of custody evidence is a matter of judicial discretion that will not be disturbed on appeal unless clear a mistaken exercise thereof. *State v. Morton*, 155 N.J. 383 (1998).

Rule 901. Requirement of Authentication or Identification.

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.

v. Entitlement to charts and graphs of testing process. State v. Weller, 225 NJ Super. 274 (Law Div. 1986)

vi.) Entitlement to appearance of technicians and phlebotomists at trial. State v. Berezansky, 386 NJ Super. 84 (App. Div. 2006); State v. Renshaw, 390 NJ Super 456 (App. Div. 2007).

vii.) Laboratory technician must testify, not a surrogate witness. State v. Rehmann, 419 NJ Super. 451 (App. Div. 2011).



Part II. Refusal to submit to breath test - NJSA

39:4-50.4a

a.) Four Elements of offense

[State v. Marquez, 202 NJ 485, 503 (2010)]

1. Operation - the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs;

a.) Operation under NJSA 39:4-50.4a - Operation of a motor vehicle must occur on the public highways or quasi-public areas of this State.

b.) Under the implied consent statute, NJSA 39:4-50.2, operation must occur on a public road, street or highway or quasi-public area.

[See State v. Garbin, 325 NJ Super. 521 (App. Div. 1999); State v. Bertrand, 408 NJ Super. 584, 589 (App. Div. 2009) [Shared use of the driving area implies quasi-public nature.]

(2) Defendant was arrested for driving while intoxicated;

(3) The officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and

(4) Defendant thereafter refused to submit to the test.

b.) Burden of proof is beyond a reasonable doubt.

[State v. Cummings, 184 NJ 475, 500 (2010)]

[Note- the legislature has not updated this burden in the statute NJSA 39:4-50.4a(a) were it indicates that the burden of proof is by a preponderance of the evidence.]

c.) No curing of a refusal permitted.

[State v. Bernhardt 245 NJ Super. 210 (App. Div. 1991).]



d.) Affirmative defenses

1.) Medical incapacity - At the outset, it is telling that defendant never has asserted that he was somehow unable to provide the volume and length of breath required for a valid reading; he claims no limitation, whether by physical condition, disease, or some other verifiable cause, that somehow prevented him from providing the breath samples as required. State v. Schmidt, 206 NJ 71, 85 (2011).

ii.) Grudging consent - State v. Duffy, 348 NJ Super. 609 (App. Div. 2002).

iii.) Errors in Reading paragraph 36 - State v. O'Driscoll, 215 NJ 461 (2013); State v. Peralta, 437 NJ Super. 570 (App. Div. 2014).

iv.) Foreign languages - State v. Marquez, 202 NJ 485 (2010).

v.) Woman over age 60 - State v. Chun, 194 NJ 54, 104-05 (2008).

vi.) Confusion doctrine - State v. Leavitt, 107 NJ 534, 542 (1987) “We recognize that despite the best of efforts some confusion may remain. Without resolving whether any defendant may validly assert the defense, we agree with the view expressed in the Attorney General's brief that the ‘exclusive, narrow exception to the general rule that refusals cannot be validly justified,’ would have to be premised on a record developed by a defendant to show that he had indeed been confused. We also agree that it is entirely appropriate that a defendant bear the burden of persuasion if he wishes to establish a confusion claim.”

Part IV. Sentencing

Introduction - Generally speaking, the order and sequence of DWI convictions does not affect sentencing:

State v. Guiendon, 113 N.J. Super. 361 (App. Div. 1971); State v. Petrello, 251 N.J. Super. 476 (App. Div. 1991)



a.) Sentencing Ranges

i.) First Offense - First Tier (BAC Less than 0.10%)

A DUI defendant who is to be sentenced as a first offender, first tier, will be subject to a variety of sanctions. These total \$389 and include the following:

Monetary Sanction	Required Amount	Statute
Fine	\$250–\$400	N.J.S.A. 39:4-50(a)(1)(i)
Fine	\$300–500	N.J.S.A. 39:4-50(a)(1)(ii)
VCCB	\$50	N.J.S.A. 2C:43-3.1
SNF	\$75	N.J.S.A. 2C:43-3.2
DUI Enforcement	\$100	N.J.S.A. 39:4-50.8
DUI Surcharge	\$125	N.J.S.A. 39:4-50(i)
Court Costs	\$33	N.J.S.A. 22A:3-4
Additional fine assessments	\$6	N.J.S.A. 39:5-41



D/I Loss – N.J.S.A. 39:4-50(a)(1)(i) – 90-days

Jail = discretionary up to 30 days

IDRC = 12 to 48 Hours

Ignition Interlock – optional BAC < .15 - otherwise (6 months to 1 year) N.J.S.A. 39:4-50(a)(1)(iii)

Unresolved Issues:

**Synergistic Effects of drugs & alcohol
State v. Glynn, 20 N.J. Super.20 (App. Div. 1952)**

ii.) First Offense - Second Tier (BAC 0.10% or more)

A DUI defendant who is to be sentenced as a first offender, second tier, will be subject to a variety of sanctions. These total \$389 and include the following:

Monetary Sanction	Required Amount	Statute
Fine	\$250–\$400	N.J.S.A. 39:4-50(a)(1)(i)
Fine	\$300–500	N.J.S.A. 39:4-50(a)(1)(ii)
VCCB	\$50	N.J.S.A. 2C:43-3.1
SNF	\$75	N.J.S.A. 2C:43-3.2
DUI Enforcement	\$100	N.J.S.A. 39:4-50.8
DUI Surcharge	\$125	N.J.S.A. 39:4-50(i)
Court Costs	\$33	N.J.S.A. 22A:3-4
Additional fine assessments	\$6	N.J.S.A. 39:5-41



D/I Loss - N.J.S.A. 39:4-50(a)(1)(ii) – 7 months to 1 year

Jail = Discretionary up to 30 days

IDRC = 12 to 48 Hours

Ignition Interlock – optional BAC < .15 - otherwise (6 months to 1 year) N.J.S.A. 39:4-50(a)(1)(iii)

iii. Second Offense

A non-school-zone DUI defendant who is to be sentenced as a second offender will be subject to a variety of sanctions. These total \$389 and include the following:

Monetary Sanction	Required Amount	Statute
Fine	\$500–\$1,000	N.J.S.A. 39:4-50(a)(2)
VCCB	\$50	N.J.S.A. 2C:43-3.1
SNF	\$75	N.J.S.A. 2C:43-3.2
DUI Enforcement	\$100	N.J.S.A. 39:4-50.8
DUI Surcharge	\$125	N.J.S.A. 39:4-50(i)
Court Costs	\$33	N.J.S.A. 22A:3-4
Additional fine assessments	\$6	N.J.S.A. 39:5-41



D/l Loss – N.J.S.A. 39:4-50(a)(2) – 2 years

Jail = 2 days to 90 days (May be served in IDRC – N.J.S.A. 39:4-50(a)(3))

30 days (180 hours) community service

IDRC = 12 to 48 Hours

Ignition Interlock – mandatory 1 to 3 years during & following d/l suspension

iv.) Third Offense

A non-school-zone DUI defendant who is to be sentenced as a third offender will be subject to a variety of sanctions. These total \$389 and include the following:

Monetary Sanction	Required Amount	Statute
Fine	\$1,000	N.J.S.A. 39:4-50(a)(3)
VCCB	\$50	N.J.S.A. 2C:43-3.1
SNF	\$75	N.J.S.A. 2C:43-3.2
DUI Enforcement	\$100	N.J.S.A. 39:4-50.8
DUI Surcharge	\$125	N.J.S.A. 39:4-50(i)
Court Costs	\$33	N.J.S.A. 22A:3-4
Additional fine assessments	\$6	N.J.S.A. 39:5-41



180 Jail (discretionary - up to 90 days in IDRC-approved in-patient rehab); State v. Fyffe, 244 N.J. Super. 310 (App. Div. 1990) – (retro credits for rehab)

10-year suspension of driving privileges

IDRC Participation

Ignition Interlock – mandatory 1 to 3 years during & following d/l suspension

Jail term - AOC (Carchman) Memorandum of October 25, 2006 requires immediate imposition of DWI jail terms except in compelling circumstances that must be placed on the record.

b.) Technical Issues

i.) No Rules of Evidence – N.J.R.E. 101(a)(2)(C); State v. Carey, 232 N.J. Super. 553 (App. Div. 1989);

ii.) Abstract review required by sentencing judge – N.J.S.A. 2B:25-5.1; Directive #10-04.

iii.) Plea with a Civil Reservation – Rule 7:6-2(a)(1)– State v. LaResca, 267 N.J. Super. 411 (App. Div. 1993) (Superior Court Rule 3:9-2 – State v. Tsilimidos, 364 N.J. Super. 454 (App. Div. 2003); Maida v. Kuskin, 221 NJ 112 (2015).

iv.) Restitution made out-of-Court - In re Friedland, 59 N.J. 209, 220 (1971)

“In the future, should an attorney wish to have complaints dismissed by his client he must first go before the prosecutor and a judge and make a full and open disclosure of the nature of the charges and the terms, if any, under which the dismissal is sought. The dismissal should not be consented to unless both the judge and the prosecutor are satisfied that the public interest as well as the private interests of the complainant will be protected.”



v.) Stay of Sentence – Rule 7:13-2 (N.J.S.A. 39:5-22) (See also Rule 3:23-5) [Note this procedure is currently on review before the Supreme Court. See State v. Robertson, 438 NJ Super. 47 (App. Div. 2014).]

Notwithstanding R. 3:23-5, a sentence or a portion of a sentence may be stayed by the court in which the conviction was had or to which the appeal is taken on such terms as the court deems appropriate.

vi.) Defendant entitled to bail on appeal – Rule 3:23-5(a).

vi.) Limitations on Weekend Jail – N.J.S.A. 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.

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

vii.) Cap on jail terms (180-days in the absence of a jury trial offer.) – State v. Owens, 54 N.J. 153 (1969)

viii.) Probation – NJSA 39:5-7 - In any proceeding instituted pursuant to the provisions of this subtitle, except where a mandatory penalty is fixed herein, the magistrate may suspend the imposition or execution of sentence, and may also place the defendant on probation under the supervision of the chief probation officer of the county for a period of not less than six months nor more than one year. The probation shall be effected and administered pursuant to the provisions of [sections 2A:168-1 to 2A:168-13 of the New Jersey Statutes](#).

ix.) School Zone offenses - Merge with longer and stronger DWI sentence. DWI is a lesser-included offense of the school-zone. State v. Reiner, 180 NJ 307 (2004).

c.) Moran Sentencing factors for d/l and jail

- 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.**
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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)

d.) Collateral consequences

i.) Interlock device and automobile ownership/re-licensing;

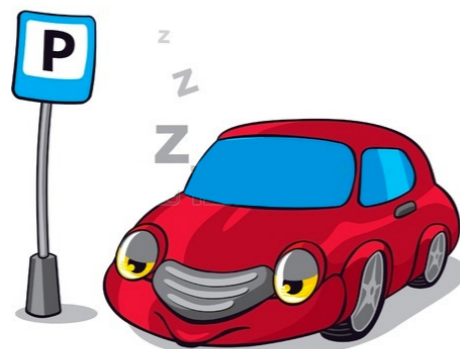
ii.) MV Surcharges;

iii.) Loss of liability insurance;

iv.) Loss of ability to file civil suit (NJSA 39:6A-4.5);

v.) Possible immigration consequences;

vi.) IDRC and associated fees.



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

i.) 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.

See generally State v. Burroughs, 349 NJ Super. 225 (App. Div. 2002). State v. Revie, 220 NJ 126 (2014).

Controlling Dates (Violation Date) for Sentencing Purposes – State v. Bischoff, 232 N.J. Super. 515 (App. Div. 1989)

ii.) 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).

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

iv.) 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)

f.) 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 (Motor vehicle penalty points imposed for merged tickets.)

Garden State CLE

NJ DWI Trial Notebook



by Robert Ramsey