Garden State CLE presents

Absolutely Forbidden Defenses in New Jersey DWI Cases

Lesson Plan

Table of Contents

Part I – Effective Advocacy

1. What is expected of defense counsel in a drunk-driving case under the RPC's?

1.1 Competence

A lawyer shall not:

- **(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.**
- **(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.**

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RPC 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

RPC 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) **A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.**
- (b) **A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.**
- (c) **A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.**
- (d) **A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.**

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2. Limitation on Frivolous Pleadings

RPC 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

3. Post-Conviction Relief

Rule 3:22-6(d)

- **(d) Substitution; Withdrawal of Assigned Counsel. Counsel should advance all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference. Pro se briefs can also be submitted.**
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4. State v. Rue, 175 NJ 1, 18-19 (2002)

In *Rue* the Supreme Court resolved a conflict between *R.P.C.* 3.1, "which generally bars lawyers from advancing frivolous claims," and *Rule* 3:22-6(d), The Court concluded that *Rule* 3:22-6 trumped *R.P.C.* 3.1:

Put another way, for nearly forty years, and directly in the face of *RPC* 3.1, our Rules have taken a unique position regarding PCR representation. That choice was obviously motivated by our view of the critical nature of faithful and robust representation of a defendant at a PCR proceeding. PCR is a defendant's last chance to raise constitutional error that may have affected the reliability of his or her criminal conviction. It is not a *pro forma* ritual. That is why we require provision of counsel. Under our scheme that attorney is responsible to communicate with his client and investigate the claims.. Based on that communication and investigation, counsel then must "fashion the most effective arguments possible."

In some cases, the record will give PCR counsel a wealth of grist for his or her mill, in some cases, not. At the very least, where communication and investigation have yielded little or nothing, counsel must advance the claims the client desires to forward in a petition and brief and make the best available arguments in support of them. Thereafter, as in any case in which a brief is filed, counsel may choose to stand on it at the hearing, and is not required to further engage in expository argument. In no event however, is counsel empowered to denigrate or dismiss the client's claims, to negatively evaluate

them, or to render aid and support to the state's opposition. That kind of conduct contravenes our PCR rule.

5. By contrast, generally, the law discourages frivolous pleadings

1:4-8. Frivolous Litigation

- **(a) Effect of Signing, Filing or Advocating a Paper. The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:**
  - **(1) the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;**
  - **(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;**

[Cross-reference RPC 3.1]

Part II– Advancing Forbidden Defenses – In General

1. Duty to inform the Court & Adversary

RPC 3.3. Candor Toward the Tribunal

- (a) **A lawyer shall not knowingly:**
  - (1) **make a false statement of material fact or law to a tribunal;**
  - (2) **fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;**
  - (3) **fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;**
  - (4) **offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or**

        - (5) **fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.**
    - (b) **The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.**

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

- **(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- **(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- **(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- **(d) engage in conduct that is prejudicial to the administration of justice;**
- **(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;**
- **(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;**

- **(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.**

Part III– The Ban on Defenses Begins

1. The Edson Theory:

Chronology

State v. Tischio – argued 11/5/86
In re Edson – argued 5/4/87
State v. Tischio – Decided 6/30/87

In re Edson, 108 NJ 464, 470-71 (1987)

[T]he record is clear that respondent advised two clients to manufacture evidence in the defense of their drunk driving cases, contrary to RPC 1.2(d). Respondent also knowingly permitted a client to offer false evidence in a trial, contrary to

RPC 3.3(a)(4), and counseled and assisted a witness to testify falsely in a trial, contrary to RPC 3.4(b). Respondent also participated in a fraud by giving false information to his expert witness for the purpose of having him testify under oath in reliance upon those facts, and he gave false information to a municipal prosecutor, contrary to RPC 8.4(a), (b), (c), and (d).

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In re Edson, 108 NJ 464, 472-73 (1987)

One need but listen to the tapes. The reaction to what is portrayed is at once fascinating and chilling. The members of this Court are not babes in the woods. We are invested with at least minimally acceptable levels of sophistication, of worldliness. Our professional backgrounds have exposed us, in varying degrees, to some of life's seamier aspects. We have travelled different roads in our professional careers. We practiced in different fields and encountered, collectively, all kinds of lawyers-most very good, some perhaps indifferent, and a mere handful bad. In short, we have been around enough that not much surprises us. But rarely have we encountered in our colleagues at the bar the kind of shocking disregard of professional standards, the kind of amoral arrogance, that is illustrated by this record. There could hardly be a plainer case of dishonesty touching the

administration of justice and arising out of the practice of law.

Part IV – Absolutely banned Defenses

1. Retrograde Extrapolation [State v. Tischio, 107 NJ 504 (1987)]

The overall scheme of these laws reflects the dominant legislative purpose to eliminate intoxicated drivers from the roadways of this State. To this end, the Legislature, working in tandem with the courts, has consistently sought to streamline the implementation of these laws and to remove the obstacles impeding the efficient and successful prosecution of those who drink and drive. One such impediment has been the introduction of conflicting expert testimony at trials under *N.J.S.A.* 39:4-50(a). The vast majority of statutory revisions in this area have been directed towards minimizing, if not eliminating, the necessity for this kind of evidence. (at 514)

Accordingly, we hold that the 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. Prosecution for this particular offense neither requires nor allows extrapolation evidence to demonstrate the defendant's blood-alcohol level while actually driving. (at 522)

Note dissent by Justice Clifford

State v. Oriole, 243 NJ Super. 688, 695-696 (Law Div. 1990)

This court holds that extrapolation evidence of the defendant's blood alcohol level at the time of operation is both relevant to, and probative of, whether defendant Oriole acted recklessly, in violation of *N.J.S.A.* 2C:12-1b(1) and -1c. The State therefore will be permitted to adduce evidence of the extrapolation analysis based on defendant's blood-alcohol readings taken at the hospital, in order to show the level of defendant's blood-alcohol concentration when the collision occurred. At trial, the State may introduce extrapolation evidence on the issue of whether defendant acted recklessly (under circumstances manifesting extreme indifference to human life), as charged in the indictment[.]

2. Involuntary Intoxication - No criminal code defenses allowed [State v. Hammond, 118 NJ 306 (1990)]

We hold that the provisions of the Code governing principles of liability are not applicable to the motor vehicle violation of driving while intoxicated under *N.J.S.A.* 39:4-50. The Code defense of involuntary intoxication, *N.J.S.A.* 2C:2-8, is not a defense to this violation. (at 318)

Our holdings in *Downie* and *Tischio* confirm a clear legislative intent and a strong legislative policy to discourage long trials complicated by pretextual defenses. Yet that is what defendant seeks to accomplish in this case. Defendant does not contend

that what he ingested did not create objectively all of the well-known symptoms of intoxication or did not result in a breathalyzer reading that *per se* constitutes intoxication. Defendant's expert testimony was proffered only to confirm his *318 contention that he drank liquor unwittingly. Indeed, defendant does not even argue that he had nothing intoxicating to drink the night he was arrested, but only that *some* of his consumption of alcohol was unknowing and "involuntary." This kind of defense has every potential for being pretextual, and is the kind of tendentious defense the Legislature sought to discourage by its enactment of a statute based on objective measurements of intoxication. (at 317-318)

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Common law defenses are available. Example: Common law necessity – See State v. Romano, 355 NJ Super. 21 (App. Div. 2002); State v. Fogarty, 128 NJ 59 (1992).

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4. Defenses based upon pretext - Entrapment and quasi-entrapment - [State v. Fogarty, 128 NJ 59 (1992)]

A clear legislative intent and a strong legislative policy exist to discourage long trials complicated by pretextual defenses. . Defendant seeks to avail himself of a subjective pretextual defense in this case. He does not contend that the police officer ordered him to drive drunk; he asserts only that he believed that some unidentified police officer told him to leave. That

kind of defense has every potential for being pretextual and would "impede the efficient and successful prosecution of those who drink and drive."

In our DWI decisions we attempt to eliminate every possibility of pretextual defenses. We have done so not only because of any doubts about the veracity of the factual defense offered, but also because of the potential for pretext.

In this case the risk of pretext is [great].. The scene is all too common: a brawl in a parking lot outside a bar, a restaurant, or a sports stadium, or indeed at any gathering where a number of people are present. The police arrive and decide that public safety requires that they immediately disperse the crowd. The police do not have time to assess the risk that some ordered to leave may be drunk. Moreover, if the police had to administer sobriety tests to everyone at those events before dispersing them, their law-enforcement efforts would suffer.

After a police order to disperse, those who had intended to leave anyway, those without fear of arrest or of physical assault, those without any reason to fail to tell the police that they are drunk, drive away intoxicated. Obviously, if the law were to permit those people to offer as a defense that they drove only because they reasonably feared that telling the police that they were drunk might lead to arrest, the invitation to offer a pretext would be clear. (at 68-69)

[See dissent by Justice Stein]

5. Common law and statutory Insanity - [State v. Inglis, 304 NJ Super. 207 (Law Div. 1997)]

As with involuntary intoxication, entrapment, and duress, the insanity defense has a high potential for serving as an

instrument of pretext. When evaluating whether a particular defense has a high potential for pretext, the focus should be on the ease with which a defendant can allege a frivolous defense. In this respect, there is little difference between Mr. Inglis' insanity defense and the involuntary intoxication defense rejected in *Hammond.* (at 212)

6. No plea-bargaining - [State v. Hessen, 145 NJ 441 (Law Div. 1996)] – [State v. Marsh, 290 NJ Super. 663 (App. Div. 1996)]

The Court's intention in upholding this ban can therefore be seen as an effectuation of the strong legislative and public policy to eliminate drunk driving, by refusing to allow drunk drivers to escape responsibility for their actions, by ensuring accountability of those who cause drunk driving, and by penalizing drinking-and-driving offenses to the fullest extent of the law. The ban is an essential element of a strongly-endorsed and well-articulated policy to eliminate drunk driving by affording offenders "zero tolerance" in the prosecution of their offenses. (Hessen at 458)

GUIDELINE 4. LIMITATION.
No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50)

RPC 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- **(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;**

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GUIDELINE 3. PROSECUTOR'S RESPONSIBILITIES

Nothing in these Guidelines should be construed to affect in any way the prosecutor's discretion in any case to move unilaterally for an amendment to the original charge or a dismissal of the charges pending against a defendant if the prosecutor determines and personally represents on the record the reasons in support of the motion.

Supreme Court Comment (6/29/90)

Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter. It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases. In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well-established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.

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7. Other Prohibited Defenses

a. No Jury Trial – State v. Stanton, 176 NJ 75 (2003); State v. Hamm, 121 NJ 109 (1990)
b. Glove-box defense – State v. Snyder, 337 NJ Super. 59 (App. Div. 2001); State v. Lizotte, 272 NJ Super. 568 (Law Div. 1993)
c. Use of video to rebut per se violation – State v. Allex, 257 NJ Super. 16 (App. Div. 1992); State v. Manfredi, 242 NJ Super. 708 (Law Div. 1990)
d. Involuntary workplace exposure to alcohol – State v. Carey, 263 NJ Super. 377 (App. Div. 1993)
e. Chronic Alcoholism – State v. Housman, 131 NJ Super. 478 (App. Div. 1974)
f. Hyper-sensitivity to effects of alcohol – State v. Cryan, 363 NJ Super. 442, 457 (App. Div. 2003)
g. Too intoxicated to understand paragraph 36 – State v. Marquez, 202 NJ 485, 513 (2010)
h. No automatic dismissal when complainant officer fails to appear for trial – Bulletin letter #9/10-85 – See State v. Paris, 214 NJ Super. 220 (Law

Div. 1986) overruled by State v. Prickett, 240 NJ Super. 139 (App. Div/ 1990)

i. Judicial Review of Dismissal Applications by the Prosecutor – Memorandum 12/2/04.