

Garden State CLE Presents:



**Top 10 and 1/2 Mistakes the cops make in NJ DWI
Cases**

Lesson Plan

Introduction

Even the most experienced police officers will make mistakes during the course of a DWI stop and arrest.

These errors can result from inexperience, haste, short cuts, lack of training or the pressures of other police duties.

Often, the errors committed by police are harmless and embarrassing. (Typos, misspellings, cutting and pasting blocks of prior reports) In other instances, the courts have come to the rescue and have judicially eliminated a variety police errors. So, do not waste your time pursuing these errors unless you intend to make new law as permitted under RPC 3.1.



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

However, there are certain police mistakes that can be fatal to a DWI prosecution.

The following examples will show you which errors can be used to the advantage of the defense and which have been eliminated through the decisional case law.



1. Using Portable breath-testing units



N.J. law has vested the power to select breath-testing devices exclusively in the Attorney General.

Section: 39:4-50.3: Method of analyses; approval of techniques; certification of analysts; reports; forms

Chemical analyses of the arrested person's breath, to be considered valid under the provisions of this act, shall have been performed according to methods approved by the Attorney General, and by a person certified for this purpose by the Attorney General. The Attorney General is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to make certifications of such individuals, which certifications shall be subject to termination or revocation at the discretion of the Attorney General. The Attorney General shall prescribe a uniform form for reports of such chemical analysis of breath to be used by law enforcement officers and others acting in accordance with the provisions of this act. Such forms shall be sequentially numbered.



N.J.A.C. 13:51-3.5 (2015)

§ 13:51-3.5 Approved methods of chemical breath testing and approved instruments for the testing of a person's breath by chemical analysis

(a) The Attorney General, pursuant to P.L. 1966, c.142, Sec. 3, as amended by P.L. 1971, c.273, Sec. 1 (N.J.S.A. 39:4-50.3), P.L. 1990, c.103, Sec. 17 (N.J.S.A. 39:3-10.25) and P.L. 1986, c.39, Sec. 8 (N.J.S.A. 12:7-56) and this subchapter, approves the following methods of chemical breath testing and the following instruments for use in the testing of a person's breath by chemical analysis.

1. Photometry is approved as a method of chemical breath testing.

i. The Breathalyzer, Model 900, is a Photometric instrument and is an approved instrument for use in the testing of a person's breath by chemical analysis.

ii. The Breathalyzer, Model 900A, is a Photometric instrument and is an approved instrument for use in the testing of a person's breath by chemical analysis.

iii. The Dominator Albreath is a Photometric instrument and is an approved instrument for use in the testing of a person's breath by chemical analysis.

2. Infrared analysis and electrochemical analysis, when utilized in a single approved instrument as a dual system of chemical breath testing, is approved as a method of chemical breath testing.

i. The Alcotest 7110 MKIII, is a chemical breath test instrument which employs both infrared analysis and electrochemical analysis as a dual system of chemical breath testing and is an approved instrument for use in the testing of a person's breath by chemical analysis.

Applicable Defenses



Motion to suppress breath-test results due to police misconduct.

Motion to dismiss based upon failure to provide discovery in the form of PBTU results. See also *Brady v. Maryland*, 373 US 83 (1963).

To rebut the argument that the device is used purely for the purpose of verifying the odor of an alcoholic beverage on the breath, demand a *Frye* hearing (*Frye v. U.S.*, 293 F. 1013 (1923)).

In refusal cases, argue the 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. We suspect that in most cases the defendant makes a more practical rather than legal judgment about exercising the statutory right to refuse a blood-alcohol test in light of the generally known consequences.

2. Refusal - Operation on Private Property

Generally, NJSA 39:4-50(a) applies in every part of New Jersey where the State exercises sovereign jurisdiction. See State v. McColley, 157 NJ Super. 525 (App. Div. 1978).

However, the obligation to submit breath samples does not extend to purely private property.

NJSA 39:4.50.2 provides:

Section: 39:4-50.2: Consent to taking of samples of breath; record of test; independent test; prohibition of use of force; informing accused.

2. (a) Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of R.S.39:4-50 or section 1 of P.L.[1992, c.189](#) (C. 39:4-50.14).

See State v. Bertrand, 408 NJ Super. 584 (App. Div. 2009) (defining "quasi-public" areas.)



Applicable Defenses

In cases involving breath sample, file MTS arguing that the police acted unreasonably in detaining the defendant and reading paragraph 36 when it was not required.

In cases involving a refusal, place of operation is an affirmative defense.

3. Searches justified by the automobile exception.

This defense may be subject to change upon the publication of the Supreme Court's pending decision in *State v. Witt*. It will also either affirm or disapprove the "mistake of law" defense. See *State v. 379 NJ Super. 378* (App. Div. 2005). See also *Heien v. North Carolina*, ___ US ___ (2014).

Currently, both probable cause and exigent circumstances are required under New Jersey law to support this exception to the warrant requirement. *State v. Cooke*, 163 NJ 657 (2000).

When police arrest an intoxicated driver, they have probable cause to search the vehicle for evidence of intoxication. *State v. Irelan*, 375 NJ Super. 100 (App. Div. 2005).



Exigent circumstances are defined in *Cooke* as:

We conclude by stating the obvious: the term "exigent circumstances" is, by design, inexact. It is incapable of precise definition because, by its nature, the term takes on form and shape depending on the facts of any given case. We reiterate that exigency in the constitutional context amounts to "circumstances that make it impracticable to obtain a warrant when the police have probable cause to search the car." [Colvin, supra, 123 N.J. at 437, 587 A.2d 1278](#). It is that impracticability and the existence of probable cause to believe that the vehicle contains evidence of a crime, together with a lessened expectation of privacy in an automobile, that tips the balance in favor of condoning the warrantless search. Although the balance is a delicate one, we must attempt to maintain it to protect the rights and interests of all members of the community.



Applicable Defenses

Motion to suppress evidence seized from within the vehicle: Police will never have exigent circumstances in a DWI case since the vehicle will be towed and impounded for a minimum of 12 hours. This should be more than sufficient time for the police to obtain a warrant by telephone or conventional means.

See John's Law - NJSA 39:4-50.23

Section: 39:4-50.23: Impoundment of vehicle operated by arrestee; conditions of release; fee for towing, storage

2. a. Whenever a person has been arrested for a violation of R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a), the arresting law enforcement agency shall impound the vehicle that the person was operating at the time of arrest.

b. A vehicle impounded pursuant to this section shall be impounded for a period of 12 hours after the time of arrest or until such later time as the arrestee claiming the vehicle meets the conditions for release in subsection d. of this section.

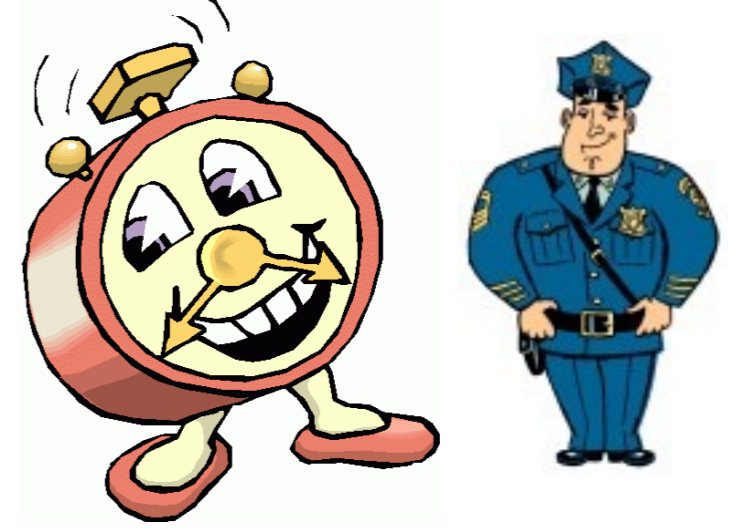
c. A vehicle impounded pursuant to this section may be released to a person other than the arrestee prior to the end of the impoundment period only if:

(1) The vehicle is not owned or leased by the person under arrest and the person who owns or leases the vehicle claims the vehicle and meets the conditions for release in subsection d. of this section; or

(2) The vehicle is owned or leased by the arrestee, the arrestee gives permission to another person, who has acknowledged in writing receipt of the statement required in section 1 of P.L. 2001, c.69 (C. 39:4-50.22) to operate the vehicle and the conditions for release in subsection d. of this section are met.

4. Twenty-minute issues

State v. Filson, 409 NJ Super. 246 (Law Div. 2009)



"In sum, what constitutes observation must be determined in view of the purpose of the observation requirement: to assure that the suspect has not ingested or regurgitated substances that would confound the results. An officer's observation should be of the sort capable of detecting contamination if it actually occurred. Thus, an officer who looks away must be close enough to detect contamination through aural or olfactory senses. An officer who rides alone in the patrol car with the suspect must be especially attentive to the suspect, free from road-related distractions, to spot regurgitation or ingestion if it occurs."

The 20-minute period should extend backwards from the time of the first sample. Typically, police reports will demonstrate poor time reporting and will offer evidence of other activities during the 20 minute observation period such as administering Miranda warnings, completing the drunk driving questionnaire, reading paragraph 36 and the like. Also, check data downloads to find out precisely when the instrument was activated and the first characters typed.

It is critical to make a chart of every mention or recordation of time up to the moment the first sample is taken.

NARRATIVE OF INVESTIGATION (CONTINUED)

1. OPERATION OF THE MOTOR VEHICLE: On 5/20/14 at approximately 0204 hours, this officer (P/O S. [REDACTED]) and P/O D. [REDACTED] were on patrol in marked patrol unit #701 in the area of Whitehorse-Mercerville Road and Route 33 when we observed [REDACTED], a black 2012 Hyundai, traveling south on Whitehorse-Mercerville Road in the left lane and stopped at the red traffic signal at Route 33. When the traffic signal turned green, the vehicle proceeded south on Whitehorse-Mercerville Road and veered into the right lane and failed to use his turn signal. The vehicle then veered back into the left lane without using his turning signal and crossed over the double lines. I activated my emergency overhead lights and sirens at the corner of Whitehorse-Mercerville Road and Trenton Avenue, at which time the vehicle continued for approximately 300 feet and came to a stop at Whitehorse-Mercerville Road and Estates Boulevard.

2. WHEN STOPPED OR AT THE SCENE: When I approached the vehicle, I observed the driver, later identified as [REDACTED], [REDACTED] in the front driver seat of the vehicle. I asked [REDACTED] to produce his credentials, and he provided me with his Connecticut driver's license, vehicle registration and insurance card. At this time, this officer observed [REDACTED] eyes to be glassy and a strong odor of an alcoholic beverage was emanating from the vehicle and [REDACTED] breathe. I asked [REDACTED] as to whether he had any alcoholic beverages on this date at which time he stated, "Yes, only one." I Then asked [REDACTED] why he was swerving between the right and left lanes and he stated, "I was using my cell phone." [REDACTED] was then asked to exit the vehicle to have sobriety tests performed.

The field sobriety tests were performed by this officer. The first test conducted was the **HORIZONTAL GAZE NYSTAGMUS TEST**. During the HGN test, Yantosca lacked smooth pursuit in both right and left eyes. There was distinct and sustained nystagmus at maximum deviation. There was onset nystagmus prior to 45 degrees in his right eye. The next test conducted was the **WALK AND TURN TEST**. I first explained then demonstrated this test [REDACTED]. While [REDACTED] was in the starting position he leaned and raised his arms to maintain balance prior to starting the test and also performed an incorrect turn after completing the first nine steps. The next test conducted was the **ONE LEG STAND TEST**. After I gave a full description on how to perform the test, [REDACTED] failed to complete the test successfully, as he did not keep his arms at his sides and raised his arms to maintain his balance. At that time, [REDACTED] was handcuffed double locked and checked for proper fit and placed under arrest for D.W.I. [REDACTED] was then secured in the rear of patrol unit #701. The vehicle was towed from the scene by Allen's collision for John's Law.

3. ENROUTE TO STATION: While enroute to the station, [REDACTED] was calm but a strong odor of an alcoholic beverage was emanating from inside our patrol vehicle during the transport.

4. AT THE STATION: At the station, [REDACTED]'s manner was calm, polite, and indifferent. A continuous 20 minute observation was kept on [REDACTED] by this officer in the holding area. Before the Alcotest was performed, [REDACTED] was read the New Jersey Motor Vehicles Commission Standard Statement For Operators Of A Motor Vehicle – N.J.S.A. 39:4-50.2(e) and replied "YES". P/O S. [REDACTED] performed the Drager Alcotest 7110 on [REDACTED]. The breath test was ultimately performed effectively. [REDACTED] registered a 0.12% B.A.C. on the Alcotest device. It should be noted that It appeared [REDACTED] had a piece of chewing gum his mouth during the test. I then asked [REDACTED] if he was chewing gum and he stated, "No" and opened up his mouth and stuck out his tongue but nothing was visible inside his mouth.

P/O S. [REDACTED]
PD-107A

SIGNATURE


7. BADGE #


REVIEWED BY:


Applicable Defenses

Test was not administered according to official procedures, thus results are inadmissible.

5. Refusals and paragraph 36

A refusal is completed when a defendant provides an unequivocal "no" to the question, "Now will you take the test?" It is unnecessary for the police to read any more of paragraph 36 unless the initial answer was equivocal. State v. Schmidt, 206 NJ 71 (2011). However, contrast State v. Duffy, 348 NJ Super. 609 (App. Div. 2002) ("I'll take the test, but it's under duress.")

Although paragraph 36 now includes a warning on providing a proper sample, police seldom report that they read the required instructions to the defendant when a valid sample has not been given.

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 (2008).

Wrong version of paragraph 36 - State v. O'Driscoll, 215 NJ 451, 465-81 (2013).

Note - minimum sample required by women over age 60.

"in each prosecution involving any woman who, at the time of the alleged offense, was over the age of sixty and for whom an AIR was generated with an error message evidencing a breath sample of inadequate volume, the AIR shall not be admissible as evidence in a prosecution for refusal, see *N.J.S.A. 39:4-50.4a*, unless the woman also provided another breath sample of at least 1.5 liters;"



6. Curing refusals (Don't waste your time)

Refusals to submit a breath test cannot be cured under New Jersey law. Once a defendant has unequivocally refused, the offense is complete and police have no duty to do anything else.

State v. Bernhardt, 245 NJ Super 210 (1991)

Once the defendant says anything except an unequivocal "yes" to the officer's request after the officer has informed the defendant of the consequences of a refusal, the defendant cannot legally cure the refusal. Prosecutions for drunk driving and for failure to give a breath sample are quasi-criminal proceedings and therefore notions of curing defects, as frequently occur in the commercial world pursuant to the Uniform Commercial Code, have no application absent a clear expression to the contrary by the Legislature.



7. Unsigned tickets (Don't waste your time)

This is another example where the judiciary has stepped in to cover the police. Normally, a complaint-summons needs a signed certification from the complainant that an offense has occurred in order to require participation by the defendant and action by the courts. This is not true in DWI cases.

State v. Fisher, 180 NJ 462 (2004)

Although the officer's signature plays a valuable role in protecting citizens' rights, we do not agree with defendant that the absence of the signature on the ticket at the time of its issuance renders the ticket invalid. Ordinarily, the omission of the signature will not impair the ticket from serving its primary function of safeguarding the defendant's right to procedural due process. Moreover, in most cases, any danger of unfounded prosecution posed by an unsigned ticket can be eliminated by an amendment under *Rule 7:2-4* or *7:14-2*. We, therefore, find no principled reason for adopting a *per se* rule that an unsigned traffic ticket is null and void. To conclude otherwise would undermine the policy expressed in our court rules of resolving traffic matters on the merits rather than on technicalities.

Having determined that the omission of an officer's signature is an amendable defect that does not void the traffic ticket, we conclude that *N.J.S.A. 39:5-3(a)* does not foreclose the State from supplementing the ticket with an attestation of probable cause more than thirty days after the commission of the offense.

8. Copies of AIR

Does the failure of the police to provide a copy of the AIR to the test-subject support a suppression of the Alcotest results based upon a failure of the police to administer the test according to official procedure?

The triggering event for providing a copy of the AIR is controlled by statute: NJSA 39:4-50.2(b) provides:

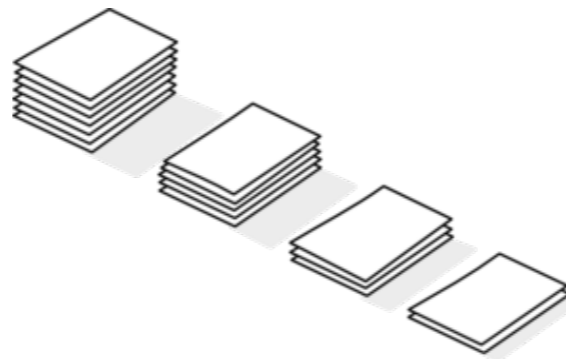
(b) A record of the taking of any such sample, disclosing the date and time thereof, as well as the result of any chemical test, shall be made and a copy thereof, upon his request, shall be furnished or made available to the person so tested.

Paragraph 36 states: "A record of the taking of the breath samples, including the test results, will be made. Upon your request, a copy of that record will be made available to you."

State v. Sorensen, 439 NJ Super. 471 (App. Div. 2015)

We hold that suppression of the AIR is not an appropriate remedy in the absence of prejudice.

What will occur when the test subject makes a timely request and is not given a copy?



9. Expired operator cards

NJAC 13:51-1.8

(a) The certification of an operator will become invalid on the day following the date set for expiration of the operator's present valid certification as set forth at N.J.A.C. 13:51-1.7, if the operator has not satisfied the requirement for recertification, as set forth at N.J.A.C. 13:51-1.6(c), before the expiration of said valid certification.

(d) Any test conducted to analyze a person's breath, pursuant to procedures and methods contained in this chapter, by an operator whose certification is suspended, revoked, or invalid at the time such test is conducted, shall be considered invalid for presentation in evidence or testimony in a court of law or administrative hearing.



Applicable defenses

Always check three cards in Alcotest discovery package

Operator's card

Trooper's card

Card of officer who made last solution change.



10. Exigent circumstances in blood cases

No search warrant required in blood-draw cases involving probable cause coupled with exigent circumstances. *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

Finally, "whether the exigent circumstance can properly be characterized as 'police-created,' and, if so, whether it arose 'as a result of reasonable police investigative conduct intended to generate evidence of criminal activity'" must also be taken into account. **Police-created exigent circumstances which arise from unreasonable investigative conduct cannot justify warrantless home entries. *State v. Hutchins*, 116 NJ 457 (1989).**

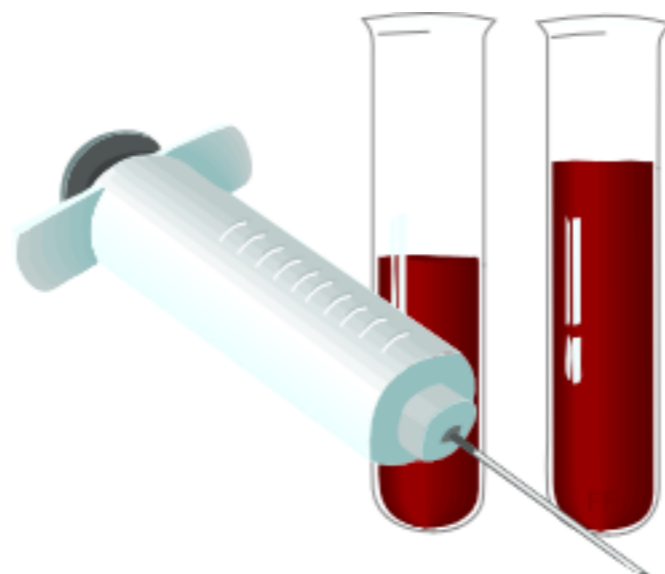


Best example - driving around the county looking for a functional Alcotest unit may result in police-created exigency.

See also State v. Jones, 437 NJ Super. 68 (App. Div. 2014); State v. Jones, ___ NJ Super. ___ (App. Div. 2015) (Jones II).

Also implicates whether test was administered with a reasonable time of the stop/arrest. State v. Tichio, 107 NJ 504 (1987) and State v. DiFrancisco, 232 NJ Super. 317 (Law Div. 1989)

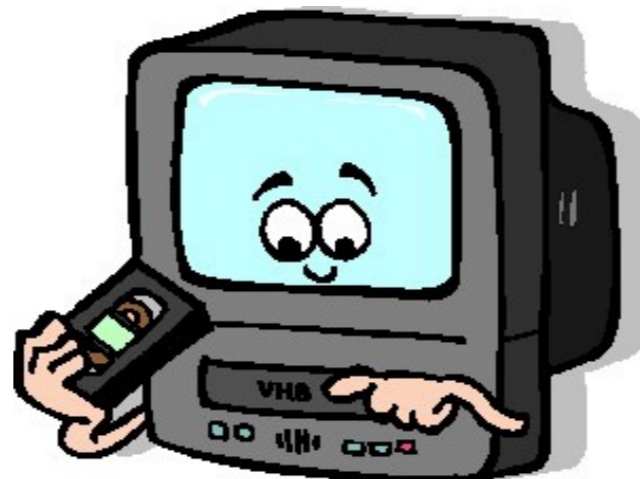
Exigency and the use of force in the taking of a blood sample - State v. Ravotto, 169 NJ 227 (2001).



10 1/2. Lost Video

The State's failure to videotape Gordon did not violate his due process rights. There is no duty on the part of the police to **create evidence** by videotaping suspected drunken drivers. Moreover, Gordon has not shown that any failure to videotape him was caused by bad faith and he has shown no **465*465** prejudice from the lack of a videotape. Thus, even if videotaping were required, he would not be entitled to relief. *State v. Gordon*, 261 NJ Super. 462 (App. Div. 1993).

Because defendant did not establish that the videotape had exculpatory value that was apparent to the State when it was erased through reuse or that its potentially exculpatory value was destroyed in bad faith, defendant could not establish his entitlement to relief. Even if we were to assume that the videotape included exculpatory evidence and was available to the prosecution at the time of discovery, we could not conclude that defendant demonstrated that the videotape was material to his decision to plead guilty. [State v. Mustaro, 411 N.J. Super. 91 \(App. Div. 2009\).](#)



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