New Jersey Continuing Legal Education Services, LLC

Presents:

The Complete & Unabridged 'Driving on the Revoked List'

A Continuing Legal Education Seminar

The Complete & Unabridged
'Driving on the Revoked List'

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1. N.J.S.A. 39:3-40 Statute

Penalties for driving while license suspended, etc.

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

Except as provided in subsections i. and j. of this section, a person violating this section shall be subject to the following penalties:

a. Upon conviction for a first offense, a fine of $500.00 and, if that offense involves the operation of a motor vehicle during a period when the violator's driver's license is suspended for a violation of R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a), revocation of the violator's motor vehicle registration privilege in accordance with the provisions of sections 2 through 6 of P.L.1995, c.286 (C.39:3-40.1 through C.39:3-40.5);

b. Upon conviction for a second offense, a fine of $750.00, imprisonment in the county jail for at least one but not more than five days and, if the second offense involves the operation of a motor vehicle during a period when the violator's driver's license is suspended and that second offense occurs within five years of a conviction for that same offense, revocation of the violator's motor vehicle registration privilege in accordance with the provisions of sections 2 through 6 of P.L.1995, c.286 (C.39:3-40.1 through C.39:3-40.5);

c. Upon conviction for a third offense or subsequent offense, a fine of $1,000.00 and imprisonment in the county jail for 10 days. If the third or a subsequent offense involves the operation of a motor vehicle during a period when the violator's driver's license is suspended and the third or subsequent offense occurs within five years of a conviction for the same offense, revocation of the violator's motor vehicle registration privilege in accordance with the provisions of sections 2 through 6 of P.L.1995, c.286 (C.39:3-40.1 through C.39:3-40.5);

d. Upon conviction, the court shall impose or extend a period of suspension not to exceed six months;

e. Upon conviction, the court shall impose a period of imprisonment for not less than 45 days or more than 180 days, if while operating a vehicle in violation of this

section a person is involved in an accident resulting in bodily injury to another person;

f. (1) In addition to any penalty imposed under the provisions of subsections a. through e. of this section, any person violating this section while under suspension issued pursuant to section 2 of P.L.1972, c.197 (C.39:6B-2), upon conviction, shall be fined $500.00, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.

(2) In addition to any penalty imposed under the provisions of subsections a. through e. of this section and paragraph (1) of this subsection, any person violating this section under suspension issued pursuant to R.S.39:4-50, section 2 of P.L.1981, c.512 (C.39:4-50.4a) or P.L.1982, c.85 (C.39:5-30a et seq.), shall be fined $500, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year or more than two years, and shall be imprisoned in the county jail for not less than 10 days or more than 90 days.

(3) In addition to any penalty imposed under the provisions of subsections a. through e. of this section and paragraphs (1) and (2) of this subsection, a person shall have his license to operate a motor vehicle suspended for an additional period of not less than one year or more than two years, which period shall commence upon the completion of any prison sentence imposed upon that person, shall be fined $500 and shall be imprisoned for a period of 60 to 90 days for a first offense, imprisoned for a period of 120 to 150 days for a second offense, and imprisoned for 180 days for a third or subsequent offense, for operating a motor vehicle while in violation of paragraph (2) of this subsection while:

(a) on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property;

(b) driving through a school crossing as defined in R.S.39:1-1 if the municipality, by ordinance or resolution, has designated the school crossing as such; or

(c) driving through a school crossing as defined in R.S.39:1-1 knowing that juveniles are present if the municipality has not designated the school crossing as such by ordinance or resolution.

A map or true copy of a map depicting the location and boundaries of the area on or within 1,000 feet of any property used for school purposes which is owned by or leased to any elementary or secondary school or school board produced pursuant to section 1 of P.L.1987, c.101 (C.2C:35-7) may be used in a prosecution under subparagraph (a) of this paragraph.

It shall not be relevant to the imposition of sentence pursuant to subparagraph (a) or

(b) of this paragraph that the defendant was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property or while driving through a

school crossing. Nor shall it be relevant to the imposition of sentence that no juveniles were present on the school property or crossing zone at the time of the offense or that the school was not in session;

g. In addition to the other applicable penalties provided under this section, a person violating this section whose license has been suspended pursuant to section 6 of P.L.1983, c.65 (C.17:29A-35) or the regulations adopted thereunder, shall be fined $3,000. The court shall waive the fine upon proof that the person has paid the total surcharge imposed pursuant to section 6 of P.L.1983, c.65 (C.17:29A-35) or the regulations adopted thereunder. Notwithstanding the provisions of R.S.39:5-41, the fine imposed pursuant to this subsection shall be collected by the Motor Vehicle Commission pursuant to section 6 of P.L.1983, c.65 (C.17:29A-35), and distributed as provided in that section, and the court shall file a copy of the judgment of conviction with the chief administrator and with the Clerk of the Superior Court who shall enter the following information upon the record of docketed judgments: the name of the person as judgment debtor; the commission as judgment creditor; the amount of the fine; and the date of the order. These entries shall have the same force and effect as any civil judgment docketed in the Superior Court;

h. A person who owns or leases a motor vehicle and permits another to operate the motor vehicle commits a violation and is subject to suspension of his license to operate a motor vehicle and to revocation of registration pursuant to sections 2 through 6 of P.L.1995, c.286 (C.39:3-40.1 through C.39:3-40.5) if the person:

(1) Knows that the operator's license to operate a motor vehicle has been suspended for a violation of R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a); or

(2) Knows that the operator's license to operate a motor vehicle is suspended and that the operator has been convicted, within the past five years, of operating a vehicle while the person's license was suspended or revoked;

i. If the violator's driver's license to operate a motor vehicle has been suspended pursuant to section 9 of P.L.1985, c.14 (C.39:4-139.10) or for failure to comply with a time payment order, the violator shall be subject to a maximum fine of $100 upon proof that the violator has paid all fines and other assessments related to the parking violation that were the subject of the Order of Suspension, or if the violator makes sufficient payments to become current with respect to payment obligations under the time payment order;

j. If a person is convicted for a second or subsequent violation of this section and the second or subsequent offense involves a motor vehicle moving violation, the term of imprisonment for the second or subsequent offense shall be 10 days longer than the term of imprisonment imposed for the previous offense.

For the purposes of this subsection, a "motor vehicle moving violation" means any violation of the motor vehicle laws of this State for which motor vehicle points are assessed by the chief administrator pursuant to section 1 of P.L.1982, c.43 (C.39:5-30.5).

2. Elements of Offense

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

I. Driver Status

Refused D/L
Suspended D/L or Reciprocity
Revoked D/L or Reciprocity
Prohibited from Obtaining D/L

A. Includes the following types of Cases:

1. Reciprocity Privileges that are Suspended or Revoked

State v. Profita, 183 N.J. Super. 425 (App. Div. 1982)
State v. Colley, 397 N.J. Super. 214 (App. Div. 2007)

2. New Jersey License Suspended or Revoked

Court Imposed or Administrative

3. Grant of License Refused

Health, immigration status, not a fit person under N.J.S.A. 39:3-10

4. Prohibited from Obtaining

N.J.S.A. 39:3-10(b) or violators under the age of 17

II. Personally Operate

1. **Acts Constituting Operation of a Motor Vehicle**
   State v. Derby, 256 N.J. Super. 702 (Law Div. 1992)

2. **Personal Operation**
   State v. Cattafi, 226 N.J. Super. 409 (App. Div. 1988)

3. **Place of Operation**
   State v. McColley, 157 N.J. Super. 525 (App. Div. 1978)

III. Motor Vehicle

1. Words & Phrases from 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.

Mo-peds – N.J.S.A. 39:4-14.3(d) - No person shall operate a motorized bicycle unless he is in possession of a valid driver's license of any class or a motorized bicycle license, which shall be issued by the commission to any person 15 years of age or older, upon proof of identity and date of birth, and after he has passed a satisfactory examination as to his ability as an operator. Such examination shall include a test of the applicant's knowledge of such portions of the mechanism of motorized bicycles as is necessary to insure their safe operation and of the laws and ordinary usages of the road and a demonstration of his ability to operate a motorized bicycle.

Automobile" includes all motor vehicles except motorcycles.

Driver" means the rider or driver of a horse, bicycle or motorcycle or the driver or operator of a motor vehicle, unless otherwise specified.

"Operator" means a person who is in actual physical control of a vehicle or street car.

IV. During Period of Refusal, Suspension, Revocation or Prohibition

1. **Term of Suspension Period**

   State v. Zalta, 217 N.J. Super. 209 (App. Div. 1987)
   State v. Sandora, 272 N.J. Super. 206 (App. Div. 1994)
   ~~**State v. Somma, 215 N.J. Super. 142 (Law Div. 1987)**~~

2. **Requirement of Notice of Suspension vs. Strict Liability Offense**

   Collateral Attack on Suspension – State v. Ferrier, 294 N.J. Super. 198 (App. Div. 1996).

183 N.J.Super. 425, 444 A.2d 70

Superior Court of New Jersey, Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Annella PROFITA, Defendant-Appellant.
Submitted March 9, 1982.
Decided March 18, 1982.

Defendant was convicted before the Superior Court, Law Division, Monmouth County, of operating a motor vehicle in New Jersey at a time when her New York driver's license was suspended, and she appealed. The Superior Court, Appellate Division, Botter, P. J. A. D., held that: (1) statute providing that no person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate motor vehicle during the period of refusal, suspension, revocation, or prohibition applies to any nonresident motorist whose privilege to drive motor vehicle in state has been automatically suspended as a consequence of the suspension of his foreign driver's license, as well as to nonresidents whose reciprocity privilege has been suspended in the State, and (2) there was sufficient proof of personal injury to pedestrian who was involved in accident with defendant's car to warrant imposition of mandatory jail sentence under statute providing for such sentence for persons involved in accidents resulting in personal injury.

Affirmed.

*****71 *427*** Donald R. Ambrose, Red Bank, for defendant-appellant.

Alexander D. Lehrer, Monmouth County Prosecutor, for plaintiff-respondent (Jacqueline Sharkey, Asst. Prosecutor, of counsel and on the brief).

Before Judges BOTTER, ANTELL and FURMAN.

The opinion of the court was delivered by

BOTTER, P. J. A. D.

Defendant was convicted of violating N.J.S.A. 39:3-40 for operating a motor vehicle in New Jersey at a time when her New York driver's license was suspended. In addition to a fine of $200 which was imposed, defendant was sentenced to 45 days in the Monmouth County Corrections Institution, to be served on weekends. This accorded with the provisions of N.J.S.A. 39:3-40 which mandate such punishment where the motorist is involved in an accident resulting in personal injury. Enforcement of that penalty was stayed pending this appeal.

Defendant Annella Profita was a New York resident until moving to New Jersey in November 1980. Prior to moving to New Jersey defendant's New York driver's license was suspended because of her failure to respond to two summonses for traffic violations in that state. While driving her automobile on January 3, 1981 in the parking lot of a supermarket in Little Silver, New Jersey, defendant was involved in an accident with an eight-year-old boy who was a pedestrian. The boy was injured, but not seriously. A police officer who was called to the scene ascertained that defendant's New York driver's license had been suspended, and defendant acknowledged that she knew of the suspension. Thereafter, she was given a summons for violating N.J.S.A. 39:3-40. The description of the violation was "operate while D.L. refused or reciprocity privilege suspended," contrary to N.J.S.A. 39:3-40.

***428** On this appeal defendant's principal contention is that defendant's "reciprocity privilege" had not been suspended within the meaning of N.J.S.A. 39:3-40 because no action had been taken by the New Jersey Division of Motor Vehicles to suspend her reciprocity privilege pursuant to N.J.S.A. 39:5-30. Defendant's contention is that a foreign motorist operating a motor vehicle in New Jersey while his driver's license has been suspended or revoked in his home state is not in violation of N.J.S.A. 39:3-40 although he may be in violation of other provisions of New Jersey's motor vehicle laws, such as N.J.S.A. 39:3-10, which provides that no person shall drive a motor vehicle on a highway in this State "unless licensed to do so in accordance with this article." N.J.S.A. 39:3-17 extends the right to a nonresident driver to drive a vehicle in this State, provided he "has complied with the law of his resident State, or country, with respect to the licensing of drivers or chauffeurs." Conceding that the suspension of her New York driver's license automatically**72** voided her reciprocity privilege to drive in this State, defendant contends, nevertheless, that she did not violate N.J.S.A. 39:3-40 because the suspension or revocation of a foreign driver's reciprocity privilege in that section refers to separate proceedings in New Jersey pursuant to N.J.S.A. 39:5-30 by which such privilege may be suspended or revoked.

These contentions were rejected by the judges of the municipal court and the court below to which defendant had appealed her conviction. Both judges held that N.J.S.A. 39:3-40 applies to any driver whose driver's license had been suspended or revoked, and that defendant was such a driver. We agree with this interpretation. N.J.S.A. 39:3-40 provides in part:

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

(1) By amendment in 1941 the language was added making this section applicable to persons whose "reciprocity privilege" had been suspended or revoked. L.1941, c. 344, s 1. At that ***429** time N.J.S.A. 39:5-30, which authorizes the Director of Motor Vehicles to suspend or revoke a registration certificate and driver's license for a violation of the New Jersey motor vehicle laws, did not expressly authorize the revocation or suspension of a nonresident's reciprocity privilege. It was not until the 1945 amendment to N.J.S.A. 39:5-30, L.1945, c. 256, s 1, that this section expressly authorized the suspension or revocation of a nonresident's reciprocity privilege. Thus, the 1941 amendment to N.J.S.A. 39:3-40, which made it unlawful for a person to operate a motor vehicle in this State while his reciprocity privilege was suspended or revoked, must have referred to the automatic loss of the reciprocity privilege provided by N.J.S.A. 39:3-17 rather than the loss of such privilege by separate action in this State under N.J.S.A. 39:5-30. Although not referring to this legislative history, the Attorney General of New Jersey had ruled by Formal Opinion, 1956, No. 23, that N.J.S.A. 39:3-40 applies to a nonresident whose driver's license has been suspended or revoked in his home state, whether or not action has been taken against his reciprocity privilege in this State under N.J.S.A. 39:5-30. We conclude, therefore, that N.J.S.A. 39:3-40 applies to any resident and nonresident motorist whose driver's license has been suspended or revoked and to a nonresident motorist whose privilege to drive a motor vehicle in this State has been automatically suspended as a consequence of the suspension of his foreign driver's license, as well as to nonresidents whose reciprocity privilege has been suspended in this State by proceedings under N.J.S.A. 39:5-30.

(2) We turn now to defendant's contention that there was insufficient proof of personal injury to the child pedestrian who was involved in the accident with defendant's car. Defendant contends that the injury suffered by the child was so minimal that the Legislature could not have intended the strict penalties provided in N.J.S.A. 39:3-40 to apply to this case. The boy who was struck suffered a swollen ankle and some cuts and bruises on his knee and foot. He was given emergency treatment at a hospital and was released. His injury was painful, he had ***430** difficulty walking for several days, and sometime later a toenail fell off.

There is no basis for the conclusion that the Legislature meant the mandatory jail sentence to apply only in cases of serious injury. The purpose of the statute is to remove "presumptively unsafe drivers from the road...." State v. Fearick, 69 N.J. 32, 37, 350 A.2d 227 (1976). The simple and clear language of N.J.S.A. 39:3-40 makes it applicable to all persons "involved in an accident resulting in personal injury ...." In our view, the proofs in this case amply support the finding of personal injury within the meaning of N.J.S.A. 39:3-40. In State v. Fearick, supra, the Supreme Court rejected the contention that the mandatory 45-day jail sentence was meant to apply ***73** only to drivers who were at fault in causing the accident. Similarly, we are compelled to apply the plain meaning of the words used in the statute, "accident resulting in personal injury," and reject the contention that the Legislature meant more serious personal injury than occurred in this case.

(3) Lastly, defendant contends that the trial judge erred in allowing the child's father to testify to the child's injuries because the father was not named as a person having relevant knowledge during pretrial discovery as required by R. 3:13-3(a)(7), made applicable by R. 7:4-2(g) to cases tried by a municipal prosecutor in a municipal court. The record before us does not sustain this contention. We were not furnished a copy of the letter sent by defendant in which discovery was requested. The transcript

indicates that by that letter defendant's attorney sought to inspect and receive copies of documents pertaining to the case. The prosecutor stated that he had complied with the request and that defense counsel was given permission to look at anything in the file. The documents furnished to defense counsel were the police report and a "First Aid report." In these circumstances the trial judge did not abuse his discretion in allowing the boy's father to testify, even though his name apparently was not contained in the documents ***431** furnished to defense counsel. No specific request was made before trial for the names of prospective witnesses. Defense counsel did not ask for a continuance to meet the testimony concerning the boy's injuries, and we cannot perceive that the failure to supply the father's name before trial prejudiced defendant in preparing to meet the State's case.

Affirmed.

N.J.Super.A.D., 1982.
State v. Profita
183 N.J.Super. 425, 444 A.2d 70

Superior Court of New Jersey, Law Division,
Criminal Part, Cumberland County.
STATE of New Jersey, Plaintiff,
v.
Jason B. DERBY, Defendant.
Decided March 30, 1992.

Defendant was convicted in the Municipal Court, Commercial Township, of operating a vehicle while suspended, operating uninsured vehicle, and operating unregistered vehicle, and he appealed. The Superior Court, Law Division, Cumberland County, Serata, J.S.C., held that defendant who was seated in driver's seat, behind steering wheel of vehicle that was under tow and was in physical control of vehicle did not "operate" vehicle.

Reversed.

West Headnotes

***1068 *703** Michael Brooke Fisher, Cumberland County Prosecutor, for plaintiff (Raymond A. Marcolongo, Asst. Prosecutor).

***1069** Shapiro and Shapiro, Vineland, for defendant (Harold B. Shapiro, Attorney).

SERATA, J.S.C.

Jason Derby was convicted by the Commercial Township Municipal Court of *N.J.S.A.* 39:3-40-operating a vehicle while suspended; *N.J.S.A.* 39:6B-2-operating an uninsured vehicle; and, *N.J.S.A.* 39:3-4-operating an unregistered vehicle, thus requiring the following penalties: *N.J.S.A.* 39:3-40-fine of $500.00, plus costs and suspension of his driving privilege for 6 months; *N.J.S.A.* 39:6B-2-a fine of $300.00, plus costs, suspension of his driving privilege for one year, and 15 days community service; *N.J.S.A.* 39:3-4-a fine of $20.00 plus costs, ATS surcharge of $1.00.

The issue of operation has only been considered in a few New Jersey cases. In the case at bar, the issue is whether defendant while occupying a vehicle under tow, without an engine was operating his motor vehicle within the meaning of *N.J.S.A.* 39:3-40, *N.J.S.A.* 39:6B-2, and *N.J.S.A.* 39:3-4. This court's research does not find a statutory definition for "operation". ***704** *N.J.S.A.* 39:1-1 does however define "operator" as follows: *"Operator" means a person who is in actual physical control of a vehicle or street car.*

From the Municipal Court record this court finds the facts as follows: On July 22, 1991 defendant was observed by a New Jersey State Trooper in a vehicle that was being towed northbound on Hemlock Road in Laurel Lake, Commercial Township. The trooper observed the vehicle turn onto Dandelion Road at which point the vehicle's turn indicators and brake lights were engaged. The trooper testified he observed the defendant sitting behind the steering wheel of the vehicle in tow and opined that defendant was steering the vehicle. The record below also reveals that there was no engine in the towed vehicle. It is interesting to note that although the tow was illegal, there was no citation issued.

This court is thus faced with this issue. Whether occupying a vehicle while under tow, without an engine may be considered "operation" thereof within the meaning of the statute, if so, whether under the facts of this case, defendant's actions justify a conviction.

We find no New Jersey case law considering whether a vehicle in tow and incapable of being propelled under its own power fits into the definition of operation as set forth in *N.J.S.A.* 39:1-1 which is a requisite element necessary to obtain a conviction under *N.J.S.A.* 39:3-40, 39:3-4, and 39:6B-2. This question has, however, been considered by courts outside this jurisdiction and there are several cases on point. A person steering a disabled motor vehicle which is being towed by another car is not operating a motor vehicle within the meaning of a statute requiring such an operator to be licensed. *Dewhirst v. Connecticut,* 96 *Conn.* 389, 114 *A.* 100 (1921) This was a similar situation albeit a civil case. In *Dewhirst,* a motor vehicle had been towed for 25 miles, the person in that vehicle was sitting behind the steering wheel while the vehicle was being towed and was totally helpless so far as directing the ***705** course or conduct of such car. The court in *Dewhirst* held that the person in the vehicle being towed was not operating the vehicle. Courts have been struggling with the definition of "operation" since horse-drawn vehicles were replaced by motor vehicles and it seems that we may not be getting any closer to the solution of this problem. A person who manipulates the controls of a car with no engine cannot be said to be operating such a car. *State v. Swift,* 125 *Conn.* 399, 6 *A.*2d 359 (1939). For further case law *see; State v. Ferrenti,* 22 *Conn.Supp.* 494, 175 *A.*2d 378 (1961); *State v. Duggan,* 290 *Or.* 369, 622 *P.*2d 316 (1981).

The few New Jersey cases interpreting the definition of "operator", *N.J.S.A.* 39:1-1, fall into two distinct categories. First, the definition that has developed under *N.J.S.A.* 39:4-50, Driving Under the Influence of Alcohol. "Operation" in this context has been broadened to address societal concerns caused by the damages that drunk drivers inflict on this State's roadways. Second, a less restrictive definition that has been applied to motor vehicle code ****1070** and insurance violations promulgated under those sections of the New Jersey Statutes Annotated.

In *State v. Sweeney,* 77 *N.J.Super.* 512, 520, 187 *A.*2d 39 (App.Div.1962) the court addressed the issue of whether for the purposes of *N.J.S.A.* 39:4-50, the statutory definition of operation only envisioned those situations where the operator actually drives the vehicle. The court held it did not, and adopted a broader approach. Where the acts of the operator demonstrate physical control of the vehicle and those acts demonstrate an intent to put the vehicle into motion then the defendant operated the vehicle. The defendant in *Sweeney* entered the vehicle, turned on the ignition, started the motor in operation while behind the steering wheel. It is this control which justifies the inference

of intent to operate. In *State v. Prociuk,* 145 *N.J.Super.* 570, 368 *A.*2d 436 (1976) the Court held there were three basic ways to show "operation" within the meaning of the statute proscribing operation of a motor vehicle while impaired: observation by the arresting officer, evidence of intent to drive ***706** while in physical control of the vehicle, or confession by defendant that he was driving. There is also a requirement that the vehicle must at least be operable. In *Prociuk* the defendant was found within 150 yards of a vehicle which was, at the time the arresting officer arrived, temporarily inoperable due to lack of gas. Defendant disclosed to the arresting officer that he had just run out of gas on the ramp and he wanted the officer's assistance in obtaining more gas. The court determined it was clear from the defendant's statements to the officer that he was driving the vehicle shortly before his arrest, thereby sustaining a conviction of operating a motor vehicle while impaired. In *State v. Jeannette,* 172 *N.J.Super.* 587, 412 *A.*2d 1339 (Law Div.1980) the court held that intentional movement of a motor vehicle without engine power is sufficient operation to fall within the definition of operation as required under *N.J.S.A.* 39:4-50. The defendant in *Jeannette* was sitting on the seat of his motorcycle riding it down a slight incline for a short distance. The court went on to state that the public is to be protected from the operation by an intoxicated driver of a motor vehicle that has been placed in motion, whether powered by its engine or by gravity. In *State v. Grant,* 196 *N.J.Super.* 470, 483 *A.*2d 411 (App.Div.1984) police officers responded to a report pertaining to a suspicious vehicle possibly occupied by an intoxicated driver. Upon their arrival they observed a vehicle occupied by defendant, parked along the shoulder of the road with the defendant asleep behind the steering wheel in the driver's seat. The engine was not running and the headlights were off. The court applied *Kelly v. Gwinnell and Paragon Corp.,* 96 *N.J.* 538, 476 *A.*2d 1219 (1984) where the New Jersey Supreme Court held that a conviction for driving while impaired could be sustained on a showing that the defendant was found intoxicated at the wheel of a vehicle with the engine off at a position other than a normal one for parking. In *Grant* defendant was intoxicated, behind the wheel of a vehicle parked along the shoulder of a road, a place not usual for parking, thus raising the inference that defendant in exercising control over ***707** the vehicle had operated the vehicle to the place where the officers observed it parked. Intoxication, control over the vehicle and its unusual place of rest taken together are of sufficient magnitude to sustain a conviction under *N.J.S.A.* 39:4-50. In *State v. Stiene,* 203 *N.J.Super.* 275, 496 *A.*2d 738 (App.Div.1985) the intoxicated defendant unsuccessfully attempted to move his vehicle which had run out of gas under its own power, and then later had his mother use another vehicle in an attempt to push the car back to his home. The court held when one in an intoxicated state places himself behind the wheel of a motor vehicle and not only intends to operate it in a public place, but actually attempts to do so and there is the possibility of motion, he violates the statute.

The trilogy of cases from the New Jersey Supreme Court *State v. Mulcahy,* 107 *N.J.* 467, 527 *A.*2d 368 (1987); *State v. Wright,* 107 *N.J.* 488, 527 *A.*2d 379 (1987); ****1071** *State v. Tischio,* 107 *N.J.* 504, 527 *A.*2d 388 (1987) hold when a person enters a vehicle and puts himself in control of the vehicle and intends to drive the vehicle and there is some physical action that puts the vehicle in motion that defendant has operated a vehicle for the purposes of *N.J.S.A.* 39:4-50. In *State v. DiFrancisco,* 232 *N.J.Super.* 317, 556 *A.*2d 1307 (Law Div.1988), defendant was found slumped over the driver's seat, his foot on the brake, keys in the ignition and the engine warm. The front end of the truck was in a driveway, the bed of the truck in a ditch, defendant's breath had the strong odor of alcohol. At the time of defendant's arrest he was seated in a vehicle which could not be operated, and as such defendant was not operating the vehicle at the time of his arrest and since the vehicle was in a ditch could not have intended to operate the vehicle. The court held under those facts that operation was impossible and defendant could not be convicted under the driving while impaired statute.

A second line of cases has developed in New Jersey dealing with the interpretation of the definition of operation, these few cases deal with motor vehicle code and insurance violation. In ***708** *Stupin v. Sanchez,* 113 *N.J.Super.* 84, 272 *A.*2d 761 (App.Div.1971), plaintiff was on his way home from work when his tire went flat; he proceeded to fix the flat and was injured. The court held that the plaintiff was operating the car at the time of the accident since fixing a flat tire was part of operating the car to enable him to get home. In *Caldwell v. Kline,* 232 *N.J.Super.* 406, 557 *A.*2d 661 (App.Div.1989), the plaintiff's car blew a rod in the engine and had it towed to a garage for repair. It is the vehicle's temporary inoperability that plaintiff claims removes him from disqualification of *N.J.S.A.* 39:6-70 and 78. In *State v. DeMarco,* 157 *N.J.Super.* 341, 384 *A.*2d 1113 (App.Div.1978), the court held that a vehicle in a state of partial disassembly in a repair shop was a motor vehicle requiring certification of ownership and registration. A vehicle does not lose its character as such because it is temporarily inoperable, but a vehicle whose owner no longer intended to operate his vehicle would not be precluded from the fund, because the vehicle is more than merely temporarily inoperable.

These cases show that a vehicle, albeit temporarily inoperable, retains its character as a motor vehicle if the operator subjectively intended to restore its ability to operate. Conversely, a vehicle that is no more than a shell loses its character as a motor vehicle and is as such "inoperable."

[1] It is this court's conclusion that the Legislature intended but one definition of operation as evidenced by the promulgation of *N.J.S.A.* 39:1-1. The distinction that has developed over the years in the interpretation of "operation" between cases involving the driving while impaired statute, *N.J.S.A.* 39:4-50 and those motor vehicle code and insurance cases should be eliminated. If the Legislature intended to differentiate the definition of operation creating varying standards, it should promulgate in the New Jersey Statutes Annotated separate and distinct classification defining operation for the purpose of driving while impaired and for those arising out of the motor vehicle code. In order to show operation a three prong ***709** test must be met, the elements are: physical control over a vehicle, an intent to operate and an ability to do so; this prong requires at least that the vehicle be capable of operation.

[2] Defendant was charged with driving while suspended, operating an uninsured vehicle and operating an unregistered vehicle. The Municipal Court below found defendant guilty on all three charges, finding in effect he was the operator of the vehicle in tow.

In the case at bar defendant was seated in the driver's seat, behind the steering wheel of a vehicle that was under tow. The defendant was clearly in physical control of the towed vehicle and as such the first prong of the test is satisfied. The defendant testified, in the court below, that he was in the towed vehicle to exercise control should it be required. Therefore, defendant subjectively intended to operate and as such the second prong of the test is met. Defendant, however, was in a vehicle that had no engine as it had been pulled ***1072** earlier in the day because it was blown. It is axiomatic that in order to "operate", the vehicle must in some way be capable of operation. Here, the defendant was occupying a vehicle which could only be characterized as a shell; it was utterly and totally incapable of operation in every sense of the word. This vehicle, incapable of operation under its own power, cannot satisfy the third prong which requires an ability to operate.

It is the opinion of this court after carefully analyzing all of the facts and reviewing, at considerable length, the statutory authority and case law of this State as well as those from out-of-state jurisdictions, that defendant was not operating a vehicle. The application of the test outlined by this court to the facts pending clearly show that the vehicle in tow, without an engine, was incapable of operation, it then logically follows that defendant could not be said to be operating the vehicle; therefore, the holding of the Municipal Court of Commercial Township is reversed and defendant is found not guilty.

***710** The prosecutor will prepare the appropriate order under the five-day rule.

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Frank E. CATTAFI, Defendant-Appellant.
Submitted June 8, 1988.
Decided July 6, 1988.

SYNOPSIS

Defendant was convicted in the Cedar Grove Municipal Court of driving while his license was revoked. On de novo appeal, the Superior Court, Law Division, Essex County, again found defendant guilty and imposed fine, and defendant appealed. The Superior Court, Appellate Division, Gaulkin, J.A.D., held that defendant could not be convicted of driving with revoked license based on his presence as front-seat passenger in vehicle operated by individual who was not a licensed driver but held permit allowing him to operate automobile under supervision of licensed driver.

Reversed.

***867 *410** Hetchka, Maenza & Bachmann, for defendant-appellant (Keith A. Bachmann, on the brief).

Herbert H. Tate, Jr., Essex County Prosecutor, for plaintiff-respondent (John S. Redden, Deputy First Asst. Prosecutor, of counsel).

***409** Before Judges KING, GAULKIN and GRUCCIO.

The opinion of the court was delivered by

GAULKIN, J.A.D.

Defendant was found guilty in the Cedar Grove Municipal Court of driving while his license was revoked. *N.J.S.A.* 39:3-40. He was fined $750 as a second offender. *Id.* On his *de novo* appeal, the Law Division again found him guilty and reimposed the $750 fine. Defendant appeals from the Law Division judgment.

The facts are undisputed. On July 5, 1987, defendant was a front-seat passenger in a vehicle operated by his brother, Patrick. Patrick was not a licensed driver, but held a permit allowing him to operate an automobile under the supervision of a licensed driver. *N.J.S.A.* 39:3-13. Defendant was not licensed to drive, for his license had been revoked.

Defendant's attorney conceded that he was in the car "to accommodate what he believed was a permit driver." A police officer stopped the vehicle and, after ascertaining the facts, charged defendant with violating *N.J.S.A.* 39:3-40, which provides in relevant part:

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

Relying on the statutory definition of "operator" as a person "in actual physical control of a vehicle" (*N.J.S.A.* 39:1-1), defendant***411*** says that he did not "personally operate" the car. In response, the State urges that *N.J.S.A.* 39:3-40 must be read in conjunction with *N.J.S.A.* 39:3-13, which provides that a permittee may operate a vehicle only "under the control" of a licensed driver and that both the permittee and the licensed driver "shall be held accountable for all violations" of the motor vehicle and traffic laws. Since defendant undertook to supervise Patrick as a permittee, the State argues, he exercised control of the car, accepted responsibility for its operation and thus "personally operated" it within the meaning of *N.J.S.A.* 39:3-40.

We find the State's argument unpersuasive. By purporting to validate Patrick's operation of the car as a permittee, defendant may be said to have assumed "supervision" and "control" of Patrick, albeit in violation of *N.J.S.A.* 39:3-13. And it may follow that defendant thereby became accountable for all violations of the motor vehicle and traffic laws, since a driver with a revoked license who undertakes responsibilities reserved to a licensed driver should not be any less accountable than a duly licensed driver. But supervision and control of Patrick, and accountability for his driving, do not establish that defendant ***868*** "personally" operated the car within the meaning of *N.J.S.A.* 39:3-40. "Personally" means without the intervention of another, not through an agent or substitute. *See Webster's Third New International Dictionary,* 1686 (1976); *Funk & Wagnall's New Standard Dictionary* 1844 (1952). Since defendant's "operation" of the car was through Patrick, he cannot be said to have "personally" operated the car that Patrick himself was personally operating.

The judgment of conviction is reversed.

N.J.Super.A.D.,1988.
State v. Cattafi
226 N.J.Super. 409, 544 A.2d 866

Superior Court of New Jersey,Appellate Division.
STATE of New Jersey, Plaintiff-Respondent, v. Jon R. McCOLLEY, Defendant-Appellant.
Submitted March 7, 1978. Decided March 28, 1978.

Defendant was convicted before the Middlesex County Court of driving while impaired and driving while on the revoked list, and he appealed. The Superior Court, Appellate Division, held that: (1) statutes prohibiting driving while impaired and driving while on the revoked list were applicable to motorist who was driving in nonpublic parking lot owned by company in which he was a principal, and (2) defendant who opted to be sentenced under new law establishing rules governing driving while under influence of alcohol was properly sentenced as a second or subsequent offender.

Affirmed.

Mohr & Mintz, Colonia, for defendant-appellant (J. Gary Mohr, Colonia, on the brief).

C. Judson Hamlin, Middlesex County Prosecutor, for plaintiff-respondent (Raymond F. Storch, Jr., Asst. Prosecutor, on the brief).

***526** Before Judges LORA, SEIDMAN and MILMED.

PER CURIAM.

Defendant Jon R. McColley appeals his convictions for driving while impaired, in violation of N.J.S.A. 39:4-50(b), and driving while on the revoked list, in violation of N.J.S.A. 39:3-40.

The record shows that on October 31, 1976 at 1:21 a. m. defendant was seen driving a car in a parking lot by two Woodbridge Township police officers who had earlier seen McColley in an intoxicated and disorderly condition in a nearby store.

The parking lot, which is owned by a moving company in which defendant is a principal, is behind the company's business offices and is used primarily to park the company's trucks. Defendant's residence is also located on the lot.

Although there is no fence around the property, a sign stating "No Parking, Private Property" is posted principally to keep nearby beauty parlor customers off the property. There is access from the lot directly onto one street and through a driveway onto a second street. Access to the driveway entrance is blocked during the day but not at night.

At the time defendant was apprehended by the police he was moving a friend's car that was parked in the wrong section of the property to another part of the lot. It is uncontested that defendant was not attempting to leave the property and that he was on the revoked list on that date.

[1] Defendant appeals both convictions, contending that N.J.S.A. 39:4-50(b) and N.J.S.A. 39:3-40 do not apply to private property not devoted to public use.

N.J.S.A. 39:4-50(b) provides in pertinent part:

A person who operates a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol shall ***528** be subject, for a first offense, to a fine of not less than $50.00 nor more than $100.00 and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of 6 months from the date of his conviction.

****266** In earlier cases we held that the drunk or impaired driving statute applied to the operation of vehicles on private property to which the public had access. State v. Gillespie, 100 N.J.Super. 71, 241 A.2d 239 (App.Div.1968), certif. den. 51 N.J. 274, 239 A.2d 663 (1968); State v. Sisti, 62 N.J.Super. 84, 162 A.2d 297 (App.Div.1960). But we broadened this holding in State v. Magner, 151 N.J.Super. 451, 453, 376 A.2d 1333 (App.Div.1977), to include the drunken or impaired operation of a vehicle irrespective of where it took place, stating that "(t)he failure to include language limiting the offense to public streets and highways persuades us that it was the intention of the Legislature to deal with drunken operation of a motor vehicle, irrespective of where it took place." We further reasoned that the nature of the property on which the driving occurred is irrelevant since there is "no less threat of extraordinary danger of injury to the driver and others or damage to property because that particular folly is performed in a private place than it would were it to occur in a quasi -public or public place." Id. at 454, 376 A.2d at 1334. Accordingly, we affirm defendant's conviction for violation of N.J.S.A. 39:4-50(b).

Defendant challenges his conviction for driving while on the revoked list in violation of N.J.S.A. 39:3-40 on the ground that N.J.S.A. 39:3-10, which provides in part that "(n)o person shall drive a motor vehicle on a public highway in this State unless licensed to do so in accordance with this article," must be read in pari materia with N.J.S.A. 39:3-40 so as to imply a requirement that a person may only be convicted for driving while on the revoked list if he or she drives on a public highway.

N.J.S.A. 39:3-40 provides in pertinent part:

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, ***529** shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

[2] In State v. O'Grady, 19 N.J.Misc. 559, 21 A.2d 864 (Cty.Ct.1941), the court rejected a contention similar to that here advanced by defendant McColley. In O'Grady defendant likewise argued that the same provision in N.J.S.A. 39:3-10 required that N.J.S.A. 39:4-50(b) be read to prohibit only driving while impaired on a public highway, and that N.J.S.A. 39:4-50 did not apply to private property. The following reasoning in that case is equally applicable in the instant case:

* * * It is true that by virtue of R.S. 39:3-10; N.J.S.A. 39:3-10, no person is permitted to drive a motor vehicle on a public highway unless licensed to do so in accordance with the provisions of said article. But, before obtaining such license, it is equally true that any person exhibiting the proper qualifications had a right to operate a motor vehicle over the highways of this State by complying with the provisions of said article. It is this right and not the license which is forfeited by virtue of the legislation in question. This must be quite clear, because for a first offense the forfeiture was for a period of two years from the date of conviction, whereas, the license is only in force for one year, and for a subsequent violation the forfeiture is perpetual. So that a person operating a motor vehicle in a private place, which he may do without obtaining a license therefor, upon being convicted of violating section 4-50, nevertheless, forfeits his right to obtain a license to drive a motor vehicle in a public place, for the period set forth in the statute and therefore his right to so operate an automobile. (19 N.J.Misc. at 563, 21 A.2d at 867.)

It follows, then, that a person may operate a motor vehicle on private property or in a private place when no license has been issued but not when a license has been revoked or suspended.

***267** Similarly, in State v. Handy, 74 N.J.Super. 294, 181 A.2d 203 (Cty.Ct.1962), it was held that the defendant was properly convicted of violations of both N.J.S.A. 39:3-10 and N.J.S.A. 39:3-40 where he was driving at a time his license ***530** was revoked and he had not taken the steps necessary to restore his driving privileges. The court explained:

Reflection will also reveal that a violation of each statutory section is a different affront to or disturbance of the general welfare and safety of the community. In violating N.J.S.A. 39:3-10 the offender signifies his possible inaptitude to drive a motor vehicle, and circumvents the licensing authority, regulations, and fees of this State. However, in violating N.J.S.A. 39:3-40 the offender asserts his defiance of public sanctions imposed for community safety before his fitness to drive again has been determined by the Director of Motor Vehicles pursuant to R.S. 39:5-32, 39:5-33 and 39:5-35. (at 299, 181 A.2d at 206.)

See also, State v. Williams, 21 N.J.Misc. 329, 332, 34 A.2d 141 (Recorder's Ct.1943). We are in accord with the reasoning of these cases.

[3] [4] It is obvious, then, that the two statutes have different purposes and that the restriction in N.J.S.A. 39:3-10 that the offense be committed on a public highway in no way affects N.J.S.A. 39:3-40, which contains no reference to the offense occurring on a public highway. As stated in State v. Magner, supra, 151 N.J.Super. at 454, 376 A.2d at 1334, "the general rule (is) that if a motor vehicle statute makes no references to offenses occurring on a public highway, it is usually held that the statute applie(s) generally throughout the State." See also, State v. Valeriani, 101 N.J.Super. 396, 401, 244 A.2d 510 (App.Div.1968).

[5] On the violation of N.J.S.A. 39:4-50(b), the County Court suspended defendant's driver's license for one year, sentenced him to 60 days in the county workhouse, suspended on condition defendant attend and complete an alcohol rehabilitation program and pay a fine of $500 plus costs. On the violation of N.J.S.A. 39:3-40, defendant was ordered to pay a $200. fine plus costs. Defendant contends that "since this matter is being decided under the new N.J.S. 39:4-50 it is believed that any suspension * * * should not have a period of suspension of longer that (sic) six months since this would be the defendant's first conviction under the new law."

***531** The transcript of the sentencing proceedings of June 10, 1977 shows that defendant opted to be and was sentenced under the new act. We are of the view that he was properly sentenced thereunder as a second or subsequent offender in light of the language of s 6 of the act (L.1977, c. 29) which involves prior offenders and which provides for two kinds of relief for persons convicted of an alcohol-related offense prior to the effective date of the act. Cf. State v. Duswalt, 153 N.J.Super. 399, 405, 379 A.2d 1278 (App.Div.1977); State v. Culbertson, 156 N.J.Super. 167, 383 A.2d 729 (App.Div.1978), and see Report of the New Jersey Motor Vehicle Study Commission (1975), at 164, where reference is made to a "grandfather clause" and wherein, referring to the approximately 20,000 individuals under license suspension for periods of at least six months up to ten years, six months, on the effective date of a new statute, the Commission stated: "Fairness requires that they be accorded some relief that would place them in a similar position with respect to the law, and those who are convicted under the modified statute." (Page 151). See also Statement attached to Senate Bill 1423 dated September 27, 1976.

Defendant's convictions and the sentences imposed for violating N.J.S.A. 39:3-40 and N.J.S.A. 39:4-50(b) are affirmed.

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Ralph ZALTA, Defendant-Appellant.
Argued Dec. 10, 1986.
Decided Jan. 22, 1987.

SYNOPSIS

Defendant was convicted in the Superior Court, Law Division, Monmouth County, of driving while on the revoked list, and he appealed. The Superior Court, Appellate Division, Havey, J., held that: (1) application of statute prohibiting driving during period of suspension to convict defendant after expiration of determinate period of suspension did not deny defendant's procedural due process rights; (2) director of Division of Motor Vehicles was empowered to keep license in suspension beyond determinate period of suspension imposed by municipal court; and (3) evidence was sufficient to sustain conviction.

Fred Ira Eckhaus, Ocean Township, for appellant (Widman & Cooney, attorneys; Fred Ira Eckhaus, on the brief).

Mark P. Stalford, Asst. Prosecutor, for respondent (John A. Kaye, Monmouth County Prosecutor, attorney; Mark P. Stalford, of counsel and on the brief).

Before Judges KING and HAVEY.
The opinion of the court was delivered by

HAVEY, J.A.D.
Defendant was found guilty in the Municipal Court of West Long Branch of driving while on the revoked list, contrary to N.J.S.A. 39:3-40 and again upon his de novo appeal to the Law Division. As a third offender, he was sentenced to a ten-day jail term, fined $1,000 and his driving privileges were suspended for six months.

On appeal defendant raises the following points:

POINT I-FAILURE TO MAKE APPLICATION FOR RESTORATION DOES NOT RESULT IN AN INDIVIDUAL REMAINING ON THE REVOKED LIST INDEFINITELY. SUCH CONSTRUCTION WOULD RENDER N.J.S.A. 39:3-40 UNCONSTITUTIONAL IN THAT IT WOULD FAIL TO ADEQUATELY INFORM A PERSON OF THE PENALTIES THREATENED FOR VIOLATION. SUCH FAILURE DENIES DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND RENDERS THE STATUTE VOID FOR VAGUENESS.

POINT II-THE TRIAL COURT'S FINDING OF GUILT BEYOND A REASONABLE DOUBT WAS ERROR IN LIGHT OF THE LACK OF EVIDENCE TO SUPPORT SUCH FINDING AND SHOULD BE REVERSED.

Defendant was charged with driving while on the revoked list on May 24, 1985, after being stopped for various motor vehicle violations in West Long Branch and after producing an expired New York driver's license. At trial in the municipal court the State produced a certified copy of an abstract of defendant's driving record which described various actions taken by the New Jersey Division of Motor Vehicles against defendant's driving privileges dating from January 21, 1980 to January 25, 1982. The entry dated January 25, 1982 recorded the following violation: “operate during suspension period.” The State also produced a “Notice of Extension of Suspension” dated January *212 25, 1982 which the director had sent to defendant. The notice stated that the division had received information that defendant had been convicted of careless driving on November 1, 1980 in Eatontown. It further stated:

This information establishes you have driven a motor vehicle during suspension. Therefore, the suspension is extended for a period of 6 months in addition to the suspension already in effect.

When this period of suspension expires, you may make application for restoration of your driving privilege, and, providing **330 that there have been no additions to your driving record, your case will be reviewed and a restoration may be considered.

It is undisputed that defendant never applied for restoration of his driving privileges from January 25, 1982 to the date of his arrest, on May 24, 1985.

N.J.S.A. 39:3-40, in applicable part, reads as follows:

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driving license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation or prohibition. [Emphasis supplied].

Essentially, defendant's argument is that the statute's proscription against driving "... during the period of ... suspension ..." must be read as prohibiting the driving of a vehicle during the specific period of revocation, in this case, six months after the January 25, 1982 notice of suspension. Defendant contends that at the end of the six-month period of suspension, he was no longer on the revoked list; his New Jersey driving privileges had simply expired and he was thus only subject to a charge for driving while unlicensed, contrary to N.J.S.A. 39:3-10. He reasons that to construe the statute to mean that his privileges remained suspended until he applied for restoration would render the statute constitutionally void for vagueness. We disagree.

[1] [2] In our view, a person of ordinary intelligence acting in good faith would interpret the phrase "during the period of ... suspension ..." under N.J.S.A. 39:3-40 to mean that his suspension would continue until actual restoration of his license by the director. See State v. Cameron, 100 N.J. 586, 591, 498 A.2d 1217 (1985); *213 State v. Lee, 96 N.J. 156, 166, 475 A.2d 31 (1984); State v. Pickens, 124 N.J.Super. 193, 196, 305 A.2d 802 (App.Div.), certif. den. 63 N.J. 581, 311 A.2d 4 (1973). Moreover, defendant received a clear, unambiguous notice from the Division that upon expiration of the suspension period, defendant may apply for restoration and, providing he had not received additional citations, restoration would be considered. Thus defendant was clearly on notice that his suspension continued beyond the six-month period. We are satisfied that no procedural due process guarantee was violated here.

[3] The question is whether the director is empowered to keep a license in suspension beyond the determinate period of suspension imposed by the municipal court. We conclude that the director has such power. He has unqualified licensing jurisdiction, N.J.S.A. 39:3-10; he is given the power after due notice to suspend or revoke driving privileges for any violation of the Motor Vehicle Act "... or on any other reasonable grounds ...", N.J.S.A. 39:5-30; he has discretion, subject to specific provisions of the act, to determine the manner by which driving privileges shall be restored, N.J.S.A. 39:5-32, and he may charge a fee for the restoration of a license and "promulgate such regulations hereunder as he may deem necessary." N.J.S.A. 39:3-10a.

[4] [5] We are satisfied that implicit in this pervasive power over the licensing and suspending of driving privileges is a right to keep a license in suspension until it is restored after appropriate application for restoration by the licensee. The suspension of driving privileges is not necessarily punitive in purpose. Vance v. State, 67 N.J.Super. 63, 67, 169 A.2d 835 (App.Div.1961). It is a measure "for the prospective safety and protection of the traveling public in the nature of an auxiliary remedial sanction." Ibid, quoting Sylcox v. Dearden, 30 N.J.Super. 325, 329-330, 104 A.2d 717 (App.Div.1954). The determinate suspension period imposed under the Act or regulations is a mandatory consequence of a conviction, not a measure of the maximum period of time the director may keep a license in suspension on any "reasonable grounds" under his distinct statutory powers. See *214 Vance v. State, supra, 67 N.J.Super. at 67, 169 A.2d 835. The difficult nature of the director's task in maintaining the records of motor vehicles and licensees in this State is a matter of public record. It is perfectly reasonable to require the licensee to come forward and prove that he **331 has not suffered additional violations and to pay a fair restoration fee before the license is restored. This procedure gives the director a uniform and simplified tool to assure that the licensee has not had additional violations, and that restoration is appropriate.

Here, defendant was on notice on January 25, 1982 of his right to apply for restoration of his driving privileges but failed to do so as of the date he received the summons. As of that date, his driving privileges therefore remained suspended.

[6] [7] Defendant's contention that the finding of guilt was unsupported by the evidence is clearly without merit. The conviction was predicated upon the admission into evidence of the certified copy of defendant's driving record and the January 25, 1982 Extension of Suspension. The records were properly admitted under Evid.R. 63(13) and Evid.R. 63(15). See State v. Matulewicz, 101 N.J. 27, 30-31, 499 A.2d 1363 (1985); State v. Martorelli, 136 N.J.Super. 449, 346 A.2d 618 (App.Div.1975), certif. den. 69 N.J. 445 (1976); State v. Kalafat, 134 N.J.Super. 297, 301, 340 A.2d 671 (App.Div.1975).

Affirmed.

N.J.Super.A.D.,1987.
State v. Zalta
217 N.J.Super. 209, 525 A.2d 328

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Arthur S. SANDORA, Defendant-Appellant.
Argued Feb. 7, 1994.
Decided March 2, 1994.

Defendant was convicted in the Municipal Court, Metuchen Borough, of driving while his license was suspended. On appeal, the Superior Court, Law Division, Middlesex County, convicted defendant in a trial de novo. Defendant appealed. The Superior Court, Appellate Division, Bilder, J.A.D., (retired and temporarily assigned on recall), held that defendant's operation of motor vehicle, after period of suspension but prior to restoration of his driver's license, constituted violation of statute prohibiting operation of motor vehicle while license is suspended.

Affirmed.

Michael P. Hrycak, Cranford, argued the cause for appellant.

Simon Louis Rosenbach, Asst. Prosecutor, argued the cause for respondent (Robert W. Gluck, Middlesex County Prosecutor, attorney).

Before Judges MUIR, Jr. and BILDER.

BILDER, J.A.D. (retired and temporarily assigned on recall).

Defendant Arthur Sandora was convicted in the Metuchen Borough Municipal Court of driving while his license was suspended. *N.J.S.A.* 39:3-40. He was fined $500; ordered to pay $25 court costs and a $1 ATS fee; and his driver's license was suspended for an additional thirty day period. On appeal to the Law Division, he was again convicted in a trial *de novo* on the record below where he received the same fine and court costs, an additional $7.75 costs on appeal was imposed, but the driver's license suspension was reduced to 10 days.

On September 3, 1992, while driving in Metuchen, defendant was stopped for going straight through an intersection when he was in a left turn only lane. A motor vehicle check of defendant's driving status revealed that he was on the suspended driving list. Defendant did not deny his license had been suspended but told the police officer that he was on his way to the Department of Motor Vehicles office to reinstate his license. The ***729** officer issued a summons for driving while on the suspended list.

Defendant's license had been suspended as of February 25, 1992 for 180 days because of a failure to pay three parking tickets. Before the Municipal Court defendant testified that he had paid the tickets and had been told to go to any Motor Vehicle office to be reinstated. He testified that he believed that once he paid the tickets, he was off the suspended list and also believed that to get his driving privileges reinstated, he had to go to a Motor Vehicle office and pay $30. He ultimately did this but it was after the summons had been issued.

Defendant in reliance on a Law Division opinion, *State v. Somma,* 215 *N.J.Super.* 142, 521 *A.*2d 386 (Law Div.1986), contends before us, as he did below, that his operation of motor vehicle, after a period of suspension but prior to the restoration of ****208*** his driver's license, did not constitute a violation of *N.J.S.A.* 39:3-40. *See State v. Somma, supra,* at 148, 521 *A.*2d 386. More specifically he argues that the 180 day suspension by the Motor Vehicle Department had ended in August 1992; that he could not be found guilty of violating *N.J.S.A.* 39:3-40 on September 3, 1992 when the summons was issued.

After the *Somma* opinion was filed, but before it was published, we arrived at an opposite conclusion in *State v. Zalta,* 217 *N.J.Super.* 209, 525 *A.*2d 328 (App.Div.1987).[FN1] Because *Somma* had not been published, we made no reference to it. We agree with the courts below that this case is controlled by *Zalta.*

FN1. *Somma* was decided October 21, 1986. *Zalta* was argued on December 10, 1986 and decided on January 22, 1987.

Defendant invites us to accept the reasoning of *Somma* and disagree with *Zalta.* We decline to do so and disapprove *Somma.*

Affirmed.

N.J.Super.A.D.,1994.
State v. Sandora
272 N.J.Super. 206, 639 A.2d 728

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Rebecca FERRIER, Defendant-Appellant.
Argued Sept. 18, 1996.
Decided Oct. 4, 1996.

Defendant was convicted in the Superior Court, Law Division, Sussex County, of driving while her driver's license was suspended. Defendant appealed. The Superior Court, Appellate Division, Rodríguez, J.A.D., held that defendant should have challenged any deficiencies in suspension of her license by appealing from that decision, rather than attacking it collaterally; overruling *State v. Wenof*, 102 N.J.Super. 370, 246 A.2d 59, and *State v. Kindler*, 191 N.J.Super. 358, 466 A.2d 984.

Affirmed.

John R. Klotz, Rutherford, for appellant.

Thomas E. Bracken, Assistant Prosecutor, for respondent (Dennis O'Leary, Sussex County Prosecutor, attorney).

Before Judges LONG, SKILLMAN and A.A. RODRÍGUEZ.

The opinion of the court was delivered by

RODŔIGUEZ, A.A., J.A.D.

Defendant was convicted in the Municipal Court of Sparta and again, after a trial *de novo* in the Law Division, of driving while her driver's license was suspended, N.J.S.A. 39:3-40. The municipal judge found that this was defendant's third conviction for the same offense and imposed a mandatory custodial ten-day term, as well as a sixty-day loss of license, a $1,000 fine, and $30 in court costs. The Law Division judge imposed the same sentence. We affirm.

On August 17, 1994, the Director of the Division of Motor Vehicles (Director), suspended defendant's driving privileges for a period of ninety days. Defendant did not move to restore her driving privileges after the expiration of the period of suspension. On December 23, 1994, defendant operated a motor vehicle and received a summons.

The case was tried on stipulated facts. The transcript of the hearing in the municipal court indicates,

The stipulations are that operation is not in question. The defense is stipulating that on the date of the summons-I believe it was December 23rd, 1994, in Sparta Township-the defendant was operating a motor vehicle.

***200** Also, there is a stipulation as to her certified abstract, which shows she was, indeed,-her privileges were revoked on that date. Her driving privileges were revoked.

Also, there's an order of suspension. The order of suspension has a date prepared, a date of August 17th, 1994, showing that her privileges were suspended as of August 15th, 1994. It also shows another outstanding suspension that was effective May 1st, 1994. And there's a mailing list showing that that order of suspension was mailed to her. And I believe there's a stipulation that she received the order of suspension.

On appeal, defendant contends that: (1) she was deprived of due process when the Director suspended her driver's license without informing her of the charge and affording her the opportunity to be heard prior to the suspension, and (2) revocation of her driver's license was ineffective due to the Director's failure to comply with the requirements of *N.J.S.A.* 39:5-30 and 39:5-30.10.

[1] [2] [3] We have carefully considered these contentions and are satisfied that they are clearly without merit. *R.* 2:11-3(e)(2). We merely note that defendant should have challenged any deficiencies in the suspension of her driver's license by appealing from that decision, rather than attacking it collaterally as a defense to a charge of violating *N.J.S.A.* 39:3-40. An order of suspension by the Director is a decision by a state administrative agency which may only be challenged directly in the Appellate Division after all administrative remedies have been exhausted. *R.* 2:2-3(a)(2); *Pascucci v. Vagott,* 71 *N.J.* 40, 53, 362 *A.*2d 566 (1976). Jurisdiction to consider an attack on a final decision of a state administrative agency is vested exclusively in the Appellate Division by way of appeal; the ***1229** Law Division may not entertain such a challenge. *Doe v. State,* 165 *N.J.Super.* 392, 400, 398 *A.*2d 562 (App.Div.1979). To the extent that *State v. Wenof,* 102 *N.J.Super.* 370, 374, 246 *A.*2d 59 (Law Div.1968) and *State v. Kindler,* 191 *N.J.Super.* 358, 466 *A.*2d 984 (Law Div.1983), suggest the contrary, they are overruled.

Affirmed.

N.J.Super.A.D.,1996.
State v. Ferrier
294 N.J.Super. 198, 682 A.2d 1227

3. Review & Analysis of Driving Abstracts

1. Admissibility in Evidence NJRE 803(c)(6) and NJRE 803(c)(8)

803(c)(6) - Records of regularly conducted activity. A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

803(c)(8) - Public records, reports, and findings. Subject to Rule 807, (A) a statement contained in a writing made by a public official of an act done by the official or an act, condition, or event observed by the official if it was within the scope of the official's duty either to perform the act reported or to observe the act, condition, or event reported and to make the written statement, or (B) statistical findings of a public official based upon a report of or an investigation of acts, conditions, or events, if it was within the scope of the official's duty to make such statistical findings, unless the sources of information or other circumstances indicate that such statistical findings are not trustworthy.

2. Use at Sentencing NJRE 101(a)(2)(c)

(a) Applicability; exceptions.

(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:

(C) proceedings in a criminal or juvenile delinquency action in which information is presented for the court's use in exercising a sentencing or other dispositional discretion, including bail and pretrial intervention and other diversionary proceedings;

3. **Sample Abstract Analysis – Counting the V & Dating the O**

V = Violation Date

O = Date the Suspension Term Began
Or
"OH NO! The Cops just pulled up behind me!"
(Hudson County only)

a. Determining the number of prior offenses

b. Determining the window of suspension term/restoration

c. Determining prior offenses – State v. Conte, 245 N.J. Super. 629 (Law Div. 1991)

d. Determining sentence enhancements (s/c, dwi, ins, POAA, school zone, etc)

Superior Court of New Jersey, Law Division, Criminal Part, Middlesex County.
STATE of New Jersey, Plaintiff,
v.
Anthony T. CONTE, Defendant.
Decided Nov. 7, 1990.

The Municipal Court, Piscataway, imposed enhanced penalty upon driver following guilty plea to driving vehicle while on suspended or revoked list. Driver appealed. The Superior Court, Middlesex County, Law Division, Longhi, J.S.C., held that prior administrative suspensions of driving privileges by Division of Motor Vehicles are not prior convictions that will support imposition of enhanced penalty following conviction of driving vehicle while on suspended or revoked list.

Sentence reversed; remanded.

Manuel B. Sameiro, Jr., Roseland, for plaintiff (Alan A. Rockoff, Middlesex County Prosecutor, attorney).

Wayne J. Menz, for defendant (Menz & Luxenberg, attorneys, New Brunswick).

LONGHI, J.S.C.

This is an appeal from the imposition of an enhanced penalty following a guilty plea in municipal court to driving a vehicle while on the suspended or revoked list. The issue to be resolved is whether prior administrative suspensions of a person's driving privilege by the Division of Motor Vehicles (DMV) are convictions under *N.J.S.A.* 39:3-40.

On March 7, 1988, defendant was not privileged to operate a motor vehicle in the State of New Jersey because his driving privileges had been suspended by order of the Director of the DMV for having operated his vehicle while on the revoked list. Nevertheless, on March 7, 1988, defendant drove a vehicle in Piscataway, New Jersey. He was caught and charged with driving on the suspended or revoked list in violation of *N.J.S.A.* 39:3-40. He plead guilty to the charge in the Piscataway Municipal Court on June 11, 1990.

At the time of sentencing the judge had available a certified copy of defendant's driving history. The DMV record disclosed that defendant's license had previously been administratively suspended on two separate occasions by the DMV for operating a motor vehicle during a period of driving privilege suspension. The orders of suspension issued by the DMV were accomplished administratively pursuant to *N.J.S.A.* 39:5-30 and *N.J.A.C.* 13:19-10.8.

***631** The judge took the position that the two DMV suspensions equated to prior convictions and therefore sentenced defendant, for the March 7, 1988 violation, as a third-time offender under *N.J.S.A.* 39:3:40.

N.J.S.A. 39:3-40 in pertinent part provides:

A person violating this section shall be subject to the following penalties:

a. Upon conviction for a first offense, a fine of $500.00;

b. Upon conviction for a second offense, a fine of $750.00 and imprisonment in the county jail for not more than five days;

c. Upon conviction for a third offense, a fine of $1,000.00 and imprisonment in the county jail for 10 days;

d. Upon conviction, the Court shall impose or extend a period of suspension not to exceed six months....

The word conviction is not defined in the statute. *Black's Law Dictionary* defines conviction as "[t]he final judgment in a verdict or finding of guilty, a plea of guilty...." *Black's Law Dictionary* (6 ed. 1990) at 333. *N.J.S.A.* 2C:44-4(a) defines "prior conviction of an offense" as "[a]n adjudication *by a court* of competent jurisdiction that the defendant committed an offense constitutes a prior conviction." Emphasis supplied. Conviction has also been defined as "the confession of the accused *in open court* or the verdict returned by the jury which ascertains and publishes the fact of guilt." *Tucker v. Tucker,* 101 *N.J.Eq.* 72, 73, 137 *A.* 404 (Ch.1927).

[1] [2] The motor vehicle statute, *N.J.S.A.* 39:3-40, is *quasi*-criminal and penal in nature and must be strictly construed against the State. *State v. Churchdale-Leasing Inc.,* 115 *N.J.* 83, 102, 557 *A.*2d 277 (1989). The word conviction, as it is used in *N.J.S.A.* 39:3-40, refers only to a plea or a finding of guilty in a court of competent jurisdiction and not an order of suspension entered by the DMV as the result of an administrative proceeding. The two prior suspensions are not convictions and defendant must be viewed as a first offender under the statute.

The sentence imposed is reversed and the matter is remanded to the Piscataway Municipal Court for sentencing in accordance with *N.J.S.A.* 39:3-40(a) and (d).

N.J.Super.L.,1990.
State v. Conte
245 N.J.Super. 629, 586 A.2d 353

4. Standard Sentencing under NJSA 39:3-40

a. Collateral Consequences with Every Conviction

1. $750 Surcharge – NJSA 17:29A-35(b)(3)
2. Nine Insurance Eligibility Points – NJAC 11:3-34 (appendix)
3. Two-year Restriction on License Plates – NJSA 39:3-33.5(c)
4. Disqualification from purchase of liability insurance – NJAC 11:3-2.8(d)
5. Enhanced Punishment for Future Convictions

b. Standard Sanction for NJSA 39:3-40

NOTE: Except as provided in subsections i. [POAA & Time Payments] and j. [Companion Point Violations] of this section, a person violating this section shall be subject to the following penalties:

1. First Offense
   * Fine = $506 – NJSA 39:3-40(a)
   * Additional d/l loss up to 6 months – NJSA 39:3-40(d)
   * Court costs - $33 – NJSA 22A:3-4

2. **Second Offense**

   * **Fine = 756 – NJSA 39:3-40(b)**

   * **Court costs - $33 – NJSA 22A:3-4**

   * **Additional d/l loss up to 6 months – NJSA 39:3-40(d)**

   * **One to Five days in the Slammer – NJSA 39:3-40(b)**

- **Loss of Registration if within 5 years of First Offense – NJSA 39:3-40(b)**

State v. Duva, 192 N.J. Super. 418 (Law Div. 1983) (Modified by Amendment in 2007)

State v. Pavao, 239 N.J. Super. 206 (App. Div. 1990) (Modified by Amendment in 2007)

3. **Third or Subsequent Offense**

   *** Fine = 1000 – NJSA 39:3-40(b)**

   *** Court costs - $33 – NJSA 22A:3-4**

   *** Additional d/l loss up to 6 months – NJSA 39:3-40(d)**

   *** Ten days in the Can – NJSA 39:3-40(b)**

- **Loss of Registration if within 5 years of Previous Offense – NJSA 39:3-40(b)**

State v. Stern, 242 N.J. Super. 695 (App. Div. 1990) (Sequence of Offenses Irrelevant to Sentecing)

Superior Court of New Jersey, Law Division,
Morris County.
STATE of New Jersey, Plaintiff,
v.
Marc S. STERN, Defendant.
Decided Feb. 5, 1990.

Defendant was convicted of driving while suspended and sentenced as third-time offender before the Municipal Court, Morris County. Defendant appealed. The Superior Court, Law Division, Marianne Espinosa Murphy, J.S.C., held that enhanced penalties for subsequent offenses of driving when license is suspended may be applied based on offenses of which defendant had not yet been convicted at time of arrest.

Affirmed.

Lee S. Trumbull, Morristown, for plaintiff.

Stanley J. Kaczorowski, Fanwood, for defendant.

***696** MARIANNE ESPINOSA MURPHY, J.S.C.

This municipal appeal concerns the applicability of the enhanced penalty provisions of *N.J.S.A.* 39:3-40 (driving when license suspended) to offenders who have not been previously convicted of that violation.

[1] Within a three-day period, defendant was charged three times with operating a motor vehicle while his driver's license was suspended. The first and third summonses were issued in Harding Township***1332** for driving on December 6 and 9, 1988. The second summons was issued in Morris Township for a violation on December 8, 1988. The Harding Township charges were disposed of in a single court appearance prior to the trial date for the Morris Township violation. The Harding Township Municipal Court treated those violations as first and second offenses.[FN1] Although those convictions preceded the conviction in Morris Township, defendant argues that he should be sentenced as a first offender because he had not been *convicted* of any violations prior to the date of the instant violation. An analysis of the statutory language and the legislative purpose for the enhanced penalty scheme conclusively demonstrates that defendant's argument is erroneous.

FN1. Defendant was represented by different counsel and did not appeal from those convictions.

N.J.S.A. § 39:3-40 provides enhanced penalties for subsequent offenses through the following language:

A person violating this section shall be subject to the following penalties:

a. *Upon conviction for a first offense,* a fine of $500.00;

b. *Upon conviction for a second offense,* a fine of $750.00 and imprisonment in the county jail for not more than five days;

c. *Upon conviction for a third offense,* a fine of $1,000.00 and imprisonment in the county jail for 10 days.... [Emphasis supplied]

The statute is notably silent as to any requirement that there be a "prior conviction" before an enhanced penalty would apply. This omission plainly distinguishes this statute from those which impose an enhanced penalty upon a clearly defined class ***697** of offenders who have previously been convicted of a particular type of offense. For example, the enhanced penalty of the Controlled Dangerous Substances Act applies "if, prior to the commission of the offense, the offender has at any time been convicted of an offense ... under this act...." *N.J.S.A.* 24:21-29b. The Graves Act also specifies that the offender "who has been previously convicted of an offense involving the use or possession of a firearm" is subject to a mandatory extended term. *N.J.S.A.* 2C:43-6c. Similarly, the sex offender statute (*N.J.S.A.* 2C:14-6) mandates certain minimum penalties "if the actor has at any time been convicted under Sections 2C:14-2 or 2C:14-3a. or under any similar statute...." FN2

FN2. The language in the sex offender statute "at any time" was interpreted to mean "at any previous time" in *State v. Anderson,* 186 *N.J.Super.* 174, 177, 451 *A.*2d 1326 (App.Div.1982), aff'd o.b. 93 *N.J.* 14, 459 *A.*2d 302 (1983).

The legislative purpose for an enhanced penalty provision may be more persuasive than a dissection of the statute's words in determining whether such a provision applies to multiple convictions or is limited to chronologically sequential convictions. In *State v. Hawks,* 114 *N.J.* 359, 554 *A.*2d 1330 (1989), the Supreme Court addressed the question whether a defendant whose first conviction was based upon a second offense may be considered "previously convicted." Answering this question in the affirmative, the Court considered the language of the statute unambiguous:

The plain language of the Graves Act provisions does not limit, either expressly or impliedly, the chronological sequence of convictions subject to its extended term provisions; the requirement is that there be a prior conviction. [at 365, 554 *A.*2d 1330]

However, the Court's analysis probed beyond the words to the purpose of the statute, noting a "fundamental difference in purpose" between the Graves Act and repeat-offender statutes aimed at rehabilitation. *Ibid.* The triggering of the mandatory extended term by a more limited requirement is completely consistent with the punitive goal of the statute. Its "focus is deterrence and only deterrence; rehabilitation plays no part in ***698** this legislation." *State v. Des Marets,* 92 *N.J.* 62, 68, 455 *A.*2d 1074 (1983).

**1333 The language and purpose of N.J.S.A. 39:3-40 are equally plain. Certainly, it is difficult to fathom any cognizable goals other than deterrence and punishment.[FN3] The limited legislative history available describes the 1982 amendment which created the enhanced penalties for multiple offenses simply as increasing the general penalties for the offense of driving on the revoked list. Moreover, the statute lacks any "prior conviction" requirement language. The absence of such triggering language, viewed within the context of the legislative purpose, suggests that the statute is to be construed to increase punishment for those who commit multiple offenses. As is the case in Graves Act cases, the effectiveness of enhanced punishment provisions is dependent upon the certainty of their application:

FN3. Although the class of offenders subject to punishment under N.J.S.A. 39:4-50 (driving while intoxicated) is more susceptible to classification as requiring rehabilitation, that statute has consistently been characterized as being deterrence-oriented. *See, e.g., State v. Sturn,* 119 *N.J.Super.* 80, 290 *A.*2d 293 (App.Div.), certif. den. 61 *N.J.* 157, 293 *A.*2d 387 (1972); *State v. Deckert,* 69 *N.J.Super.* 105, 173 *A.*2d 575 (Cty.Ct.1961).

... [T]he potency of ... deterrent value lies precisely in the certainty of enhanced punishment. To allow a defendant to escape the statutorily-required higher penalty because he or she has not yet been convicted, either because of strategic maneuvering by counsel or because of the vicissitudes of the court docket would create for defendants a windfall not envisioned by the Legislature. [114 *N.J.* at 366-367, 554 *A.*2d 1330]

[2] The facts of this case illustrate how the certainty of enhanced punishment would be dissipated by the statutory construction urged by defendant. Although guilty of three offenses, defendant would be subject only to first offender penalties on all three violations and on any others which occurred until a violation was reduced to a conviction. Thereafter, his exposure would be limited to second offender penalties for any violation occurring after the conviction until such time as a second conviction resulted. The windfall which could be engineered through docket juggling in a variety of municipal *699 courts might well permit a defendant to escape any enhanced penalties during a minimal period of suspension.

Therefore, it plainly appears that defendant was properly sentenced as a third offender.

N.J.Super.L.,1990.
State v. Stern
242 N.J.Super. 695, 577 A.2d 1331

5.Enhanced Sentencing under 39:3-40

Introduction – Former "notwithstanding" issues clarifierd by 2007 statutory amendment, thus abrogating:

State v. Wrotny, 221 N.J. Super. 226 (App. Div. 1987)

State v. Rought, 221 N.J. Super. 42 (Law Div. 1987)

a. Non-payment of Surcharges – NJSA 39:3-40(g)

In addition to the other applicable penalties provided under this section, a person violating this section whose license has been suspended pursuant to section 6 of P.L.1983, c. 65 (C.17:29A-35) or the regulations adopted thereunder, *shall be fined $3,000*. The court shall waive the fine upon proof that the person has paid the total surcharge imposed pursuant to section 6 of P.L.1983, c. 65 (C.17:29A-35) or the regulations adopted thereunder. Notwithstanding the provisions of R.S.39:5-41, the fine imposed pursuant to this subsection shall be collected by the Motor Vehicle Commission pursuant to section 6 of P.L.1983, c. 65 (C.17:29A-35), and distributed as provided in that section, and the court shall file a copy of the judgment of conviction with the chief administrator and with the Clerk of the Superior Court who shall enter the following information upon the record of docketed judgments: the name of the person as judgment debtor; the commission as judgment creditor; the amount of the fine; and the date of the order. These entries shall have the same force and effect as any civil judgment docketed in the Superior Court;

b. Personal Injury to Another– NJSA 39:3-40(e)

Upon conviction, the court shall impose a period of imprisonment for not less than 45 days or more than 180 days, if while operating a vehicle in violation of this section a person is involved in an accident resulting in bodily injury to another person

State v. Profita, 183 N.J. Super. 425 (App. Div. 1982) (injury defined)

State v. Fearick, 69 N.J. 32 (1976) (Constitutionality)

State v. Linnehan, 197 N.J. Super. 41 (App. Div. 1984) (Jury Trial and sentence limitations)

State v. Pickins, 124 N.J. Super. 193 (App. Div. 1973) (Constitutionality)

State v. Graney, 174 N.J. Super. 455 (App. Div. 1980) (Injury to someone other than defendant)

Apprendi v. New Jersey – 530 US 466 (2000) (Element of Proof)

c.Suspension imposed under NJSA 39:6B-2 - NJSA 39:3-40(f)(1)

In addition to any penalty imposed under the provisions of subsections a. through e. of this section, any person violating this section while under suspension issued pursuant to section 2 of P.L.1972, c. 197 (C.39:6B-2), upon conviction, shall be fined $500.00, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.

d.Suspension imposed for DWI, Refusal or Habitual Offender - NJSA 39:3-40(f)(2)

In addition to any penalty imposed under the provisions of subsections a. through e. of this section and paragraph (1) of this subsection, any person violating this section under suspension issued pursuant to R.S.39:4-50, section 2 of P.L.1981, c. 512 (C.39:4-50.4a) or P.L. 1982, c. 85 (C.39:5-30a et seq.), shall be fined $500, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year or more than two years, and shall be imprisoned in the county jail for not less than 10 days or more than 90 days.

State v. Cromwell, 194 N.J. Super. 519 (App. Div. 1984) (out-of-state)

State v. Colley, 397 N.J. Super. 214 (App. Div. 2007) (out-of-state)

State v. Cuccurullo, 228 N.J. Super. 517 (App. Div. 1988) (When do suspensions begin and end?)

NJSA 39:5-30a - "Habitual offender" means a person who has his license to operate a motor vehicle suspended three times for violations occurring within a 3-year period.

NOTE: Registration Suspension for First Offenders Required when operating while under suspension for DWI or Refusal – See NJSA 39:3-40(a)

Upon conviction for a first offense, a fine of $500.00 and, if that offense involves the operation of a motor vehicle during a period when the violator's driver's license is suspended for a violation of R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C.39:4-50.4a), revocation of the violator's motor vehicle registration privilege in accordance with the provisions of sections 2 through 6 of P.L.1995, c. 286 (C.39:3-40.1 through C.39:3-40.5)

e.Suspension imposed for DWI, Refusal or Habitual Offender and driving in a school zone - NJSA 39:3-40(f)(3)

In addition to any penalty imposed under the provisions of subsections a. through e. of this section and paragraphs (1) and (2) of this subsection, a person shall have his license to operate a motor vehicle suspended for an additional period of not less than one year or more than two years, which period shall commence upon the completion of any prison sentence imposed upon that person, shall be fined $500 and shall be imprisoned for a period of 60 to 90 days for a first offense, imprisoned for a period of 120 to 150 days for a second offense, and imprisoned for 180 days for a third or subsequent offense, for operating a motor vehicle while in violation of paragraph (2) of this subsection while:

(a) on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property;

(b) driving through a school crossing as defined in R.S.39:1-1 if the municipality, by ordinance or resolution, has designated the school crossing as such; or

(c) driving through a school crossing as defined in R.S.39:1-1 knowing that juveniles are present if the municipality has not designated the school crossing as such by ordinance or resolution.

A map or true copy of a map depicting the location and boundaries of the area on or within 1,000 feet of any property used for school purposes which is owned by or leased to any elementary or secondary school or school board produced pursuant to section 1 of P.L.1987, c. 101 (C.2C:35-7) may be used in a prosecution under subparagraph (a) of this paragraph.

It shall not be relevant to the imposition of sentence pursuant to subparagraph (a) or (b) of this paragraph that the defendant was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property or while driving through a school crossing. Nor shall it be relevant to the imposition of sentence that no juveniles were present on the school property or crossing zone at the time of the offense or that the school was not in session;

State v. Reiner, 180 N.J. 307 (2004) (Prior Convictions defined in DWI School Zone context)

f.Companion Point Violations for second or subsequent offenses - NJSA 39:3-40(j)

If a person is convicted for a second or subsequent violation of this section and the second or subsequent offense involves a motor vehicle moving violation, the term of imprisonment for the second or subsequent offense shall be 10 days longer than the term of imprisonment imposed for the previous offense.

For the purposes of this subsection, a "motor vehicle moving violation" means any violation of the motor vehicle laws of this State for which motor vehicle points are assessed by the chief administrator pursuant to section 1 of P.L.1982, c. 43 (*C.*39:5-30.5).

*** Plea Bargaining Considerations**

*** Merger of Offenses & Survival of Points**

State v. Martin, 335 N.J. Super. 447, 450-51 (App. Div. 2000)

We also regard the structure of the disposition in municipal court to have been defective. It is inappropriate to order merger of one charged offense to which no plea of guilty has been entered with another in respect of which a guilty plea has been entered. Merger occurs, not of charges but rather of convictions, when there are two or more convictions which, by the standards of *State v. Dillihay*, 127 N.J. 42, 601 *A.*2d 1149 (1992) and *State v. Gonzalez*, 123 *N.J.* 462, 588 *A.*2d 816 (1991), must be treated as one for the purposes of sentencing.

State v. Price (unpublished) 2007 WL 3287844

Under our holding in *State v. Wallace*, 313 *N.J.Super.* 435, 439 (App.Div.1998), *aff'd on other grounds* 158 *N.J.* 552 (1999), the convictions under Title 39 for speeding, *N.J.S.A.* 39:4-98, careless driving, *N.J.S.A.* 39:4-97, failure to observe a traffic control device, *N.J.S.A.* 39:4-81, following too closely, *N.J.S.A.* 39:4-89, and failure to observe marked lanes, *N.J.S.A.* 39:4-88A, must merge with the conviction for second-degree eluding. This is so, because "every significant element of [these offenses] is embodied in second-degree eluding." *Wallace supra*, 313 *N.J.Super.* at 439. [FN3]

This merger, however, does not obviate the imposition of mandatory penalties under Title 39. *State v. Baumann*, 340 *N.J.Super.* 553, 556-57 (App.Div.2001). "Those penalties ... must survive the merger, particularly since they represent not only punishment for the offender but also protection for the driving public." *Id.* at 557. Our reasoning and ultimate holding in *Baumann* was upheld by the Supreme Court in *State v. Wade*, 169 *N.J.* 302, 303 (2001). Here, although none of the merged Title 39, Chapter 4 offenses carry specific mandatory statutory penalties, the court is nevertheless required to assess motor vehicle points. *N.J.S.A.* 39:5-30.6; and *N.J.S.A.* 39:5-30.5a.

g.POAA and Time Payment - NJSA 39:3-40(i)

If the violator's driver's license to operate a motor vehicle has been suspended pursuant to section 9 of P.L.1985, c. 14 (C.39:4-139.10) or for failure to comply with a time payment order, the violator shall be subject to a maximum fine of $100 upon proof that the violator has paid all fines and other assessments related to the parking violation that were the subject of the Order of Suspension, or if the violator makes sufficient payments to become current with respect to payment obligations under the time payment order;

Supreme Court of New Jersey.
STATE of New Jersey, Plaintiff-Respondent,
v.
Robert FEARICK, Defendant-Appellant.
Argued Nov. 3, 1975.
Decided Jan. 8, 1976.

The Superior Court, Appellate Division, 132 N.J.Super. 165, 333 A.2d 29, held that statute imposing mandatory sentence of imprisonment upon a person whose license has been suspended and is involved in an accident resulting in personal injury applied to driver whose license was suspended but who was not cause of accident and upheld the constitutionality of such statute, and appeal was taken. The Supreme Court, Halpern, P.J.A.D., temporarily assigned, held that such statute was not limited to situation where unlicensed driver caused accident; and that the statute did not violate equal protection or due process.

Affirmed.

William T. McElroy, Morristown, for defendant-appellant (McElroy, Connell, Foley & Geiser, Morristown, attorneys).

R. Benjamin Cohen, Asst. Prosecutor, for plaintiff-respondent (Joseph P. Lordi, Essex County Prosecutor, attorney).
The opinion of the Court was delivered by

HALPERN, P.J.A.D., Temporarily Assigned.
The narrow issues presented on this appeal are (1) whether the mandatory jail terms of the proviso contained in N.J.S.A. 39:3-40[FN1] applies to a defendant whose driver's license has been suspended but who admittedly did not cause an automobile accident which resulted in injuries, and (2) if it does, whether such mandatory jail term is cruel or unusual punishment and violative of the due process or equal protection requirements of the United States Constitution.

FN1. No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.A person violating any provision of this section shall be fined not less than $200.00 nor more than $1,000.00, or be imprisoned in the county jail for not more than 6 months, or both Provided, that if while operating a vehicle in violation of this section, such person is involved in an accident resulting in personal

injury, the punishment shall include imprisonment for not less than 45 days. (Emphasis supplied).
*35 The stipulated facts are fully detailed in State v. Fearick, 132 N.J.Super. 165, 333 A.2d 29 (App.Div.1975), and will not be repeated herein at length. The pertinent portions thereof, relevant to a disposition of this appeal, may be briefly summarized. Defendant, Robert Fearick, suffers from recurring episodes of epilepsy. The Commissioner of Motor Vehicles, pursuant to authority granted by N.J.S.A. 39:3-10.4 Et seq., suspended his driving privileges in New Jersey effective November 3, 1973. On January 13, 1974, while the suspension was still operative, he drove a car which was involved in an accident resulting in personal injuries to himself and a number of other persons. The State stipulated that except for driving while his license was suspended, defendant was entirely without fault in causing the accident.

Based on these facts, defendant pleaded guilty in the Livingston Township Municipal Court to violating N.J.S.A. 39:3-40, but reserved his right to contest the mandatory jail term in the proviso of the statute. He was sentenced to the Essex County Correctional Center for a term of 45 days, fined $200 and assessed costs of $10. The sentence was stayed pending appeal.

The Essex County Court, on a De novo appeal on the record below, imposed the same fine and costs, but imposed no custodial sentence. The trial judge determined**229 that the imposition of a prison term rested in his sound discretion, and since the accident was not caused by any fault attributable to defendant, he saw fit not to confine him. On appeal, the Appellate Division modified the County Court's judgment by reinstating the 45 day prison term imposed by the Municipal Court. This Court granted defendant's petition for certification, 68 N.J. 143, 343 A.2d 431 (1975), and stayed the sentence pending this appeal.

[1] We have reviewed the entire record and are in substantial accord with the comprehensive views expressed by the Appellate Division that N.J.S.A. 39:3-40, under the factual circumstances existing in this case, mandates the imposition of the minimum 45 day prison sentence even though *36 the accident was not the fault of or caused by defendant. We also agree that the statute is constitutionally unassailable. However, some supplemental observations are called for in light of the arguments made by defendant.

Defendant argues that the Legislature never intended by the adoption of the proviso in N.J.S.A. 39:3-40, to mandatorily imprison a victim of epilepsy, albeit he was driving while his license was suspended, merely because he was involved in an accident wherein injuries resulted, when he was completely free of fault for the accident. To buttress his argument he points to that portion of the Appellate Division's decision which held:

The statute is designed to deter persons whose driver's licenses have been suspended or revoked from driving upon the public highways of the State. Protection of the public is the paramount consideration. It is not accurate to say that the Legislature has chosen to inflict punishment upon blameless individuals. Rather, the Legislature has chosen to recognize the occurrence of an accident in which someone is injured as an aggravating

circumstance which justifies the imposition of a greater sanction. State v. Pickens, 124 N.J.Super. 193, 196-197, 305 A.2d 802 (App.Div.1973), certif. den. 63 N.J. 581, 311 A.2d 4 (1973). (132 N.J.Super. at 168-169, 333 A.2d at 31).

He argues that the use of the term 'aggravating circumstance' presupposes that defendant must of necessity be at fault to 'justify' the imposition of the jail term. The argument lacks substance. It is crystal clear that the Appellate Division adopted the reasoning and language used in State v. Pickens, supra, and used the term 'aggravating circumstance' to indicate that if defendant had complied with the law, and refrained from driving on the highway, this particular accident would never have occurred. Fault played no part in the court's use of the term 'aggravating circumstance'. The 'aggravating circumstance' referred to by the court is the fact that defendant violated the law by driving a car when he should not have, and injury resulted therefrom.

In like vein, defendant argues that the statutory words '* * * involved in an accident resulting in personal injury*37 * * *' should be interpreted to mean that defendant was 'totally at fault, substantially at fault, partially at fault * * *.' Again, we disagree. The Legislature never intended to place such a limitation on the word 'involved.' See N.J.S.A. 1:1-1 which requires us to construe statutory language by giving the words used '* * * their generally accepted meaning, according to the approved usage of the language. * * *' The word 'involved,' as used in the context of the whole statute, means no more than that the person violating the statute was 'in' an accident, with resulting injuries, while driving when his license had been suspended.

[2] [3] The strained interpretation defendant asks us to place upon N.J.S.A. 39:3-40 is completely unwarranted. In view of the unambiguous language used in the statute evidencing the legislative goal to protect the public, as well as the suspended**230 driver himself, by removing presumptively unsafe drivers from the road, defendant's contention would lead to an unworkable, absurd and anomalous result. See N.J. Builders, Owners and Managers Assoc. v. Blair, 60 N.J. 330, 338-340, 288 A.2d 855 (1972). Our judicial function is to effectuate the legislative goal to the extent permitted by the statutory provisions. Singleton v. Consolidated, 64 N.J. 357, 362-363, 316 A.2d 436 (1974); State v. Hatch, 64 N.J. 179, 186, 313 A.2d 797 (1973); State v. Johnson, 42 N.J. 146, 176, 199 A.2d 809 (1964); State v. Sheppard, 125 N.J.Super. 332, 336-337, 310 A.2d 731 (App.Div.1973), certif. den. 64 N.J. 318, 315 A.2d 407 (1973). This cardinal rule of construction was incisively set forth by former Justice Benjamin Cardozo, of the United States Supreme Court, in his classic treatise, The Nature of the Judicial Process,

* * * In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful. I think the difficulty has its origin in the failure to distinguish between right and power, between the command embodied in a judgment and the jural principle to which the obedience of the judge is due. Judges have, of course, *38 the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices,

the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law. * * * (Seventeenth Printing, Yale University Press, September, 1957 at p. 129).

Viewed as above indicated, there is no room for judicial construction of N.J.S.A. 39:3-40-the State having proved the prescribed statutory elements, the courts have no alternative but to impose the penalty called for therein. We are charged with the duty of interpreting statutes, not of legislating. Powell v. Texas, 392 U.S. 514, 538, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), reh. den. 393 U.S. 898, 89 S.Ct. 65, 21 L.Ed.2d 185 (1968); State v. Sheppard, supra.

[4] [5] [6] Finally, we likewise concur in the views expressed by the Appellate Division that even though defendant was blameless for this accident and the resulting injuries, he was not deprived of equal protection of the laws. Neither was he denied due process of law, nor did the prison sentence imposed constitute cruel and unusual punishment. The Legislature may constitutionally choose a class of offenders for unequal treatment without violating a defendant's constitutional right to equal protection and due process of law, provided there is a rational nexus between the classification and a valid legislative purpose. Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966); State v. Smith, 58 N.J. 202, 276 A.2d 369 (1971). The classification of suspended drivers who are in accidents which result in injuries is not unreasonable merely because other suspended drivers are not mandatorily subject to being jailed if they drive without being in an accident reslting in injuries. The proviso in the statute, objected to by defendant, applies to all who fall within its classification. The legislative approach to a solution of the problem was reasonable and the distinctions drawn are based on practical *39 experience. South Carolina v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). The mandatory jail term provides additional deterrence for those who drive while their licenses are revoked, and the incidence of the special penalty is supported rationally by the considerations already mentioned. The philosophy for such determination was stated thusly by **231 Justice Jacobs in Burton et al. v. Sills, 53 N.J. 86, 95, 248 A.2d 521, 525 (1968), app. dismissed 394 U.S. 812, 89 S.Ct. 1486, 22 L.Ed.2d 748 (1969).

The arguments bear on the wisdom of the legislation rather than on its validity. Presumably they were all weighed by the Legislature when it concluded that the Law would further the public interest and should be adopted. We do not sit here as a superlegislature and we accept the legislative judgment as to the wisdom of the statute.

The benefits and protection the statute affords to the public far outweigh the detriments imposed upon the selected class. See Rothman v. Rothman, 65 N.J. 219, 228, 320 A.2d 496 (1974); Jamouneau v. Harner, 16 N.J. 500, 109 A.2d 640 (1954), Cert. den. 349 U.S. 904, 75 S.Ct. 580, 99 L.Ed. 1241 (1955); see also Note, 82 Harv.L.Rev. 921, 922 (1969).

For the first time on this appeal, by way of supplemental brief, defendant suggests that in considering his equal protection and due process arguments we go beyond the test of determining whether there was ‘a rational relationship between the legislative goal

('protection of the public from the hazard of unlicensed drivers upon the highways') and the means employed to achieve that goal.' He argues that we should apply a stricter equal protection standard and require the State to show that N.J.S.A. 39:3-40 also 'promotes * * * a compelling governmental interest,' the test which the United States Supreme Court has ruled is appropriate 'in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications.' San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973).

*40 We are satisfied, however, that there is no justification for applying that test to the statute here involved. As we said in State v. Krol, 68 N.J. 236, 253, 344 A.2d 289, 298 (1975):

Under the so-called 'two-tiered' analysis of the federal equal protection clause, the state need show only a rational basis for its classification, unless it involves 'invidious' standards or infringes upon 'fundamental' rights, in which case it must show a 'compelling state interest.'

[7] N.J.S.A. 39:3-40 does not create statutory classifications which are inherently suspect or affect fundamental rights which are based solely on race, nationality, political affiliation, sex, right to vote, the right to travel, or any other 'fundamental' right. Because defendant will be deprived of his liberty in this case does not command our finding he is entitled to the extraordinary protection afforded by the 'compelling governmental interest' test. There is nothing inherently suspect in N.J.S.A. 39:3-40, nor does the mandatory jail sentence for those coming within its proviso improperly affect their fundamental rights. The test to be applied is the one we have applied, the 'rational relationship' test. See San Antonio Independent School District v. Rodriguez, supra; State v. Krol, 68 N.J. 236, 253, 344 A.2d 289 (1975).

[8] The penalty mandatorily imposed by the proviso in N.J.S.A. 39:3-40 cannot be classified as cruel and unusual punishment. Placing the offense proscribed by the statute against the form and extent of the punishment provided therein, we find nothing disproportionate involved. The punishment, in the light of present day concepts, appears facially reasonable and not cruel or unusual. Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910); State v. Hampton, 61 N.J. 250, 273-274, 294 A.2d 23 (1972); State v. Smith, 58 N.J. 202, 276 A.2d 369 (1971); State v. Guiendon, 113 N.J.Super. 361, 273 A.2d 790 (App.Div.1971).

**232 The judgment of the Appellate Division is affirmed.

*41 For affirmance: Justices MOUNTAIN, SULLIVAN, PASHMAN and SCHREIBER and Judges CONFORD, KOLOVSKY and HALPERN-7.

For reversal: None.

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Richard LINNEHAN, Defendant-Appellant.
Argued Oct. 24, 1984.
Decided Nov. 9, 1984.

SYNOPSIS

Defendant was convicted in the Red Bank Municipal Court of driving while intoxicated, careless driving, and two charges of driving while on revoked list. On appeal, he was again convicted in the Superior Court, Law Division, Monmouth County, and he appealed. The Superior Court, Appellate Division, Richard S. Cohen, J.A.D., held that defendant was not entitled to jury trial.

Affirmed.

Frank D. DeVito, Red Bank, for defendant-appellant (Francis X. Moore, Red Bank, attorney; Frank D. DeVito and Stephen Moore, Red Bank, on the brief).

James W. Kennedy, Asst. Prosecutor, for plaintiff-respondent (John A. Kaye, Monmouth County Prosecutor, attorney).

Before Judges MATTHEWS, FURMAN and COHEN.

The opinion of the court was delivered by

RICHARD S. COHEN, J.A.D.

Defendant was convicted in the Red Bank Municipal Court of driving while intoxicated, *N.J.S.A.* 39:4-50, careless driving, *N.J.S.A.* 39:4-97, and two charges of driving while on the revoked list, *N.J.S.A.* 39:3-40. On the drunk driving conviction, he was sentenced as a third offender to 180 ***35** days incarceration reduced by 90 days of community service. He was also fined $1,000 and his operator's license was revoked for ten years. His conviction for careless driving merged into the drunk driving conviction and was not the subject of a separate sentence. On each conviction for driving while on the revoked list, defendant was sentenced to 10 days incarceration, a fine of $1,500 and a license revocation for 2 1/2 years.

***43** Defendant appealed to the Law Division where he was again convicted and the same sentences were imposed. On appeal here, his sole argument is that one charged with drunk driving as a third offender is entitled to a jury trial.

[1] [2] Persons charged with crime are constitutionally entitled to trial by jury. Those charged with petty offenses are not. *Duncan v. Louisiana,* 391 *U.S.* 145, 88 *S.Ct.*

1444, 20 *L.Ed.*2d 491 (1968). The New Jersey Supreme Court has held that the only reliable test for distinction is the severity of the authorized punishment, and that jury trial is not required unless the maximum penalty to which the defendant is exposed exceeds six months incarceration and a fine of $1,000. *State v. Owens,* 54 *N.J.* 153, 254 *A.*2d 97 (1969); *In re Yengo,* 84 *N.J.* 111, 417 *A.*2d 533 (1980). *See Baldwin v. New York,* 399 *U.S.* 66, 90 *S.Ct.* 1886, 26 *L.Ed.*2d 437 (1970). Where factually related petty offenses are tried together whose maximum sentences total more than six months, and the defendant is not offered a jury trial, the sentences may not total more than six months. *State v. Owens, supra.* Concurrent jail sentences, each of which does not exceed six months, are permissible. *Id.* 54 *N.J.* at 163, 254 *A.*2d 97.

[3] The penalty for a drunk driving third offender is a mandatory term of incarceration for 180 days, a fine of $1,000 and loss of license for 10 years. *N.J.S.A.* 39:4-50. The statutory language, "a term of not less than 180 days," was not well chosen. However, we are satisfied of the legislative intent and we adopt the reasoning of *State v. Ferretti,* 189 *N.J.Super.* 578, 461 *A.*2d 193 (Law Div.1983) in this regard. Defendant was ordered to be jailed for a total of 200 days less 90 days of community service, or a net 110 days. Since his total sentence exposure was to incarceration of not more than six months and a fine of $1,000, and his actual incarceration will be less, there is no constitutional infirmity.

[4] Counsel asks us to consider the ten years of license revocation and excess insurance premiums involved in a third conviction of drunk driving. We do not belittle those consequences***44*** of conviction. We hold, however, that they are insufficient to convert a petty offense into a crime so as to require trial by jury.

Affirmed.

N.J.Super.A.D.,1984.
State v. Linnehan
197 N.J.Super. 41, 484 A.2d 34

Superior Court of New Jersey,
Appellate Division.
The STATE of New Jersey, Plaintiff-Respondent,
v.
William R. PICKENS, Defendant-Appellant.
Submitted March 19, 1973.
Decided June 8, 1973.

Defendant was convicted before the Monmouth County Court of operating a motor vehicle while on revoked list and becoming involved in accident resulting in personal injury and he appealed. The Superior Court, Appellate Division, Trautwein, J.A.D., held that statutory provision for mandatory prison sentence of not less than 45 days for person operating motor vehicle while on revoked list if person, while so operating vehicle, becomes involved in accident resulting in personal injury was not unconstitutional on ground that it was a legislative imposition of criminal redress for a civil wrong or on ground that it denied due process through inherent vagueness and uncertainty of legislative intent.

Affirmed.

Carl Klein, Asbury Park, for defendant-appellant.

George F. Kugler, Jr., Atty. Gen., for plaintiff-respondent (John De Cicco, Deputy Atty. Gen., of counsel and on the brief).

Before Judges FRITZ, LYNCH and TRAUTWEIN.

The opinion of the Court was delivered by

TRAUTWEIN, J.A.D.

This appeal challenges the constitutionality of N.J.S.A. 39:3-40 which provides for a mandatory jail sentence of not less than 45 days for a person***195*** operating a motor vehicle while on the revoked list if such person while so operating a vehicle is involved in an accident resulting in personal injury.

Facts have been stipulated. Defendant concedes his license was revoked. He further concedes that, while his license was thus revoked he operated his motor vehicle and that during its operation an accident occurred with another vehicle resulting in injuries to both drivers, those of the other driver being more extensive than defendant's.

At the municipal court level defendant was fined $200, with court costs of $10, and sentenced to 45 days in the county jail. On his appeal to the County Court, on the same stipulated facts as hereinabove recited, defendant challenged the constitutionality of that portion of the statute mandating a minimum jail sentence of 45 days. The County Court found defendant guilty and imposed a sentence identical to that in the municipal court plus an additional $20 court costs on the appeal.

Defendant contends that the mandatory prison sentence portion of the statute is unconstitutional on the grounds that legislative imposition of 'criminal redress' for a civil wrong is an abuse of discretion and that it works a denial of due process through inherent vagueness and uncertainty of legislative intent.

[1] The thrust of defendant's first contention is that the mandatory jail term is imposed for the commission of an unintentional tort-negligence-which is noncriminal in nature, and thus by directing a prison sentence the Legislature has wrongfully converted a civil wrong into a crime. This argument fails. A defendant convicted under the statute here involved may still have ***804** to face a civil suit for damages brought by the driver of the other car, cast in negligence. Our common law provides for that relief. The statute here involved is designed for separate and distinct purposes-punishment and deterrence to the end that the public be protected. Cf. State v. Smith, 58 N.J. 202, 276 A.2d 369 (1971); ***196** Vance v. State, 67 N.J.Super. 63, 67, 169 A.2d 835 (App.Div.1961). Thus the action is brought in the name of the State. To this end it has been held that the Legislature possesses broad discretion to impose both a criminal and civil or administrative sanction in respect to the same act or omission. Atkinson v. Parsekian, 37 N.J. 143, 154, 179 A.2d 732 (1962). Consistent with this proposition are an abundance of decisions characterizing proceedings to enforce Title 39 as quasi-criminal in nature. State v. Zucconi, 93 N.J.Super. 380, 384, 226 A.2d 16 (App.Div.1967), and cases therein cited.

Finally, on this point, defendant's emphasis on being jailed for involvement in an accident resulting in injury is misplaced. The gravamen of the offense here charged is driving on the revoked list. The fact that an accident occurs and injury results is an aggravating circumstance clearly recognized by the Legislature and correspondingly providing for a harsher punishment.

[2] [3] As to defendant's second contention that the statute is inherently vague to the point of a denial of due process, we find no merit. He offers a variety of hypothetical cases through which run common threads of either no fault on the accused's part or injury only to himself, as for example, driving on the revoked list and being hit in the rear while stopped or hitting a tree with injury only to himself. The fact is that such was not the case in this instance. Moreover, we do not believe that defendant had standing to raise these hypothetical cases within the context of his theory of error.

A contention that a statute violates due process because of vagueness is based on the theory the defendant had no fair warning that his conduct was proscribed. Thus, a defendant whose conduct was such that he clearly could tell it was prohibited will not be heard to say that the statute is overly broad in that another, in some hypothetical case, could be misled. (State v. Moretti, 52 N.J. 182, 192, 244 A.2d 499, 504 (1968))

It is abundantly clear that the conduct proscribed in N.J.S.A. 39:3-40 is not a departure from the standard of ***197** care of an ordinary prudent motor vehicle operator-negligence-but rather driving an automobile while one's license is revoked. Furthermore, one is unmistakenly warned that if he so conducts himself in violation of the statute, which results in an accident with bodily injury, such aggravating circumstances mandate the imposition of a jail sentence.

Thus reviewing the statute, we perceive no vagueness of any nature, let alone one arising to constitutional dimensions.

Affirmed.

Superior Court of New Jersey, Appellate Division.
STATE of New Jersey, Plaintiff-Respondent, v. Mark W. GRANEY, Defendant-Appellant.
Submitted June 3, 1980. Decided June 19, 1980.

A municipal court imposed 45-day jail term on defendant for driving while on the revoked list. The conviction and sentence were affirmed on trial de novo in the Superior Court, Law Division, Ocean County, and defendant appealed. The Superior Court, Appellate Division, Polow, J. A. D., held that statute mandating a 45-day jail term for a driver on the revoked list who is involved in an accident resulting in personal injury applies where the unlicensed driver is the only one who suffers injury.

Affirmed.

Stephen J. Boyle, Manahawkin, for defendant-appellant.

John J. Degnan, Atty. Gen., for plaintiff-respondent, (Keith M. Endo, Deputy Atty. Gen., of counsel and on the brief).

Before Judges MATTHEWS, ARD and POLOW.

The opinion of the court was delivered by

POLOW, J. A. D.

Defendant appeals from the trial court's determination that N.J.S.A. 39:3-40, which mandates a 45-day jail term for a driver on the revoked list who is involved in an accident resulting in personal injury, applies where only the unlicensed driver himself suffers injuries. The underlying facts are not in dispute. On September 11, 1979 defendant was driving a vehicle which left the road and struck a building. Personal injuries were sustained by defendant. As a result he was charged with driving while intoxicated, careless driving, leaving the scene of an accident and driving while his license was revoked. At the municipal court hearing the drunken driving and careless driving charges were dismissed and defendant entered guilty pleas to leaving the scene of the accident and driving while on the revoked list. It was stipulated that only defendant himself received personal injuries.

***457** The municipal court judge reluctantly concluded that N.J.S.A. 39:3-40 mandates a minimum 45-day jail term because defendant was involved in an accident resulting in personal injury as a driver on the revoked list. Hence, the mandatory minimum 45-day jail term was imposed. With consent of the prosecutor, defendant was permitted to serve his sentence on weekends. The conviction and sentence were affirmed on trial de novo in the Law Division.

N.J.S.A. 39:3-40 provides:

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

A person violating any provision of this section shall be fined not less than $200.00 nor more than $1,000.00, or be imprisoned in the county jail for not more than 6 months, or both provided, that if while operating a vehicle in violation of this section, such person is involved in an accident resulting in personal injury, the punishment shall include imprisonment for not less than 45 days. (Emphasis supplied)

Defendant argues that the underlined portion of the statute applies only when the violator is involved in an accident which results in personal injury to someone else. In support thereof, he refers to legislative history and interprets the mandatory jail provisions as being part of a bill intended to keep the unsatisfied claim and judgment fund solvent. Since only persons other than the driver could claim under the fund, defendant reasons that the mandatory jail provisions were intended to apply only when the unlicensed driver injured a potential claimant. He also seeks support for his contention in the fact that the Legislature has decriminalized suicide.

We have previously had occasion to construe the statute in question. In State v. Pickens, 124 N.J.Super. 193, 305 A.2d 802 (App.Div.1973), certif. den. 63 N.J. 581, 311 A.2d 4 (1973), defendant had operated his motor vehicle while his license was revoked and was involved in an accident resulting in injuries to himself and the other driver. As required by N.J.S.A. 39:3-40, the trial court imposed a 45-day jail term. On appeal defendant argued that the statute was ***458** unconstitutional because it imposed criminal penalties for a civil wrong and denied due process because it was vague. In rejecting both arguments we gave consideration to the legislative intent and concluded that the purpose of the statute was punishment and deterrence to the end that the public be protected; that the gravamen of the offense is driving on the revoked list and that the "fact that an accident occurs and injury results is an aggravating circumstance clearly recognized by the Legislature and correspondingly providing for a harsher punishment." Id. at 195-196, 305 A.2d at 804. However, we specifically declined to consider whether the mandatory penalty applied when the driver was not at fault or ***974** when he alone sustained injury, because those particular facts were not involved in the case. Id. at 196, 305 A.2d 802.

In State v. Fearick, 132 N.J.Super. 165, 333 A.2d 29 (App.Div.1975), aff'd 69 N.J. 32, 350 A.2d 227 (1976), defendant, whose license had been suspended, was not responsible for the accident. The County Court judges did not impose a jail term but we held that the statute mandated incarceration and reversed. Defendant's argument that the Legislature did not intend incarceration where the individual was not at fault was rejected based upon the following rationale:

The statute is designed to deter persons whose driver's licenses have been suspended or revoked from driving upon the public highways of the State. Protection of the public is the paramount consideration. It is not accurate to say that the Legislature has chosen to inflict punishment upon blameless individuals. Rather, the Legislature has chosen to recognize the occurrence of an accident in which someone is injured as an aggravating circumstance which justified the imposition of a greater sanction. (132 N.J.Super. at 168-169, 333 A.2d at 31, citation omitted)

We also rejected defendant's argument that the statute violates due process and equal protection because:

It is not unreasonable to conclude that the punishment of all persons who are involved in accidents resulting in personal injuries while driving at a time when their licenses are suspended or revoked will have a tendency to deter persons whose licenses are suspended or revoked from driving. (Id. at 169, 333 A.2d at 31)

(1) On appeal the Supreme Court affirmed, adding the following pertinent comment:

In view of the unambiguous language used in the statute evidencing the legislative goal to protect the public, as well as the suspended driver himself, by removing presumptively unsafe drivers from the road, defendant's contention would lead to an unworkable, absurd and anomalous result (citation omitted). (69 N.J. at 37, 350 A.2d at 229-230; emphasis supplied)

***459** Hence, the primary function of the mandatory jail term is to deter individuals whose licenses have been suspended from driving. Id. at 38-39, 350 A.2d 227.

A compelling analogy can be found in the history of legislative and judicial interaction in the construction and interpretation of the statute involving leaving the scene of an accident, N.J.S.A. 39:4-129(a) and (b). Prior to 1966 that statute required the "driver of any vehicle knowingly involved in an accident resulting in injury . . . to a person or damage to property" to stop, give his name and address and exhibit his license and registration to anyone else involved or to a police officer. In State v. Patterson, 47 N.J. 450, 221 A.2d 526 (1966), the driver who left the scene had been involved in a one-car collision with a tree. The damage to the tree was minimal but substantial damage was sustained by defendant's own vehicle. The court construed the statute as not applicable where only defendant's vehicle sustained damage. It concluded that the Legislature had intended the phrase "damage to property" to mean damage to property of another. Id. at 454-455, 221 A.2d 526. Within one year the Legislature amended N.J.S.A. 39:4-129 to make it clear that the statutory meaning of the phrase "property damage" includes damage to property of the violator himself. This quick response by the Legislature to the Patterson decision indicates an intent to include injuries sustained by the violator himself within the scope of similar language providing for mandatory punishment under the traffic regulation statute.

(2) We are fully satisfied that the primary statutory purpose in enacting the provision in question was to ensure the safety of the public on the highways. There is no support for defendant's theory that the legislative concern extends to all members of the public except the violator himself. Such an interpretation would require an illogical distortion of the plain language of the statute. "(T)he State having proved ***975** the prescribed statutory elements, the courts have no alternative but to impose the penalty called for therein." State v. Fearick, supra 69 N.J. at 38, 350 A.2d at 230.

Affirmed.

N.J.Super.A.D., 1980.
State v. Graney
174 N.J.Super. 455, 416 A.2d 972

Superior Court of New Jersey, Appellate Division.
STATE of New Jersey, Plaintiff-Respondent, v. Michael CROMWELL, Defendant-Appellant.
Argued June 6, 1984. Decided June 21, 1984.

SYNOPSIS

Defendant was convicted in the Superior Court, Law Division, Passaic County, of driving while on the revoked list, and he appealed, seeking reduction of term of license suspension. The Superior Court, Appellate Division, Gaulkin, J.A.D., held that defendant having been subjected to mandatory license suspension under New Jersey law following his New York drunk driving conviction, in keeping with policies of the Interstate Driver License Compact, his subsequent violation in New Jersey triggered enhanced penalties provision, giving same effect to the New York conduct as if it had occurred in New Jersey.

Affirmed.

Kevin G. Roe, Hackensack, for defendant-appellant (Lucianna, Bierman & Stillman, P.A., Hackensack, attorneys).

Steven E. Braun, Asst. Prosecutor, for plaintiff-respondent (Joseph A. Falcone, Passaic County Prosecutor, attorney; Margaret Ann F. Mullins, Asst. Prosecutor, on brief).

Before Judges MATTHEWS, J.H. COLEMAN and GAULKIN.

The opinion of the court was delivered by

GAULKIN, J.A.D.

Defendant was convicted in the Little Falls Municipal Court of driving while on the revoked list in violation of *N.J.S.A.* ***409** 39:3-40. He was sentenced to a 90 day county jail term and fined $500 and his driving license was suspended for 5 years. He was again convicted on his *de novo* appeal to the Law ***521** Division; that court imposed a $500 fine and a license suspension of 2 years.[FN1] On this appeal from the Law Division judgment defendant seeks to reduce the term of his license suspension because "the courts below erred in sentencing defendant ... as having been under a suspension issued pursuant to *N.J.S.A.* 39:4-50."

FN1. Defendant had already served the custodial sentence imposed by the municipal court.

Defendant, who holds a New Jersey driver's license, was convicted in New York of drunk driving. Based on that conviction, his license was suspended in New Jersey on September 9, 1982 pursuant to the Interstate Driver License Compact, *N.J.S.A.* 39:5D-1 *et seq.* The present offense occurred on October 18, 1982. Defendant acknowledges that he violated *N.J.S.A.* 39:3-40, but contends that he was not subject to the enhanced penalties imposed by that statute for a violation committed "while under a suspension issued pursuant to *R.S.* 39:4-50."

N.J.S.A. 39:3-40 prohibits driving by any person to whom a driver's license has been refused or whose license has been suspended or revoked and fixes penalties for driving despite the prohibition. As of the date of defendant's violation, the statute also provided:

Notwithstanding paragraphs a. through e., any person violating this section while under a suspension issued pursuant to *R.S.* 39:4-50 shall be subject upon conviction to a fine of $500.00, imprisonment in the county jail for 90 days, and an additional suspension of the license to operate a motor vehicle for a period of 5 years.

Following defendant's municipal court conviction and before his Law Division hearing, that portion of the statute was amended to read as follows:

Notwithstanding paragraphs a. through e., any person violating this section while under a suspension issued pursuant to *R.S.* 39:4-50, upon conviction, shall be fined $500.00, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.

***522** We are satisfied that defendant's violation of *N.J.S.A.* 39:3-40 occurred while he was "under a suspension issued pursuant to *R.S.* 39:4-50." The Interstate Compact describes it as the policy of "each of the party States" to:

(1) Promote compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such operators drive motor vehicles.

(2) Make the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the over-all compliance with motor vehicle laws, ordinances and administrative rules and regulations as a condition precedent to the continuance or issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party States.

N.J.S.A. 39:5D-4(a) implements those policies by providing that, with respect to a conviction in a party State [FN2] for driving while intoxicated (*N.J.S.A.* 39:5D-4(a)(2)), New Jersey

FN2. New York is a party to the Interstate Compact. *N.Y.Veh. & Traf.Law* § 516 (McKinney 1970).

... for the purpose of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported ... as it would if such conduct had occurred in [New Jersey].

[1] [2] As required by that provision, defendant was subjected to the mandatory license suspension of *N.J.S.A.* 39:4-50 following***410** his New York drunk driving conviction.[FN3] The conclusion is unavoidable that his violation of *N.J.S.A.* 39:3-40 occurred while he was "under a suspension issued pursuant to *R.S.* 39:4-50." That the enhanced penalties of *N.J.S.A.* 39:3-40 are thus triggered is entirely consistent with the

statutory language and design. Moreover, we find no merit in defendant's contention that the two year suspension ordered by the Law Division was inappropriate or excessive.

FN3. The Director of the Division of Motor Vehicles also has administrative authority to revoke or suspend the license of a driver convicted of drunk driving in any State, whether or not a party to the Interstate Compact. *N.J.S.A.* 39:5-30; *Tichenor v. Magee,* 4 *N.J.Super.* 467, 67 *A.*2d 895 (App.Div.1949); *N.J.A.C.* 13:19-11.1.

***523** To the extent that it may be read as inconsistent with our conclusion, *State v. Davis,* 95 *N.J.Super.* 19, 229 *A.*2d 682 (Law Div.1967), is expressly disapproved.

The judgment of conviction is affirmed.

N.J.Super.A.D.,1984.
State v. Cromwell
194 N.J.Super. 519, 477 A.2d 408

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
Lateef J. COLLEY, Defendant-Appellant.
Submitted Oct. 29, 2007.
Decided Dec. 14, 2007.

Background: Defendant was convicted in the Fort Lee Municipal Court, Tessaro, J., of driving while license suspended and he appealed. The Superior Court, Law Division, Criminal Part, Bergen County, Harry G. Carroll, upon trial de novo, found defendant guilty and imposed the same penalties as the municipal court. Defendant appealed.

Holdings: The Superior Court, Appellate Division, A.A. Rodríguez, P.J.A.D., held that:
(1) defendant's driving in New Jersey while his New York driver's license was revoked violated statute prohibiting driving when license refused, suspended, revoked or prohibited;
(2) revocation based on violation of New York's driving while intoxicated (DWI) statute supported enhanced penalty for subsequent New Jersey conviction for driving while suspended; and
(3) abstract of defendant's New York driving record satisfied self-authentication requirements.

Affirmed.

Breslin, Auty & Preziosi, Hackensack, attorneys for appellant (John J. Breslin, III, on the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Yomara Castro, Assistant Prosecutor, of counsel and on the brief).

Before Judges STERN, A.A. RODRÍGUEZ and C.S. FISHER.
The opinion of the court was delivered by

RODRÍGUEZ, A. A., P.J.A.D.

*216 In this opinion, we hold that a prior conviction in another state for conduct equivalent to that proscribed by N.J.S.A. 39:4-50 subjects a defendant to the enhanced penalty set by N.J.S.A. 39:3-40f(2) upon a subsequent conviction in this state. Defendant, Lateef J. Colley, appeals from his conviction by the Law Division for driving while suspended in violation of N.J.S.A. 39:3-40. We affirm.

On June 29, 2005, Port Authority Police Officer Robert Sisserson was on roving patrol of the area surrounding the George Washington Bridge. At approximately 7:15 p.m., Sisserson observed defendant's vehicle, a 2000 Nissan, traveling eastbound on Bruce Reynolds Boulevard in the right-turn-only lane. Rather than making a right turn as required, defendant proceeded straight through the intersection of Lemoine Avenue and Bruce Reynolds Boulevard. Sisserson stopped the Nissan and requested defendant's documentation. Defendant produced a New York State driver's license, indicating that he resides in Staten Island, New York. Upon reviewing defendant's driving credentials in his vehicle's mobile data terminal (MDT), Sisserson learned that defendant's New York license was suspended. As a result, he **1007 issued defendant two motor vehicles summonses.FN1 In his statement of facts, defendant notes that he objected to the introduction of information obtained through the MDT because it was inadmissible hearsay. However, defendant has not made an issue of the *217 admissibility of this evidence on appeal.FN2 It was subsequently determined that defendant was convicted in New York on March 1, 2005 for driving while impaired. Defendant's license was suspended the same day. Defendant has never challenged the accuracy of his driving abstract.

FN1. The other summons for failing to observe a traffic signal was dismissed by the municipal court.
FN2. See State v. Donis, 157 N.J. 44, 54, 723 A.2d 35 (1998) (permitting the use of MDTs by law enforcement to obtain information regarding a driver's status).
Defendant appeared at the Fort Lee Municipal Court to answer those charges. At that time, Municipal Court Judge Robert T. Tessaro accepted a proposed plea agreement, whereby the State agreed to dismiss the summons for failure to obey a signal in exchange for defendant pleading guilty to the driving while suspended charge. This agreement, however, was contingent upon the judge accepting the proposition that defendant was not subject to the enhanced penalty provision set by N.J.S.A. 39:3-40, which calls for the enhancement where the basis of the suspension was a violation of N.J.S.A. 39:4-50.

Judge Tessaro reserved his decision on this issue. Subsequently, Judge Tessaro advised counsel in writing that, after exhaustively researching the issue, it was his opinion that the enhanced penalties outlined in N.J.S.A. 39:3-40 were mandatory and applied to defendant's conviction.

Defendant moved for reconsideration or, in the alternative, to withdraw his guilty plea. Judge Tessaro denied reconsideration and the matter was tried upon defendant's withdrawal of his guilty plea. At the conclusion of the trial, defendant was found guilty of

violating N.J.S.A. 39:3-40. The judge imposed a $500 fine; $33 in court costs; a $6 surcharge; a ten-day jail term to be served in the Sheriff's Labor Assistance Program; and a one-year driving privilege suspension in the State of New Jersey.

Defendant appealed to the Law Division. Judge Harry G. Carroll held a trial de novo. Judge Carroll found defendant guilty and imposed the same penalties as the municipal court. The sentence was stayed pending appeal.

*218 On appeal, defendant contends that Judge Carroll "erred in the interpretation of the provisions of [N.J.S.A.] 39:3-40." Defendant further contends that it was error to accept into evidence "a document without a proper foundation." We disagree and affirm.

[1] Defendant argues that his conviction in New York for driving while impaired does not subject him to enhanced penalties pursuant to N.J.S.A. 39:3-40 because the prior conviction was not for a violation of N.J.S.A. 39:4-50. Specifically, defendant contends that a literal reading of N.J.S.A. 39:3-40 requires a conviction of N.J.S.A. 39:4-50 in this state in order to trigger the assessment of the enhanced penalty. Additionally, defendant asserts that the enhanced penalties do not apply because he is not the holder of a New Jersey driver's license. We reject these contentions.

[2] Pursuant to N.J.S.A. 39:3-40, "[n]o person ... whose driver's license or reciprocity privilege has been suspended or revoked ... shall personally operate a motor vehicle during the period of refusal, **1008 suspension, revocation or prohibition." This section is extended to nonresident drivers whose privilege to drive has been automatically suspended by virtue of N.J.S.A. 39:3-17, as a result of the revocation of their foreign license. State v. Profita, 183 N.J.Super. 425, 428-29, 444 A.2d 70 (App.Div.1982).

Here, the proofs show that as of March 1, 2005, defendant's license in New York was revoked. Thus, defendant was operating a motor vehicle in Fort Lee on June 29, 2005, in violation of N.J.S.A. 39:3-40.

[3] The next step is to analyze whether the enhanced penalties mandated by that statute should apply. According to N.J.S.A. 39:3-40, a person violating this section shall be subject to the following enhanced penalty:

Notwithstanding the provisions of subsection a. through e. of this section and paragraph (1) of this subsection, any person violating this section under suspension issued pursuant to R.S.39:4-50, ... shall be fined $500, shall have his license to operate a motor vehicle suspended for an additional period of not less than one *219 year or more than two years, and shall be imprisoned in the county jail for not less than 10 days or more than 90 days.

[N.J.S.A. 39:3-40f(2).]

Defendant argues that a literal reading of this statute does not support the imposition of enhanced penalties because he has no prior conviction pursuant to N.J.S.A. 39:4-50.

However, a review of New Jersey case and statutory law does not support such a strict statutory interpretation.

In Div. of Motor Vehicles v. Lawrence, 194 N.J.Super. 1, 2-3, 475 A.2d 1265 (App.Div.1983), we held that N.J.S.A. 39:4-50 and New York's drunk driving statute are of a "substantially similar nature" for purposes of the Interstate Driver License Compact, N.J.S.A. 39:5D-1 to -14. In Lawrence, we noted that "[b]oth deal with alcohol-related offenses and are aimed to deter and punish drunk drivers." Id. at 3, 475 A.2d 1265.

In State v. Cromwell, 194 N.J.Super. 519, 477 A.2d 408 (App.Div.1984), we analyzed whether a New York conviction for driving while impaired would subject a New Jersey licensed driver to enhanced penalties under N.J.S.A. 39:4-50. We looked to the Interstate Driver License Compact and determined that it required the State of New Jersey to "give the same effect to the conduct reported [by a foreign state] as it would if such conduct had occurred in [New Jersey]." Id. at 522, 477 A.2d 408 (quoting N.J.S.A. 39:5D-4(a)). Hence, we reasoned that it was "entirely consistent with the statutory language and design" to find that a violation of N.J.S.A. 39:3-40 and the triggering of the enhancement penalties occurred upon an out-of-state conviction for driving while impaired under a substantially similar statute to N.J.S.A. 39:4-50. Id. at 522, 477 A.2d 408.

Furthermore, in State v. Regan, 209 N.J.Super. 596, 602-04, 508 A.2d 1149 (App.Div.1986), we concluded that the underlying policy goal of the Interstate Driver License Compact, N.J.S.A. 39:5D-1 to -14, is to encourage the reciprocal recognition of motor vehicle violations that occurred in other jurisdictions, thereby increasing the probability that safety on highways would improve overall.

*220 Defendant argues that the facts presented in Cromwell and Lawrence are factually distinguishable because both of those cases involved New Jersey licensed drivers, which he has never been. This argument, however, is not persuasive in light of the fact that these very cases support the proposition that New York convictions for driving while impaired should be treated as the equivalent of a **1009 conviction under N.J.S.A. 39:4-50 for sentencing purposes. Lawrence, supra, 194 N.J.Super. at 2-3, 475 A.2d 1265; Cromwell, supra, 194 N.J.Super. at 522, 477 A.2d 408.

[4] Defendant also argues that, although N.J.S.A. 39:3-40 is unambiguous, the rule of lenity requires that any ambiguities be resolved in his favor. We disagree. The rule of lenity is a rule of default. It applies "when extrinsic sources do not resolve satisfactorily the alleged ambiguity." State v. Fleischman, 189 N.J. 539, 553 n. 4, 917 A.2d 722 (2007). Those circumstances are not present here.

[5] Defendant contends that a document purporting to be his abstract of driving record from the State of New York should not have been admitted into evidence because it did not satisfy the evidentiary prerequisites for self-authentication pursuant to N.J.R.E. 902(b). Specifically, defendant argues that the document did not contain the raised seal of the State of New York, nor was there testimonial foundation that the signature of the

signor of the document was affixed in his official capacity or that it was genuine. We reject these contentions.

[6] Pursuant to N.J.R.E. 902(b), "extrinsic evidence of authenticity as a condition precedent to admissibility is not required" when the document bears a seal from any state. Further, N.J.R.E. 902(b)(1) requires that the document bear "a signature purporting to be an attestation or execution."

In State v. Zalta, 217 N.J.Super. 209, 211, 525 A.2d 328 (App.Div.1987), we permitted the introduction of a certified copy of a driver's abstract to sustain a conviction for driving while on the revoked list. Here, the municipal court and the Law Division *221 admitted into evidence a copy of an electronic abstract of driving record on file with the New York Motor Vehicle Commission documenting actions taken against defendant's license in that state. There is an entry dated March 1, 2005, recording a concurrent conviction and revocation of defendant's New York license for driving while impaired in violation of New York's drunk driving statute. Both courts ruled that the abstract of driving record submitted by the State satisfied the requirements for self-authentication pursuant to N.J.R.E. 902(b).

Defendant's contention is that the seal is not "raised," and therefore, is not compliant with the requirements of N.J.R.E. 902(b). However, nowhere in the language of N.J.R.E. 902(b) does it state that a seal must be "raised" in order to meet the requirements under the rule. Hence, the requirement as outlined in N.J.R.E. 902(b), is satisfied by the presence of a large seal in the center backdrop of defendant's abstract of driving record.

Next, defendant argues that the State did not lay a proper foundation before the abstract of driving record was admitted into evidence because the State failed to offer any testimony regarding whether the individual whose signature is on the abstract of driving record had the requisite authority to sign the document. Further, defendant contends that there was no proof offered by the State proving that the signature was genuine.

At the bottom of the abstract of driving record appears the following language:

This is to certify that this document is a true and complete copy of an electronic record on file in the New York State Department of Motor Vehicles, Albany, New York. The record was made in regular course of New York State Department of Motor Vehicles daily business. It is the business of the New York State Department of Motor Vehicles to create and maintain the records **1010 of drivers in the state of New York. Entries in this document are made at the time the recorded transactions or events took place or within a reasonable time thereafter. The person who reports the information is under a business duty to do so accurately.

This language is followed by the signature of Renato Denato, Jr., an individual purporting to be the Executive Deputy Commissioner of Motor Vehicles.
*222 As stated above, to satisfy the self-authentication requirements found in N.J.R.E. 902(b), a document must bear "a signature purporting to be an attestation or execution."

Here, defendant's abstract of driving record does contain a certification at the end of the document verifying that it was executed by the New York State Executive Deputy Commissioner of Motor Vehicles. It is immaterial, therefore, that Sisserson was unable to provide first-hand information regarding how the document was produced or who is charged with handling such production.

We conclude that the admission of defendant's abstract of driving record was not an abuse of the trial court's discretion. Benevenga v. Digregorio, 325 N.J.Super. 27, 32, 737 A.2d 696 (App.Div.1999), certif. denied, 163 N.J. 79, 747 A.2d 287 (2000).

The conviction and sentence are affirmed. Defendant must report to the Law Division no later than January 4, 2008, to serve his sentence.

N.J.Super.A.D.,2007.
State v. Colley
397 N.J.Super. 214, 936 A.2d 1005

Superior Court of New Jersey,
Appellate Division.
STATE of New Jersey, Plaintiff-Respondent,
v.
John CUCCURULLO, Defendant-Appellant.
Argued Sept. 28, 1988.
Decided Nov. 4, 1988.

SYNOPSIS

Defendant was convicted in the Superior Court, Law Division, Monmouth County, William T. Wichmann, J., of driving motor vehicle during period when his driver's license was suspended, and he appealed, challenging imposition of enhanced sentence. The Superior Court, Appellate Division, Brody, J.A.D., held that defendant was subject to enhanced penalties for driving while under suspension for driving while under influence of intoxicating liquor, though period of suspension had not yet begun at time present offense was committed.

Affirmed.

Steven E. Nelson, Allenhurst, for defendant-appellant (Nelson & Fromer, attys.; Steven E. Nelson, on the brief).

Patricia B. Quelch, Asst. Monmouth County Prosecutor, for plaintiff-respondent (John Kaye, Monmouth County Prosecutor, atty.; Mark P. Stalford, Asst. Monmouth County Prosecutor, of counsel, and on the letter brief).

Before Judges BRODY, ASHBEY and SKILLMAN.

The opinion of the court was delivered by

BRODY, J.A.D.

Judge Wichmann convicted defendant of driving a motor vehicle during a period when his driver's license was suspended (DWS). *N.J.S.A.* 39:3-40. The judge imposed a $1,000 fine, a suspension of defendant's driver's license for an enhanced period of two years, and a county jail term for an enhanced period of 45 days. Defendant contends that the judge erred in ruling that the DWS statute subjects him to enhanced penalties. The parties consented to a stay of the sentence pending this appeal. We now affirm.

Defendant has been convicted of DWS many times. The DWS statute subjects him as a multiple offender to ordinary penalties***501** of a $1,000 fine, suspension of his driver's license for a period not to exceed six months, and imprisonment in the county jail for not more than 10 days. *N.J.S.A.* 39:3-40c and d. The judge ruled that the statute's enhanced penalties provision applies because the present offense occurred two months after defendant's license had been ordered suspended for a six-month period for violating

N.J.S.A. 39:4-50, which prohibits operating a motor vehicle while under the influence of intoxicating liquor (DWI).

The enhanced penalties provision of the DWS statute reads as follows:

Notwithstanding subsections a. through e., any person violating this section while under suspension issued pursuant to R.S. 39:4-50, upon conviction, shall be fined $500.00[FN1], shall have his license to operate a motor vehicle suspended ***520** for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days. [*N.J.S.A.* 39:3-40.]

FN1. Defendant does not claim that the extended $500 fine supersedes the ordinary $1,000 fine that the DWS statute requires be imposed upon a multiple offender. *N.J.S.A.* 39:3-40c.

Although the present offense occurred only two months after the six-month DWI suspension had been imposed, the DWI suspension period had not yet begun because of the following provision of the DWI statute:

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title at the time of any conviction for a violation of this section, the revocation or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period. [*N.J.S.A.* 39:4-50(a).]

When convicted of DWI, defendant's driver's license was still suspended as a result of previous motor vehicle violations. Those suspension periods were not scheduled to terminate until sometime after defendant committed the present offense. Defendant contends that the enhanced penalties provision of the DWS statute does not apply because when he committed the present offense, his DWI suspension period had not begun and therefore he was not a "person ... under suspension issued pursuant to R.S. 39:4-50." *N.J.S.A.* 39:3-40. We disagree.

[1] [2] A person is "under suspension" from the time that the suspension is imposed even though the period of suspension may not begin until later. Dictionary definitions of the word "under" include "bound by." *Webster's Third New International Dictionary* (G. & C. Merriam Company, 1966). *Webster's* offers as an example of that definition, " *under* a contract to deliver."

Just as a person is "under" or "bound by" a contract to deliver before the time of delivery, a person is "under" or "bound by" a sentence of suspension from the time it is imposed even if it begins at a later date. Similarly, a defendant sentenced to a prison term is "under" that sentence from the time it is imposed even if the judge permits him to surrender at a later date. Also, a defendant sentenced to prison for a term consecutive to a term to be served at the Adult Diagnostic and Treatment Center, *see* ***521** *State v. Chapman,* 95 *N.J.* 582, 592, 472 *A.*2d 559 (1984), is "under" the sentence to prison while serving the ADTC term.

Defendant contends that the Legislature did not intend that a person receiving a DWI driver's license suspension be subject to the enhanced penalties of the DWS statute for a period longer than the DWI period of suspension. He argues from that premise that his exposure to enhanced penalties may not begin before the DWI suspension period begins. We reject the premise. There is no evidence of such legislative intent in the language of the DWI or DWS statute, nor would such intent be consistent with the legislative policies those statutes advance.

The suspension provisions in question serve distinct functions. The *N.J.S.A.* 39:4-50 (DWI) provision that a DWI suspension "shall commence as of the date of termination of [any] existing revocation or ***502** suspension period" assures that a DWI suspension period will be fully served. It prevents a judge from shortening the period by ordering it to run concurrently with an existing suspension period. The DWI statute is not concerned with the penalty for violating a DWI suspension. That concern is met in the *N.J.S.A.* 39:3-40 (DWS) provision that any person operating a motor vehicle "while under suspension issued pursuant to" the DWI statute is subject to enhanced penalties. The purpose of that DWS provision is to discourage a person from driving from the moment his DWI license suspension is imposed until after he has served the DWI suspension. Defendant mistakenly applies the language of the DWI statute to determine when the DWS statute's enhanced penalties may be imposed.

Were defendant's argument accepted, the more unserved suspension time a driver has accumulated before his DWI suspension is imposed, the longer thereafter he could continue to drive before being subject to the DWS statute's enhanced penalties. We may not attribute to the Legislature an intent to produce such an absurd result. *Marranca v. Harbo,* 41 *N.J.* 569, 574, 197 *A.*2d 865 (1964).

***522** [3] We reject defendant's final argument that the DWS statute is unconstitutionally vague. "A law is void as a matter of due process if it is so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Town Tobacconist v. Kimmelman,* 94 *N.J.* 85, 118, 462 *A.*2d 573 (1983), quoting *Connally v. General Constr. Co.,* 269 *U.S.* 385, 391, 46 *S.Ct.* 126, 127, 70 *L.Ed.* 322, 328 (1926). As we have previously demonstrated, defendant's confusion is not caused by vagueness of the DWS statute but by his unwarranted recourse to DWI statutory language to misconstrue the plain meaning of the DWS statute.

Affirmed.

N.J.Super.A.D.,1988.
State v. Cuccurullo
228 N.J.Super. 517, 550 A.2d 500

6. Suspended Registration

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

a. Same Penalties apply – No Mandatory Registration Suspension Authorized

b. Previous 39:3-40 Violations Will Count for Sentence Enhancement

c. Collateral Consequences are the same

c. Downgrade to NJSA 39:3-4

7. Administrative Enforcement via MVC

a. **MVC Administrative Detection of Offenders who are driving on the revoked list (Triggering Event)**

Traffic Violation Reported
Involved in an Accident
Out-of-State Report of a moving violation
Early Payment of traffic ticket companion to 39:3-40
Other

b. **No Revoked List Ticket Provided by Police**

c. **Proposed suspension term will always be for 180 days**

d. **Can be cured by subsequent 39:3-40 complaint dated the same day.**

e. **Negotiated disposition via opportunity conference or hearing will always include d/l suspension and surcharges**

8. The Allowing Offense (The Traffic Violation that can only be committed by Siamese twins and Defense Lawyers)

A person who owns or leases a motor vehicle and permits another to operate the motor vehicle commits a violation and is subject to suspension of his license to operate a motor vehicle and to revocation of registration pursuant to sections 2 through 6 of P.L.1995, c. 286 (C.39:3-40.1 through C.39:3-40.5) if the person:

(1) Knows that the operator's license to operate a motor vehicle has been suspended for a violation of R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C. 39:4-50.4a); or

(2) Knows that the operator's license to operate a motor vehicle is suspended and that the operator has been convicted, within the past five years, of operating a vehicle while the person's license was suspended or revoked;

Note: Suspension term is required for both d/l and registration privileges for a period up to six months. See NJSA 39:3-40.1(c).

No fines authorized under the statute

Possible Down-grade is NJSA 39:3-37.1

a. A person who has been issued a driver's license shall not lend that driver's license for use by another person.

b. A person who owns, leases or otherwise has control or custody of a motor vehicle registered under the provisions of this title shall not allow that motor vehicle to be operated by an unlicensed driver.

c. The penalty for a violation of this section shall be a fine of not less than $200 or more than $500, imprisonment for not more than 15 days, or both.

9. Miscellaneous Issues

Lesser Included Offenses:

NJSA 39:3-10 – State v. Handy, 74 N.J. Super. 294 (Cty. Ct. 1962)

NJSA 39:3-17 – Touring Privileges

Inference of Recklessness – State v. Bakka, 176 N.J. 533 (2003)

Restoration fee is $100

Vehicle Impoundment – State v. Slockbower, 79 N.J. 1 (1979)

Atlantic County Court, Law Division (Criminal), New Jersey.
STATE of New Jersey, Plaintiff,
v.
Robert HANDY, Jr., Defendant.
Nos. T-8090 to T-8092, T-8112.
May 10, 1962.

Defendant was convicted of certain violations of the Motor Vehicle Act, and he appealed. After a trial de novo, the County Court, Cafiero, J.S.C., held that driving without a license and driving while license is revoked constitute separate and distinct offenses; but held that charge of failure to produce valid driver's license is incompatible with charge of driving without driver's license.

Judgment accordingly.

Solomon Forman, Asst. Pros. Attorney, for the State.

Samuel Epstein, Atlantic City, attorney, for defendant.

CAFIERO, J.S.C.

Defendant appealed his conviction of certain violations of the Motor Vehicle Act, and a trial De novo was held thereon before this court on January 4, 1962. At its conclusion defense counsel requested and was granted an opportunity to submit a memorandum which has since been received. The sections of the act alleged to *296 have been violated are N.J.S.A. 39:4-50, 39:3-10, 39:3-40 and 39:3-29.

Defendant admits that at the time of the alleged offenses he did not possess a driver's license, and that the driver's license previously issued to him had been revoked and had not been restored. Also that the driver's license was not exhibited. The foregoing are violations under sections N.J.S.A. 39:3-10, 39:3-40 and 39:3-29, respectively.

Defendant did not testify at the trial nor did he offer any defense. However, defendant argues that it was not established beyond a reasonable doubt by credible testimony that he was operating the motor vehicle on the occasion recited in the charges and that in any event he could not be guilty of N.J.S.A. 39:3-10 and N.J.S.A. 39:3-40 because they arise ‘out of a common deficiency.’ He does not offer any specific argument as to N.J.S.A. 39:3-29, but it is to be presumed that the same logic is intended.

As to N.J.S.A. 39:4-50, which is a charge of operating a motor vehicle while under the influence of intoxicating liquor, defendant not only denies that it was established by credible testimony that he was operating the motor vehicle, but also argues that it was not established that he was under the influence of intoxicating liquor as such offense has been defined by case law, and cites State v. Rodger, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917); State v. Ash, 21 N.J.Super. 469, 91 A.2d 412 (App.Div.1952); State v. Glynn, 20 N.J.Super. 20, 89 A.2d 50 (App.Div.1952); State v. Emery, 27 N.J. 348, 355, 142 A.2d 874 (1958); State v. Miller, 64 N.J.Super. 262, 165 A.2d 829 (App.Div.1960).

It is important to consider initially whether there is credible testimony to establish beyond a reasonable doubt that defendant was operating the motor vehicle at the time stated, because if this is not established, to that extent defendant must be acquitted of all the charges made.

[1]  There is ample testimony to establish this fact by both direct and circumstantial evidence, and I find that this has been done clearly and convincingly beyond a reasonable doubt.

Ronald Sanders, a passenger in the automobile which defendant operated on this occasion, testified that he met defendant at Mrs. Fuller's bar where each of them consumed alcoholic beverages; that defendant rode with him in his boss's pick-up truck to the home of Ruth Stewart, arriving there about 2 A.M.; that he, Sanders, remained in the truck while defendant entered the premises; that defendant then came out with the keys to John Tinsley's car, whereupon Sanders left the truck at his home and rode with defendant in the Tinsley car; that they returned to Mrs. Fuller's bar, arriving at about 3 A.M.; that he, Sanders, did not enter the bar on that occasion because he suspected that his wife was inside, but that defendant entered and remained for what he termed a ‘good while’ during which Sanders fell asleep. Defendant came out and again drove Tinsley's car while Sanders remained as a passenger. He testified that defendant wasn't drunk but had been drinking; that he was ‘going fast’ and he told him to slow down, but that defendant said he had everything under control; that defendant had stopped for a red light at Main Street and Delilah Road in Pleasantville; that they went over an overpass, went around a curve pretty fast, and the car started to away and ultimately hit a pole. When Sanders was questioned by Officer Braunstein he stated that he did not know who was driving because he was asleep, but on cross-examination at the trial he stated he was positive that defendant was driving the car; that he had not seen defendant come out of the bar, as he was asleep, but that he saw him driving when they passed the Red Top Bar on Delilah Road, whereupon he told him to slow down. He said that at the scene defendant claimed that John Tinsley was driving but he (Tinsley) wasn't there.

Mrs. Shirley Sanders was in the Fullers' bar when defendant entered at about 3:00 or 3:30 in the morning of April 28, and he bought her a drink as well as one for himself. She *298 testified that he acted ‘simple like’ and that he had been drinking; that she was unable to learn from him the whereabouts of her husband, although he was outside the premises in Tinsley's car. She left the bar around 4 o'clock and defendant remained.

Mrs. Stewart testified that defendant came to her home around 1 A.M.; that he had been drinking; that he came to get John Tinsley's car keys; that Tinsley was drunk and asleep; that defendant tried to awaken him, and when he was unable to do so, picked up his jacket and took the keys.

John Tinsley testified that he visited defendant in jail on April 29 and talked with him; that defendant told him that he had an accident with his car and that he would see that he (Tinsley) got another car or he would get it fixed; and that defendant had asked him to say that he (Tinsley) was driving the car, and that defendant would take care of the bill.

All of this testimony, woven together, establishes beyond a reasonable doubt that defendant was operating the automobile during the morning hours of April 28, and particularly on the occasion when it struck the pole which brought the investigating officers to the scene. This testimony is uncontroverted and believable. See State v. Elliott, 13 N.J.Super. 432, 435, 80 A.2d 573 (App.Div.1951).

II

[2] Defendant admits that at the time of the accident his license was revoked for a speeding violation which had occurred in November 1959, and that he did not subsequently take the steps necessary to restore his driving privileges. He admits that at the time of the accident he did not possess a valid driver's license, but defendant argues that convictions for violation of N.J.S.A. 39:3-10 and N.J.S.A. 39:3-40 arise out of a 'common deficiency.'

Although this court is not reviewing the propriety or *299 legality of a conviction, but **206 instead is trying the matter De novo, it will construe the defendant's argument to mean that the charges under N.J.S.A. 39:3-10 and N.J.S.A. 39:3-40 are either mutually incompatible or that a violation of one is merged in a violation of the other.

Only one court in New Jersey had been confronted with the above problem, and that only indirectly. State v. Williams, 21 N.J.Misc. 329, 332, 34 A.2d 141 (Recorder's Ct.1943). In that case the defendant had previously been convicted of operating a motor vehicle without having a driver's license. He was thereafter charged with having operated a motor vehicle after his license had been revoked. The court held that the defendant had committed two separate offenses although they arose out of the same act, and therefore the defense of double jeopardy did not apply. This case is in accord with the overwhelming authority outside New Jersey. See Annotation, 'Former Jeopardy-Automobile,' 172 A.L.R. 1053, 1054.

In Pennsylvania it has been established by statute, and approved by case law, that the two offenses of driving without a license and driving while a license is revoked are separate and distinct offenses, the latter offense being punishable as a misdemeanor. See 61 C.J.S., Motor Vehicles, s 639, page 742, note 78.

Reflection will also reveal that a violation of each statutory section is a different affront to or disturbance of the general welfare and safety of the community. In violating N.J.S.A. 39:3-10 the offender signifies his possible inaptitude to drive a motor vehicle, and circumvents the licensing authority, regulations and fees of this State. However, in violating N.J.S.A. 39:3-40 the offender asserts his defiance of public sanctions imposed for community safety before his fitness to drive again has been determined by the Director of Motor Vehicles pursuant to R.S. 39:5-32, 39:5-33 and 39:5-35, N.J.S.A.

Therefore, it is clear that the evidence and law sustain the separate charges under N.J.S.A. 39:3-10 and *300 N.J.S.A. 39:3-40, that they do not arise out of a 'common deficiency' as contended by defendant, and that defendant is therefore guilty of violating each of the aforesaid statutory sections.

III

[3] Defendant has been charged with violating R.S. 39:3-29, N.J.S.A., (not possessing and/or failure to exhibit a valid driver's license and the registration certificate of a motor vehicle).

No evidence was adduced to support the charge that the defendant Handy failed to exhibit a valid registration certificate. Consequently, insofar as the charge purports to include a violation of the above section for failure to possess and/or exhibit a valid registration, it must fail for lack of proof, and defendant acquitted of violating the above section in that respect.

Secondly, charges of violations of N.J.S.A. 39:3-10 and R.S. 39:3-29, N.J.S.A., occurring at the same time and arising out of the same act of the same defendant are mutually incompatible, for the reason that a person without a driver's license could not possess or exhibit a license when requested to do so.

It seems that R.S. 39:3-29, N.J.S.A., was intended to apply to the situation where the driver has had a valid driver's license issued to him, which is still currently valid at the time that he is requested to exhibit it, but that he does not have immediate possession of it; or if he does have immediate possession, that he arbitrarily refuses to produce it. Therefore, a charge of failure to produce a valid driver's license is mutually incompatible with a charge of driving without a driver's license, and would be oppressive and unjust in its application to the defendant. The charge in this respect, of violating R.S. 39:3-29, N.J.S.A., is therefore dismissed, and defendant is accordingly acquitted of said charge.

IV

Finally, defendant urges that the State failed to produce sufficient evidence to prove the essential elements of a violation of N.J.S.A. 39:4-50.

It has been established that defendant Handy was driving the car in question. (See point I above).

[4] In State v. Emery, 27 N.J. 348, 355, 142 A.2d 874 (1958), the court held that it is sufficient if the presumed offender has imbided to the extent that his physical co-ordination or mental faculties are deleteriously affected. Direct and circumstantial evidence is admissible to prove influence of intoxicating liquor. Ibid. Expert testimony is not needed, and a person of ordinary intelligence, although lacking special skill, knowledge and experience, but who has had the opportunity of observation, may testify whether a person was intoxicated. State v. Pichadou, 34 N.J.Super. 177, 180, 111 A.2d 908 (App.Div.1955).

The evidence adduced at the trial De novo shows the following:

(1) Defendant Handy had been drinking for several hours before the accident (testimony of Sanders, Mrs. Sanders and Ruth Stewart).

(2) Defendant was acting 'simple like' about an hour before the accident (Ruth Stewart).

(3) At the scene, shortly after the accident, Officer Braunstein had difficulty keeping the defendant away from live wires strewn over the highway as a result of the impact with a utility pole.

(4) At that time Officer Braunstein observed the defendant 'running back and forth and shouting profanities and * * * acting in an intoxicated condition,' staggering, using obscenities and swaying.

(5) Officer Braunstein got both (Sanders and defendant Handy into the Accident Bureau car, whereupon moments later both men were sound asleep and remained asleep until they arrived at Atlantic City city hall, when he awoke them.

*302 (6) Defendant Handy argued with and pushed an electric company repairman at the scene of the accident when he advised defendant and others not to go near the live wires (testimony of Sanders).

(7) Officer Braunstein, in clinically observing defendant at the police station in city hall, noticed that his eyes were bloodshot; that his clothes were disheveled; that he acted in a very cocky and antagonistic manner and was very talkative; that there was a very strong odor of alcohol on his breath; that he spoke incoherently; that he swayed; that his finger-to-nose test was very uncertain; that after defendant was booked he sat down and again fell asleep; that after he was placed in a cell he kept pounding on the bars and screaming; that before this he was screaming and pounding his fists on the desk, and objecting to his arrest; that his opinion was that defendant Handy was under the influence of intoxicating beverage; and that in his opinion defendant Handy at that time (40 or 50 minutes after the time of the accident) was not a fit person to drive an automobile properly.

(8) Defendant Handy had no opportunity to drink anything between the time that Officer Braunstein picked him up at the scene of the accident and the time that the Officer made the aforesaid clinical observations and formed his opinions.

(9) Patrolman Warlich (desk sergeant at the Atlantic City Police Department and on duty when Officer Braunstein brought defendant Handy into the police station) heard a loud commotion and observed defendant; and he appeared to him to be in a drunken rage, was pounding on the Accident Bureau desk, and was using profane and incoherent language.

(10) Patrolman Warlich, who was present when Officer Braunstein clinically observed defendant, also observed that defendant**208 Handy could not touch his nose with his fingertip; that Handy could not walk a straight line along the floor when he attempted to do so; that Handy swayed from side *303 to side; that Handy's breath had a strong odor of alcohol; that his eyes were bloodshot; that he had all the appearances of a man who was definitely under the influence of liquor; that it was his conclusion that Handy's mental and physical faculties were definitely impaired and that if he was driving he had no reason to be driving a car; and that he was definitely under the influence; that he was not fit to drive a vehicle; that the police had considerable difficulty putting Handy in a cell at the police station; and that subsequent to his incarceration Handy pounded on the cell bars for approximately two hours until the police threatened him with a padded cell, after which he subsided considerably.

It is clear from the testimony of Officer Braunstein and Patrolman Warlich that that considered and concluded that defendant Handy was under the influence of intoxicating liquor at the time of the accident; and that he had imbibed to an extent that his physical coordination and mental faculties were deleteriously affected, even though it is not necessary to prove both. State v. Ash, supra.

The record is replete with direct and circumstantial evidence that defendant Handy's physical coordination or mental faculties were deleteriously affected.

[5] As stated in the Emery case, it is not necessary as a prerequisite to conviction that the accused be absolutely drunk, in the sense of being sodden with alcohol, but that 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., at page 355, 142 A.2d 874.

[6] Counsel for defendant cites as improper and beyond the power of the court the questions propounded by the court and directed to Officer Braunstein. However, it is settled law in this State that the court may interrogate a witness with leading questions or otherwise in order to elicit the full facts in the case. State v. Manno, 29 N.J.Super. 411, 417, 102 A.2d 650 (App.Div.1954); State v. Riley, 28 N.J. 188, 200, 145 A.2d 601 (1958); see also 3 Wigmore, Evidence (1940 ed.), section 784.

*304 [7] I find that it has been established beyond a reasonable doubt that defendant was operating a motor vehicle while under the influence of intoxicating liquor, in violation of N.J.S.A. 39:4-50.

V

The decision of this court is that defendant Handy is guilty of having violated N.J.S.A. 39:3-10, N.J.S.A. 39:3-40 and N.J.S.A. 39:4-50, as charged; and that he is to present himself before this court on notice from the prosecutor to be sentenced on said convictions.

N.J.Co. 1962.
State v. Handy,
74 N.J.Super. 294, 181 A.2d 203