Garden State CLE Presents

Municipal Court Trial Certification Training

"New Jersey Drunk Driving Law"

Lesson Plan & Study Guide

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Part 1 – DWI Statute and Sentencing Overview

N.J.S.A. 39:4-50. Driving while intoxicated

(a) Except as provided in subsection (g) of this section, a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood shall be subject:

(1) For the first offense:

(i) if the person's blood alcohol concentration is 0.08% or higher but less than 0.10%, or the person operates a motor vehicle while under the influence of intoxicating liquor, or the person permits another person who is under the influence of intoxicating liquor to operate a motor vehicle owned by him or in his custody or control or permits another person with a blood alcohol concentration of 0.08% or higher but less than 0.10% to operate a motor vehicle, to a fine of not less than $250 nor more than $400 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of three months;

(ii) if the person's blood alcohol concentration is 0.10% or higher, or the person operates a motor vehicle while under the influence of narcotic, hallucinogenic or habit-producing drug, or the person permits another person who is under the influence of narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control, or permits another person with a blood alcohol concentration of 0.10% or more to operate a motor vehicle, to a fine of not less than $300 nor more than $500 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than seven months nor more than one year;

(iii) For a first offense, a person also shall be subject to the provisions of P.L.1999, c. 417 (C.39:4-50.16 et al.).

(2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for

a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction, and, after the expiration of said period, he may make application to the Chief Administrator of the New Jersey Motor Vehicle Commission for a license to operate a motor vehicle, which application may be granted at the discretion of the chief administrator, consistent with subsection (b) of this section. For a second violation, a person also shall be required to install an ignition interlock device under the provisions of P.L.1999, c. 417 (C.39:4-50.16 et al.).

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days in a county jail or workhouse, except that the court may lower such term for each day, not exceeding 90 days, served participating in a drug or alcohol inpatient rehabilitation program approved by the Intoxicated Driver Resource Center and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years. For a third or subsequent violation, a person also shall be required to install an ignition interlock device under the provisions of P.L.1999, c. 417 (C.39:4-50.16 et al.).

As used in this section, the phrase "narcotic, hallucinogenic or habit-producing drug" includes an inhalant or other substance containing a chemical capable of releasing any toxic vapors or fumes for the purpose of inducing a condition of intoxication, such as any glue, cement or any other substance containing one or more of the following chemical compounds: acetone and acetate, amyl nitrite or amyl nitrate or their isomers, benzene, butyl alcohol, butyl nitrite, butyl nitrate or their isomers, ethyl acetate, ethyl alcohol, ethyl nitrite or ethyl nitrate, ethylene dichloride, isobutyl alcohol or isopropyl alcohol, methyl alcohol, methyl ethyl ketone, nitrous oxide, n-propyl alcohol, pentachlorophenol, petroleum ether, propyl nitrite or propyl nitrate or their isomers, toluene, toluol or xylene or any other chemical substance capable of causing a condition of intoxication, inebriation, excitement, stupefaction or the dulling of the brain or nervous system as a result of the inhalation of the fumes or vapors of such chemical substance.

Whenever an operator of a motor vehicle has been involved in an accident resulting in death, bodily injury or property damage, a police officer shall consider that fact along with all other facts and circumstances in determining whether there are reasonable grounds to believe that person was operating a motor vehicle in violation of this section.

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

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title or Title 2C of the New Jersey Statutes 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. In the case of any person who at the time of the imposition of sentence is less than 17 years of age, the forfeiture, suspension or revocation of the driving privilege imposed by the court under this section shall commence immediately, run through the offender's seventeenth birthday and continue from that date for the period set by the court pursuant to paragraphs (1) through (3) of this subsection. A court that imposes a term of imprisonment for a first or second offense under this section may sentence the person so convicted to the county jail, to the workhouse of the county wherein the offense was committed, to an inpatient rehabilitation program or to an Intoxicated Driver Resource Center or other facility approved by the chief of the Intoxicated Driving Program Unit in the Department of Health and Senior Services. For a third or subsequent offense a person shall not serve a term of imprisonment at an Intoxicated Driver Resource Center as provided in subsection (f).

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

(b) A person convicted under this section must satisfy the screening, evaluation, referral, program and fee requirements of the Division of Alcoholism and Drug Abuse's Intoxicated Driving Program Unit, and of the Intoxicated Driver Resource Centers and a program of alcohol and drug education and highway safety, as prescribed by the chief administrator. The sentencing court shall inform the person convicted that failure to satisfy such requirements shall result in a mandatory two-day term of imprisonment in a county jail and a driver license revocation or suspension and continuation of revocation or suspension until such requirements are satisfied, unless stayed by court order in accordance with the Rules Governing the Courts of the State of New Jersey, or R.S.39:5-22. Upon sentencing, the court shall forward to the Division of Alcoholism and Drug Abuse's Intoxicated Driving Program Unit a copy of a person's conviction record. A fee of $100.00 shall be payable to the Alcohol Education, Rehabilitation and Enforcement Fund established pursuant to section 3 of P.L. 1983, c. 531 (C.26:2B-32) to support the Intoxicated Driving Program Unit.

(c) Upon conviction of a violation of this section, the court shall collect forthwith the New Jersey driver's license or licenses of the person so convicted and forward such license or licenses to the chief administrator. The court shall inform the person convicted that if he is convicted of personally operating a motor vehicle during the period of license suspension imposed pursuant to subsection (a) of this section, he shall, upon conviction, be subject to the penalties established in R.S.39:3-40. The person convicted shall be informed orally and in writing. A person shall be required to acknowledge receipt of that written notice in

writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of R.S.39:3-40. In the event that a person convicted under this section is the holder of any out-of-State driver's license, the court shall not collect the license but shall notify forthwith the chief administrator, who shall, in turn, notify appropriate officials in the licensing jurisdiction. The court shall, however, revoke the nonresident's driving privilege to operate a motor vehicle in this State, in accordance with this section. Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third or subsequent violation of this section. A person shall be required to acknowledge receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of this section.

(d) The chief administrator shall promulgate rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.) in order to establish a program of alcohol education and highway safety, as prescribed by this act.

(e) Any person accused of a violation of this section who is liable to punishment imposed by this section as a second or subsequent offender shall be entitled to the same rights of discovery as allowed defendants pursuant to the Rules Governing the Courts of the State of New Jersey.

(f) The counties, in cooperation with the Division of Alcoholism and Drug Abuse and the commission, but subject to the approval of the Division of Alcoholism and Drug Abuse, shall designate and establish on a county or regional basis Intoxicated Driver Resource Centers. These centers shall have the capability of serving as community treatment referral centers and as court monitors of a person's compliance with the ordered treatment, service alternative or community service. All centers established pursuant to this subsection shall be administered by a counselor certified by the Alcohol and Drug Counselor Certification Board of New Jersey or other professional with a minimum of five years' experience in the treatment of alcoholism. All centers shall be required to develop individualized treatment plans for all persons attending the centers; provided that the duration of any ordered treatment or referral shall not exceed one year. It shall be the center's responsibility to establish networks with the community alcohol and drug education, treatment and rehabilitation resources and to receive monthly reports from the referral agencies regarding a person's participation and compliance with the program. Nothing in this subsection shall bar these centers from developing their own education and treatment programs; provided that they are approved by the Division of Alcoholism and Drug Abuse.

Upon a person's failure to report to the initial screening or any subsequent ordered referral, the Intoxicated Driver Resource Center shall promptly notify the sentencing court of the person's failure to comply.

Required detention periods at the Intoxicated Driver Resource Centers shall be determined according to the individual treatment classification assigned by the Intoxicated Driving Program Unit. Upon attendance at an Intoxicated Driver Resource Center, a person shall be required to pay a per diem fee of $75.00 for the first offender program or a per diem fee

of $100.00 for the second offender program, as appropriate. Any increases in the per diem fees after the first full year shall be determined pursuant to rules and regulations adopted by the Commissioner of Health and Senior Services in consultation with the Governor's Council on Alcoholism and Drug Abuse pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.).

The centers shall conduct a program of alcohol and drug education and highway safety, as prescribed by the chief administrator.

The Commissioner of Health and Senior Services shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), in order to effectuate the purposes of this subsection.

(g) When a violation of this section occurs while:

(1) 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;

(2) 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

(3) 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, the convicted person shall: for a first offense, be fined not less than $500 or more than $800, be imprisoned for not more than 60 days and have his license to operate a motor vehicle suspended for a period of not less than one year or more than two years; for a second offense, be fined not less than $1,000 or more than $2,000, perform community service for a period of 60 days, be imprisoned for not less than 96 consecutive hours, which shall not be suspended or served on probation, nor more than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and have his license to operate a motor vehicle suspended for a period of four years; and, for a third offense, be fined $2,000, imprisoned for 180 days in a county jail or workhouse, except that the court may lower such term for each day, not exceeding 90 days, served participating in a drug or alcohol inpatient rehabilitation program approved by the Intoxicated Driver Resource Center, and have his license to operate a motor vehicle suspended for a period of 20 years; the period of license suspension shall commence upon the completion of any prison sentence imposed upon that person.

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 paragraph (1) of this subsection.

It shall not be relevant to the imposition of sentence pursuant to paragraph (1) or (2) of this

subsection 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.

(h) A court also may order a person convicted pursuant to subsection a. of this section, to participate in a supervised visitation program as either a condition of probation or a form of community service, giving preference to those who were under the age of 21 at the time of the offense. Prior to ordering a person to participate in such a program, the court may consult with any person who may provide useful information on the defendant's physical, emotional and mental suitability for the visit to ensure that it will not cause any injury to the defendant. The court also may order that the defendant participate in a counseling session under the supervision of the Intoxicated Driving Program Unit prior to participating in the supervised visitation program. The supervised visitation program shall be at one or more of the following facilities which have agreed to participate in the program under the supervision of the facility's personnel and the probation department:

(1) a trauma center, critical care center or acute care hospital having basic emergency services, which receives victims of motor vehicle accidents for the purpose of observing appropriate victims of drunk drivers and victims who are, themselves, drunk drivers;

(2) a facility which cares for advanced alcoholics or drug abusers, to observe persons in the advanced stages of alcoholism or drug abuse; or

(3) if approved by a county medical examiner, the office of the county medical examiner or a public morgue to observe appropriate victims of vehicle accidents involving drunk drivers.

As used in this section,"appropriate victim" means a victim whose condition is determined by the facility's supervisory personnel and the probation officer to be appropriate for demonstrating the results of accidents involving drunk drivers without being unnecessarily gruesome or traumatic to the defendant.

If at any time before or during a visitation the facility's supervisory personnel and the probation officer determine that the visitation may be or is traumatic or otherwise inappropriate for that defendant, the visitation shall be terminated without prejudice to the defendant. The program may include a personal conference after the visitation, which may include the sentencing judge or the judge who coordinates the program for the court, the defendant, defendant's counsel, and, if available, the defendant's parents to discuss the visitation and its effect on the defendant's future conduct. If a personal conference is not practicable because of the defendant's absence from the jurisdiction, conflicting time schedules, or any other reason, the court shall require the defendant to submit a written report concerning the visitation experience and its impact on the defendant. The county, a court, any facility visited pursuant to the program, any agents, employees, or independent contractors of the court, county, or facility visited pursuant to the program, and any person supervising a defendant during the visitation, are not liable for any civil damages resulting from injury to the defendant, or for civil damages associated with the visitation

which are caused by the defendant, except for willful or grossly negligent acts intended to, or reasonably expected to result in, that injury or damage.

The Supreme Court may adopt court rules or directives to effectuate the purposes of this subsection.

(i) In addition to any other fine, fee, or other charge imposed pursuant to law, the court shall assess a person convicted of a violation of the provisions of this section a surcharge of $100, of which amount $50 shall be payable to the municipality in which the conviction was obtained and $50 shall be payable to the Treasurer of the State of New Jersey for deposit into the General Fund.

CREDIT(S)

Amended by L.1952, c. 286, p. 972, § 1; L.1964, c. 137, § 1; L.1965, c. 134, § 1; L.1966, c. 141, § 1; L.1971, c. 103, § 1, eff. April 16, 1971; L.1977, c. 29, § 1; L.1981, c. 47, § 1, eff. Feb. 25, 1981; L.1981, c. 537, § 1; L.1982, c. 53, § 2, eff. July 1, 1982; L.1982, c. 58, § 1, eff. July 6, 1982; L.1983, c. 90, § 2, eff. March 11, 1983; L.1983, c. 129, § 1, eff. April 7, 1983; L.1983, c. 444, § 1; L.1984, c. 243, § 1, eff. Jan. 2, 1985; L.1986, c. 126, § 1, eff. Oct. 9, 1986; L.1993, c. 296, § 6; L.1994, c. 184, § 1, eff. Dec. 23, 1994; L.1995, c. 243, § 1, eff. April 1, 1996; L.1997, c. 277, § 1, eff. Dec. 30, 1997; L.1999, c. 185, § 4; L.1999, c. 417, § 7; L.2000, c. 83, § 1, eff. Sept. 30, 2000; L.2000, c. 117, § 1, eff. Sept. 13, 2000; L.2001, c. 12, § 1; L.2002, c. 34, § 17, eff. July 1, 2002; L.2003, c. 315, § 2, eff. Jan. 20, 2004; L.2004, c. 8, § 2, eff. April 26, 2004; L.2009, c. 201, § 1, eff. Jan. 14, 2010.

Sentencing Grid

One of the confusing aspects of drunk driving sentencing law stems from the fact that many of the direct monetary sanctions that must be imposed in every case are not included under N.J.S.A. 39:4-50. Rather, they are spread throughout a wide range of other statutes and Titles. In addition to the statutory range of fines set forth within the N.J.S.A. 39:4-50(a) statute, the following costs and assessments must be imposed in every case in addition to amount of the fine.

Violent Crimes Assessment	$50	N.J.S.A. 2C:43-3.1
Safe Neighborhoods Fund	$75	N.J.S.A. 2C:43-3.2
DUI Enforcement Fund	$100	N.J.S.A. 39:4-50.8
DUI Surcharge	$100	N.J.S.A. 39:4-50(i)
Court costs	$33	N.J.S.A. 22A:3-4
Body Armor Fund	$1	N.J.S.A. 39:5-41(d)
Spinal Cord Fund	$1	N.J.S.A. 39:5-41(e).
Autism Fund	$1	N.J.S.A. 39:5-41(f).
DNA Fund	$2	N.J.S.A. 39:5-41(g).
Brain Injury Research Fund	$1	N.J.S.A. 39:5-41(h).

Beyond these direct monetary sanctions, there are also collateral consequences that include a $3000 surcharge under N.J.S.A. 17:29A-35(b) and an assessment of nine insurance eligibility points under N.J.A.C. 11:3-34 (appendix).

Chapter 1 – Operation of a Motor Vehicle

OPERATION OF A MOTOR VEHICLE

N.J. Supreme Court

Operator—An operator of a motor vehicle is defined as a person who is in actual physical control of the vehicle. One can be an operator without driving. State v. Wright, 107 N.J. 488, 527 A.2d 379 (1987).

Attempted operation—Defendant's attempt to start the engine of his car, which was thwarted when a police officer grabbed the keys from his hand, demonstrated an intent to operate a vehicle. The possibility of vehicle being put in motion, coupled with the defendant's intent to start the engine was sufficient evidence to constitute operation within the meaning of N.J.S.A. 39:4-50(a). State v. Morris, 262 N.J. Super. 413, 621 A.2d 74 (App. Div. 1993).[FN27]

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 a possibility of motion, he has operated the vehicle within the meaning of N.J.S.A. 39:4-50(a). State v. Mulcahy, 107 N.J. 467, 479, 527 A.2d 368 (1987).

Intent to drive—A person left a tavern at closing time, entered his car in the tavern's parking lot and started the engine to remain warm while "sleeping off" his intoxicated state did not possess the intent to operate his vehicle. In addition to starting the engine, evidence of intent to drive or move the vehicle at the time must appear. State v. Daly, 64 N.J. 122, 313 A.2d 194 (1973).

Elements of operation—A person operates a motor vehicle under the influence of intoxicating liquor, within the meaning of N.J.S.A. 39:4-50 when, in that condition, he or she "enters a stationary vehicle, on a public highway or in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle." State v. Sweeney, 40 N.J. 359, 360, 192 A.2d 573 (1963).[FN28]

Appellate Division

Admission, circumstantial evidence and testimony—A combination of defendant's admissions at the scene, circumstantial evidence and incredible testimony at trail was sufficient to prove the element of operation beyond a reasonable doubt. State v. Ebert, 377 N.J. Super. 1, 871 A. 2d 664 (App. Div. 2005).

Immobilized vehicle—Defendant who was attempting to free his immobilized vehicle from a log upon which it had become stuck was operating within the meaning of N.J.S.A. 39:4-50. State v. Morris, 262 N.J. Super. 413, 621 A.2d 74 (App. Div. 1993)

Behind the wheel-engine running—"Operation may be proved by any direct or circumstantial evidence—as long as it is competent and meets the requisite standards of proof. [Citations omitted.] The vehicle's operating condition combined with defendant's presence behind the steering wheel permits the logical conclusion of an intent to drive." State v. George, 257 N.J. Super. 493, 497, 608 A.2d 957 (App. Div. 1992).

Out of gas/behind the wheel—"It was reasonable for the trier of fact to conclude that defendant had actually operated the vehicle. Defendant himself stated that he had been in Philadelphia in the early evening and that his vehicle remained parked on the roadway because he had run out of gas. There were no other persons in the area; defendant was in the driver's seat, and there was no evidence that any other person was involved with the use of the automobile at the time in question." State v. Dannemiller, 229 N.J. Super. 187, 190, 550 A.2d 1303 (App. Div. 1988).

Two offenses on same evening—A defendant who after being arrested, processed and released by the police who is subsequently arrested again for drunk driving on the same evening may properly be convicted of two separate offenses as his conduct demonstrates two distinct episodes of intoxicated operation. State v. Costello, 224 N.J. Super. 157, 539 A.2d 1258 (App. Div. 1988).

Pushing inoperable vehicle: Intent to operate—In the leading case on this subject, the Appellate Division ruled that operation of a motor vehicle within the meaning of N.J.S.A. 39:4-50(a) occurs, "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 (even though the attempt is unsuccessful) and there is the possibility of motion, he violates the drunk-driving statute." State v. Stiene, 203 N.J. Super. 275, 279, 496 A.2d 738 (App. Div. 1985) .[FN29]

Parked vehicle—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, since the evidence raises a fair inference that defendant drove the vehicle to the location while intoxicated. State v. Grant, 196 N.J. Super. 470, 483 A.2d 411 (App. Div. 1984).

Two offenses on same evening—A defendant who after being arrested, processed and released by the police who is subsequently arrested again for drunk driving on the same evening may properly be convicted of two separate offenses as his conduct demonstrates two distinct episodes of intoxicated operation. State v. Metcalf, 166 N.J. Super. 46, 398 A.2d 1320 (App. Div. 1979)

Asleep with engine running—Defendant was found in his automobile on the shoulder of a superhighway, which could have only been reached by operation of the automobile to the point where it was found. Defendant admitted that he had been drinking in a bar in Rahway, and admitted that he was driving his car to take someone home to Piscataway when he did not feel well and stopped by the side of the road. Defendant was not in a place which was normal for parking. Furthermore, when defendant was finally aroused from his "deep sleep," according to the state trooper he asked, "what did he hit?" "The inference is inescapable that defendant was in fact operating his motor vehicle while under the influence of intoxicating liquor." State v. Dickens, 130 N.J. Super. 73, 78, 325 A.2d 353 (App. Div. 1974).

The "defendant's acts, while intoxicated, in entering the automobile, turning on the ignition, starting and maintaining the motor in operation, and remaining in the driver's seat behind the steering wheel, where he was found by the police, justify his conviction as the operator of the automobile. In an intoxicated condition, he was, for all practical purposes, then in control of a dangerous instrumentality." State v. Sweeney, 77 N.J. Super. 512, 521, 187 A.2d 39 (App. Div. 1962).

Evidence adduced at trial showed "that the defendant's car had its parking lights on, that when the trooper opened the door of the same the engine was running, and that the radio of the car was playing." From these undisputed facts the inference is inescapable that the defendant operated the motor vehicle he was found in on the grass portion of the shoulder of the northbound lane of the New Jersey Turnpike. State v. Damoorgian, 53 N.J. Super. 108, 114, 146 A.2d 550 (County Ct. 1958).

Methods of proof—Circumstantial evidence of operation, coupled with the defendant's admissions was sufficient evidence to prove operation of a motor vehicle. State v. Guerrido, 60 N.J. Super. 505, 159 A.2d 448 (App. Div. 1960).

Asleep with engine off—Defendant was found by the police with his head over the steering wheel, his right arm hanging through the spokes and left arm hanging to one side. "There was the smell of alcohol. The defendant's vehicle had apparently stalled; the headlights and ignition were on, but the motor was not running." The officer found the truck some six feet from the curb, standing near an intersection that had no traffic light. These facts constituted sufficient evidence to show operation while under the influence of alcohol. State v. Baumgartner, 21 N.J. Super. 348, 349-50, 91 A.2d 222 (App. Div. 1952).

Proof by admission—There was "no merit in defendant's contention that his admission of operation of his car proceeded from an irresponsible condition of mind which rendered his alleged admission incompetent to prove that he actually did operate a motor vehicle. The most that can be said for defendant's argument is that, at best, his drunken condition merely raised a question as to the weight to be given to the admissions." State v. Johnson, 23 N.J. Super. 304, 308, 93 A.2d 27 (App. Div. 1952).

13.

Circumstantial evidence—In order to secure a conviction under N.J.S.A. 39:4-50(a), "there be sufficient evidence that the defendant was operating the motor vehicle at the time and place charged. While it is true that no one actually saw this defendant driving, it is clear by the chain of circumstances that the defendant was the operator. He was seen in an intoxicated condition, and subsequently his car was seen 'zig-zagging' at the time and place charged and, thereafter, he was found drunk and slumped over the wheel with the motor running. This was shortly after the car was seen running into defendant's rear yard 'at a fast clip'." From this evidence, one cannot escape the logical conclusion that defendant was operating the automobile at the time and place charged. State v. Elliott, 13 N.J. Super. 432, 435, 80 A.2d 573 (App. Div. 1951).

Trial Level Courts

Towed vehicle—In order to show operation, a three prong test must be met. The elements are: physical control over a vehicle, an intent to operate, and an ability to do so. This third prong requires at least that the vehicle be capable of operation. Thus, a vehicle that was a mere shell being towed cannot be construed as being operated. State v. Derby, 256 N.J. Super. 702, 607 A.2d 1068 (Law Div. 1992).[FN30]

Impossibility of motion—Operation cannot be proved in a case where there is no demonstrable intent to operate the vehicle and the vehicle in question was inoperable in the sense that its movement by the defendant was impossible. State v. DiFrancisco, 232 N.J. Super. 317, 321, 556 A.2d 1307 (Law Div. 1988).

Gliding on a motor cycle—The actions of the defendant in gliding down an incline on a motor cycle without the engine running constitutes operation of a motor vehicle within the meaning of N.J.S.A. 39:4-50(a). State v. Jeannette, 172 N.J. Super. 587, 412 A.2d 1339 (Law Div. 1980).

Methods of proof—There are three ways to prove operation. They are observation by the police, by circumstantial evidence or by an admission of the defendant. State v. Prociuk, 145 N.J. Super. 570, 368 A.2d 436 (County Ct. 1976).[FN31]

Chapter 2 – Bicycles and MOPEDS

OPERATION OF BICYCLES WHILE UNDER THE INFLUENCE

Trial Level Courts

Not an offense—Operation of a bicycle while under the influence of alcohol does not constitute a motor vehicle offense under New Jersey law. State v. Machuzak, 227 N.J. Super. 279, 546 A.2d 1099 (Law Div. 1988).

Operation of a bicycle while under the influence of alcohol does not constitute a motor vehicle offense under New Jersey law. The Legislature, in defining a motorized vehicle, intended to include that only those vehicles propelled by non-muscular power. State v. Johnson, 203 N.J. Super. 436, 497 A.2d 242 (Law Div. 1985).

Offense under N.J. law—Because the provisions of N.J.S.A. 39:4-14.1 require the riders of bicycles to comply with all the regulations set forth in Chapter 4 of Title 39, a person can be found guilty of driving a bicycle while under the influence of alcohol under N.J.S.A. 39:4-50(a). State v. Tehan, 190 N.J. Super. 348, 463 A.2d 403 (Law Div. 1982).

MOTORIZED BICYCLES (MOPEDS)

Appellate Division

A person may be found guilty of operating a moped while under the influence of alcohol. State v. Lyons, 159 N.J. Super. 100, 386 A.2d 1378 (App. Div. 1978).[FN26]

Chapter 3 – Place of Operation

PLACE OF OPERATION

Appellate Division

Residential garage—Operation of a motor vehicle within defendant's personal, residential garage was sufficient to sustain a conviction under N.J.S.A. 39:4-50(a). State v. Garbin, 325 N.J. Super. 521, 739 A.2d 1016 (App. Div. 1999).

Private parking lot—The offense of driving under the influence of alcohol is not limited to conduct that takes place on highways, but subsumes driving conduct anywhere in the State of New Jersey. State v. McColley, 157 N.J. Super. 525, 385 A.2d 264 (App. Div. 1978).[FN32]

Private beach club parking lot—"Operation of a motor vehicle while under the influence of intoxicating liquor holds 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." Accordingly, the provisions of N.J.S.A. 39:4-50(a) are not limited to highways, but rather apply throughout the State. State v. Magner, 151 N.J. Super. 451, 454, 376 A.2d 1333 (App. Div. 1977).

Restricted airport service road—In discussing operation of a motor vehicle while intoxicated a restricted airport service road, the Appellate Division noted that, "it is long-settled law in New Jersey that one who operates a motor vehicle in an area open to the public is subject to the drunken driving laws even if the place of operation is privately owned." State v. McKelvey, 142 N.J. Super. 259, 261, 361 A.2d 96 (App. Div. 1976).

Quasi-public area: Roof-top apartment complex parking garage—The defendant operated a motor vehicle while intoxicated in a quasi-public area-a roof-top apartment complex parking garage. In affirming the defendant's conviction, the Appellate Division reasoned as follows: "The operation of a motor vehicle while under the influence of intoxicating liquor in a quasi-public place involves extraordinary danger of injury to the driver or other members of the public or damage to their property, just as does driving in that condition on a public highway." State v. Gillespie, 100 N.J. Super. 71, 75, 241 A.2d 239 (App. Div. 1968).

Quasi-public area: Shopping center parking lot—The operation of a motor vehicle under N.J.S.A. 39:4-50(a) is not designed to limited to public highways and includes the general parking area made available for customers of a private business concern—a shopping center parking lot. State v. Sisti, 62 N.J. Super. 84, 162 A.2d 297 (App. Div. 1960).

Chapter 4 – The *Per Se* Violation

PER SE VIOLATIONS

New Jersey Supreme Court

Documents needed to admit Alcotest 7110 results in evidence—Apart from the Alcohol Influence Report, the operator's current certification card and evidence showing that the readings are within tolerance, the other necessary documents include "(1) the most recent calibration report prior to a defendant's test, with part I-control tests, part II-linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests. Absent a pre-trial challenge to the admissibility of the AIR based on one of the other foundational documents produced in discovery, we perceive of no reason to require that they be made a part of the record routinely." State v. Chun, 194 N.J. 54, 145, 943 A.2d 114 (2008).

Strict liability offense—DWI is a strict liability offense requiring no culpable mental state. The State need not demonstrate a defendant's culpable state of mind to prove a violation of N.J.S.A. 39:4-50(a). Driving with a .10% blood-alcohol level or greater is a per se offense. State v. Hammond, 118 N.J. 306, 571 A.2d 942 (1990).

Judicial notice—The breathalyzer fulfills a legislative policy and intent to provide a reliable and fair measure of alcohol in the brain. Accordingly, breathalyzer results can be used in the prosecution of a per se offense of drunk driving. Moreover, the reliability of the breathalyzer is subject to judicial notice in drunk driving prosecutions. State v. Downie, 117 N.J. 450, 569 A.2d 242 (1990).

Elements of offense—The drunk driving statute "prescribes an offense that is demonstrated solely by a reliable breathalyzer test administered within a reasonable period of time after the defendant is stopped for drunk driving, which test results in the proscribed blood-alcohol level." State v. Tischio, 107 N.J. 504, 522, 527 A.2d 388 (1987).

Burden of proof—In establishing the conditions of admissibility of the results of a breathalyzer reading, the responsibility for adducing sufficient proof is allocated to the State and the burden of proof is by clear and convincing evidence. Romano v. Kimmelman, 96 N.J. 66, 90-91, 474 A.2d 1 (1984).

Appellate Division

Tolerances and variability—Despite the possibility of expert testimony to the effect that there is a .0.01% tolerance in the results obtained from a breathalyzer, "a per se violation is established by a breathalyzer reading of 0.10%, provided the test instrument is functioning properly, is properly operated by a qualified person and the requirements of Tischio, Romano and Johnson have been satisfied." State v. Lentini, 240 N.J. Super. 330, 336, 573 A.2d 464 (App. Div. 1990).

Constitutionality—In upholding the constitutionality of the per se violation, the Appellate Division ruled as follows: "The statute under which defendant was convicted flatly prohibits the operation of a motor vehicle by any driver whose blood alcohol concentration equals or exceeds .10%, and the penal consequences for violations thereof apply without regard to whether the operator's ability to drive a motor vehicle is impaired. We discern no lack of clarity in the terms of the statute, nor any constitutional impediment to their enforcement." State v. Kreyer, 201 N.J. Super. 202, 204, 492 A.2d 1088 (App. Div. 1985).

N.J.S.A. 39:4-50 does not violate the requirements of due process by imposing a mandatory presumption of intoxication. The statute does not do this. Rather, "it flatly prohibits the operation of a motor vehicle by any driver whose blood alcohol concentration equals or exceeds .10%, and the penal consequences for violations thereof apply without regard to whether the operator's ability to drive a motor vehicle is impaired. There is no lack of clarity in the terms of the statute, nor any constitutional impediment to its enforcement." State v. O'Connor, 220 N.J. Super. 104, 105, 531 A.2d 741 (App. Div. 1984).

Constitutionality: Cruel and unusual—"The penalties prescribed in N.J.S.A. 39:4-50(a) were designed to have a deterrent and preventative effect upon those whose continued disregard of the safety and welfare of other members of the public is manifested by a second conviction. [Citation omitted.] Those penalties are applicable to all persons who are found guilty of operating a motor vehicle under the influence of intoxicating liquors whether they are chronic alcoholics or occasional imbibers." There is no unconstitutional discrimination nor any violation of the constitutional proscriptions against cruel and inhuman punishments under either the Eighth Amendment to United States Constitution or Article I, paragraph 12 of the New Jersey Constitution. State v. Housman, 131 N.J. Super. 478, 481, 330 A.2d 598 (App. Div. 1974).

Constitutionality: Vagueness—The per se violation under N.J.S.A. 39:4-50(a) is not unconstitutionally vague. State v. D'Agostino, 203 N.J. Super. 69, 495 A.2d 915 (Law Div. 1984)

Trial Level Courts

Test administered within a reasonable time—What constitutes a reasonable period of time for the administration of a test after a defendant is stopped for drunk driving? Judge Haines analyzed the questions as follows: "One required proof as to 'the proper administration of the test' is that it be performed within a reasonable time after the defendant is stopped for drunk driving. The State must supply this proof by clear and convincing evidence. In this case the test was given as much as 3 hours and 50 minutes after the drunk driving occurred, unless the defendant was 'driving' at the time of his arrest at 3:10 a.m. In either case the State was obliged to prove that the test was given within a reasonable time. This court, absent such proof, has no way of knowing what time is reasonable, a conclusion that must depend upon a variety of facts, such as time and amount of alcohol consumption. The State presented no testimony on that issue and therefore failed to carry the burden of proof, making the breathalyzer test results inadmissible." State v. DiFrancisco, 232 N.J. Super. 317, 321, 556 A.2d 1307 (Law Div. 1988).

Chapter 5 – Breath-testing Devices

BREATH TESTING DEVICES

N.J. Supreme Court

Alcotest 7110 scientific reliability—"[T]he Alcotest, utilizing New Jersey Firmware version 3.11, is generally scientifically reliable, but that certain modifications are required in order to permit its results to be admissible or to allow it to be utilized to prove a per se violation of the statute." State v. Chun, 194 N.J. 54, 65, 943 A.2d 114 (2008).

Admissibility of Alcotest foundational documents following Crawford v. Washington—Generally, the foundational documents necessary to support the admission in evidence of Alcotest results are business records or public records and thus are not considered to be testimonial within the meaning of Crawford. State v. Chun, 194 N.J. 54, 142-45, 943 A.2d 114 (2008).

Protocols for testing machines—The protocols established by the State Police for testing breathalyzers must be designed to ensure the machine will produce reliable results, but that the adoption of those protocols is more akin to a State Police intra-agency determination than rulemaking. Therefore, adoption or modification of the protocols need not comply with the Administrative Procedure Act. N.J.S.A. 52:14B-1 to 52:14B-24. State v. Garthe, 145 N.J. 1, 678 A.2d 153 (1996).

Admissibility in evidence—Absent evidence that the test protocols established by the Division of Criminal Justice and State Police are not scientifically reliable to establish that breathalyzer machines are in proper operating order, the State may, subject to the business records and public records exceptions to the hearsay rule, offer Breath Test Instrument Inspection Certificates as admissible evidence in DWI trials.[FN43] State v. Garthe, 145 N.J. 1, 13-14, 678 A.2d 153 (1996).

A breathalyzer test result is admissible in a DWI prosecution only if it is first established that "the breathalyzer instrument is in proper working order, is administered by a qualified operator and is used in accordance with accepted procedures." The State bears the responsibility for establishing all conditions of admissibility by clear and convincing proof. Romano v. Kimmelman, 96 N.J. 66, 82, 474 A.2d 1 (1984).

Appellate Division

Worksheet "A" calculation—The calculations on Worksheet "A" should be performed out to four digits following the decimal point. State v. Rivera, 411 N.J. Super. 492, 499–500, 987 A.2d 618 (App. Div. 2010).

Admissibility of breath test certificates following Crawford v. Washington — Breath Test Instrument Inspection Certificates are business records and, as such, are considered to be non-testimonial within the meaning of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004). State v. Dorman, 393 N.J. Super. 28, 922 A.2d 766 (App. Div. 2007).[FN44]

Signature on replica certification card—That the replica was signed by a former Superintendent of State Police, not holding office at the time that the operator completed his course certification, does not affect the results obtained from tests administered from an otherwise qualified breathalyzer operator. It is at best a technical deficiency which does not require the exclusion of the breathalyzer test results. State v. Howard, 383 N.J. Super. 538, 892 A.2d 751 (App. Div. 2006).

Operator certification card—Failure of the operator to have the original certification course dates on his card did not render the card invalid. State v. Sohl, 363 N.J. Super. 573, 833 A.2d 1104 (App. Div. 2003).

Revised protocols for testing—State Police revised protocols for testing breathalyzers which involved use of an atomizer rather than human breath is sufficiently reliable and accordingly the State Police's breath test inspectors' inspection certifications (BTIIC) prepared under the revised protocol were admissible in prosecution for driving while intoxicated. State v. Cleverley, 348 N.J. Super. 455, 792 A.2d 457 (App. Div. 2002).

Alcohol influence report—In citing with approval the language used in a county court decision, State v. Hudes, 128 N.J. Super. 589, 321 A.2d 275 (County Ct. 1974), the Appellate Division ruled that, "the omission of the forms being sequentially numbered does not appear to deny defendant a fair and impartial test nor deny him access to any materials, and further, no allegation has been made that a failure to sequentially number the forms render the form inaccurate, cause the machine to malfunction, or affected the recording of the breathalyzer reading by the operating officer." State v. Jorn, 340 N.J. Super. 192, 197, 774 A.2d 507 (App. Div. 2001).

Simulator solution: Periodic testing procedures—The procedures employed by the State Police are reasonably reliable and the breath test coordinators' certificates are admissible to prove the State's compliance with Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984). State v. Slinger, 281 N.J. Super. 538, 658 A.2d 1299 (App. Div. 1995).

The State need not prove that the simulator solution was itself tested to determine whether, at the time of the issuance of the inspection certificate, the solution was of correct concentration. State v. Benas, 281 N.J. Super. 251, 657 A.2d 445 (App. Div. 1995).

Post-test certificates—A breathalyzer test result may be admissible without a post-test certification if "there is a pretest certification made within a month before the test that the machine was in proper working order and there is no evidence that the machine gave inaccurate results when used for the test." State v. Giordano, 281 N.J. Super. 150, 152, 656 A.2d 1276 (App. Div. 1995).

"Although presenting at trial a post-test certification that a breathalyzer is in proper working order is the preferred practice, a test result may be admissible without a post-test certification if, as here, there is a pretest certification made within a month before the test that the machine was in proper working order and there is no evidence that the machine gave inaccurate results when used for the test." State v. Samarel, 231 N.J. Super. 134, 142, 555 A.2d 40 (App. Div. 1989).

20.

Pre-test certificates—The decision in State v. Samarel, 231 N.J. Super. 134, 555 A.2d 40 (App. Div. 1989) does not "establish an absolute outside time limit for the validity of a pre-test inspection certificate. There is no one month limitation on the validity of a pre-test inspection certificate." A pre-test inspection certificate done too far in advance of the administered test may run the risk of being labeled stale on a record which could support such a finding. However, in this case, there was nothing of record to show "inaccurate results" which would undermine the validity of a pre-test inspection certificate issued 40, rather then 30, days prior to the administration of the breathalyzer test on the defendant. State v. Sandstrom, 277 N.J. Super. 354, 358, 649 A.2d 901 (App. Div. 1994).

Test ampoules: Periodic testing procedures—The procedures employed by the State Police are reasonably reliable and the breath test coordinators' certificates are admissible to prove the State's compliance with Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984). State v. Maure, 240 N.J. Super. 269, 573 A.2d 186 (App. Div. 1990).

Test ampoules: Random sampling—The State Police Breath Test Coordinator certifications, which indicated that random sample ampoules from the same batch as that used in the defendants' breathalyzer examination had been tested, satisfied the spot checking foundational requirement for admission of breathalyzer readings. State v. Maure, 240 N.J. Super. 269, 573 A.2d 186 (App. Div. 1990).

Test ampoules: Random testing—The State's analysis of random ampoules from the same batch of ampoules as those used to test defendant was sufficient to satisfy the requirement of "spot checking." State v. Ernst, 230 N.J. Super. 238, 243, 553 A.2d 356 (App. Div. 1989).

Ampoules are sealed. Only by breaking them "open could a chemist determine that its contents are properly prepared." The breath test coordinator who checked the breathalyzer by using a test ampoule shortly before and after defendant was tested, found the breathalyzer accurate within tolerable limits. The ampoule used by the trooper was a random unit supplied by the same laboratory. This spot check was enough. State v. Ettore, 228 N.J. Super. 25, 32, 548 A.2d 1134 (App. Div. 1988).

The law is "well settled that the spot checking of a random ampoule [of the same batch] is sufficient prima facie proof that the chemicals in the test ampoule were of the proper kind and mixed to proper proportion." State v. Dickens, 130 N.J. Super. 73, 79, 325 A.2d 353 (App. Div. 1974).

The use of an ampoule which was a random unit supplied by the same laboratory was a "spot check" sufficient to support the finding of accuracy of the ampoule actually used. State v. De Vito, 125 N.J. Super. 478, 311 A.2d 753 (App. Div. 1973).

Batch assay certificates for ampoules—Although no proof of reliance by either testing trooper or operating trooper was presented to allow admission of batch assay certificate for ampoules used in breathalyzer and despite hearsay rule problems, certificate was admissible in drunk driving prosecution, where contents of ampoules was not a direct issue in case, but issue was raised in evidentiary hearing on whether breathalyzer was qualified, in which Rules of Evidence did not apply, and where other indicia of reliability were inherent in the assay certificate. State v. Dohme, 229 N.J. Super. 49, 55-56, 550 A.2d 1232 (App. Div. 1988).[FN45]

Administration of test within a reasonable time—The drunk driving "statute calls for the

administration of a breathalyzer test within a reasonable time after the defendant was actually operating his vehicle." State v. Dannemiller, 229 N.J. Super. 187, 189, 550 A.2d 1303 (App. Div. 1988).

***Miranda* warnings**—Taking of a breath sample from a motorist suspected of driving under the influence is non-testimonial and "a simple request to submit to a chemical test does not constitute interrogation." Thus, Miranda warnings are not required. State v. DeLorenzo, 210 N.J. Super. 100, 104, 509 A.2d 238 (App. Div. 1986).

Destruction of test ampoules—Since the "preservation of the ampoule would not give any scientifically reliable information regarding the accuracy of the original test results, we hold that the State's failure to produce the ampoule does not deny defendant due process of law." State v. Teare, 135 N.J. Super. 19, 22, 342 A.2d 556 (App. Div. 1975).

Admissibility of breath test certificates in evidence—Strong and convincing "indicia of trustworthiness exist for admission of inspection certificate of breathalyzer instrument as a business record exception to hearsay rule", and a certificate is admissible without testimony and cross-examination of coordinator who tested the machine as proof that the breathalyzer was in proper working order. State v. McGeary, 129 N.J. Super. 219, 226, 322 A.2d 830 (App. Div. 1974).

Trial Level Courts

Admissibility of breath test certificates following *Crawford v. Washington*—Although the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) may bar the use of testimonial hearsay evidence in a drunk driving case, breath test certificates have long been considered to be business records, a class of evidence that was specifically excluded from the concept of testimonial hearsay by the Justices in Crawford. State v. Godshalk, 381 N.J. Super. 326, 885 A.2d 969 (Law Div. 2005).

Alcotest 7110—The Alcotest 7110 is a scientifically reliable instrument for measuring blood alcohol concentration in human beings, and, subject to certain technical adjustments to be made under the supervision of the Attorney General, it may be used in the prosecution of the case before the Court. State v. Foley, 370 N.J. Super. 341, 851 A.2d 123 (Law Div. 2003).

Alcohol influence report—"The omission of the forms being sequentially numbered does not appear to deny defendant a fair and impartial test nor deny him access to any materials, and further, no allegation has been made that a failure to sequentially number the forms rendered the results inaccurate, caused the machine to malfunction, or affected the recording of the breathalyzer reading by the operating officer." State v. Hudes, 128 N.J. Super. 589, 321 A.2d 275 (County Ct. 1974).

Chapter 6 – Under the Influence of Alcohol

UNDER THE INFLUENCE OF ALCOHOL

N.J. Supreme Court

Under the influence defined—Although the concept is not explained under N.J.S.A. 39:4-50(a), the Supreme Court has defined being "under the influence" of drugs or alcohol as follows: "The language 'under the influence' used in the statute has been interpreted many times. Generally speaking, it means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs." State v. Tamburro, 68 N.J. 414, 420-21, 346 A.2d 401 (1975).

Under the influence defined—It was the intention of the Legislature under N.J.S.A. 39:4-50(a) in forbidding the operation of a motor vehicle while under the influence of alcohol "to prescribe a general condition, short of intoxication, as a result of which every motor vehicle operator has to be said to be so affected in judgment or control as to make it improper for him to drive on the highways." State v. Johnson, 42 N.J. 146, 165, 199 A.2d 809 (1964).

Under the influence defined—N.J.S.A. 39:4-50(a) "penalizes a person who drives 'while under the influence of intoxicating liquor.' Although prosecutions pursuant to its provisions are commonly and colloquially termed 'drunken driving cases,' it is settled that the statute does not require as a prerequisite to conviction that the accused be absolutely 'drunk,' in the sense of being sodden with alcohol. It is sufficient if the presumed offender has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected." State v. Emery, 27 N.J. 348, 355, 142 A.2d 874 (1958).

"The expression, 'under the influence of intoxicating liquor,' covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive the person of that clearness of intellect and control of himself which he would otherwise possess." State v. Rodgers, 91 N.J.L. 212, 215, 217, 102 A. 433 (N.J. Ct. Err. & App. 1917)

Appellate Division

Evidence—A defendant was deemed to be under the influence of alcohol based upon his disheveled appearance, the strong odor of alcohol on his breath, his demeanor as being "very agitated," "very wobbly" and "yelling and screaming," as well as having "ruffled" clothing, "red and bloodshot" eyes and slurred speech. Moreover, defendant, upon noticing the presence of the officers who had reported to the scene, embarked on an unprovoked verbal barrage against them, calling them "a—holes" and telling them to "[g]et the f—out of here." On top of this evidence, the arresting police officer, a sergeant with twenty-four years on the force, and nineteen years training on the breathalyzer, opined from his personal observations of defendant at the scene that he fit the profile of an intoxicated person "without a doubt." State v. Morris, 262 N.J. Super. 413, 421, 621 A.2d 74 (App. Div. 1993).

Mental or physical capabilities—The test for being under the influence of alcohol is not fitness

or unfitness to drive an automobile, but rather whether the defendant has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected. State v. Miller, 64 N.J. Super. 262, 165 A.2d 829 (App. Div. 1960).

Lay opinion as to intoxication—"It is not to be doubted that the average witness of ordinary intelligence, although lacking special skill, knowledge and experience but who has had the opportunity of observation, may testify whether a certain person was sober or intoxicated. Neither our statutory law nor any procedural rule requires the testimony of medical experts in the prosecution of offenses of this nature." State v. Pichadou, 34 N.J. Super. 177, 180, 111 A.2d 908 (App. Div. 1955).

Mental or physical capabilities—A person may be deemed to be under the influence of alcohol based upon an impairment of either his mental faculties or his physical capabilities. State v. Ash, 21 N.J. Super. 469, 91 A.2d 412 (App. Div. 1952).

Trial Level Courts

A conviction for driving under the influence of alcohol "requires proof that an individual was operating a motor vehicle, whether or not on a highway, while his ability to do so was deleteriously affected by alcohol. The essence of the offense is the impaired condition of defendant's physical coordination or mental faculties rather than the manner in which he is driving." State v. Roenicke, 174 N.J. Super. 513, 517, 417 A.2d 54 (Law Div. 1980)

Chapter 7 – Under the Influence of Drugs

UNDER THE INFLUENCE OF DRUGS

N.J. Supreme Court

Marijuana/required proofs—"[E]xpert testimony remains the preferred method of proof of marijuana intoxication. We arrive at that conclusion in the knowledge that it is not too difficult a burden for the State to offer an expert opinion as to marijuana intoxication. Prosecutors in municipal courts throughout the State routinely qualify local and state police officers to testify as experts on the subject of marijuana intoxication. Expert testimony only requires that a witness be qualified 'by knowledge, skill, experience, training, or education.' " State v. Bealor, 187 N.J. 574, 902 A.2d 226 (2006).[FN23]

Under the influence—"The language 'under the influence' used in the statute has been interpreted many times. Generally speaking, it means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs." State v. Tamburro, 68 N.J. 414, 420-21, 346 A.2d 401 (1975).[FN24]

An operator of a motor vehicle is under the influence of a narcotic drug within the meaning of N.J.S.A. 39:4-50(a) if the drug produced a narcotic effect so altering his or her "normal physical coordination and mental faculties as to render such person a danger to himself, as well as to other persons on the highway." State v. DiCarlo, 67 N.J. 321, 328, 338 A.2d 809 (1975).

Appellate Division

Rebound effect from cocaine—The defendant driver was found to be impaired as a result of being under the influence of cocaine within the meaning of N.J.S.A. 39:4-50(a) even though the pharmacological effects of the drug had worn off. The proofs showed that the defendant's impaired driving was proximately caused by the so-called "rebound effects" of the cocaine he had ingested. State v. Franchetta, 394 N.J. Super. 200, 925 A.2d 745 (App. Div. 2007).

Lay opinion—A lay witness if sufficiently experienced and trained may testify generally as to the observable reaction of drug users and of the technique of the use. State v. Jackson, 124 N.J. Super. 1, 304 A. 2d 565 (App. Div. 1973).[FN25]

Synergistic effects—A person may be deemed to be under the influence within the meaning N.J.S.A. 39:4-50(a) based upon the consumption of an alcoholic beverage in combination with medication. State v. Glynn, 20 N.J. Super. 20, 89 A.2d 50 (App. Div. 1952).

Trial Level Courts

Expert opinion—Proof of the fact that a person operated a motor vehicle while under the influence of drugs is a subject for expert testimony. State v. Kraft, 134 N.J. Super. 416, 341 A.2d 373 (County Ct. 1975).

25.

Chapter 8 – Field Sobriety Testing

N.J. Supreme Court

Lay opinion—An assessment on the performance of field sobriety tests in conclusory terms such as "normal" and "failure." is not admissible "if given by lay witnesses, as distinguished from persons shown to have some expert knowledge, such as physicians, or others who have had special training in use of the tests and in normal and abnormal reactions thereto." Moreover, "where the significance of results of tests depends upon a conclusion of the witness as to whether the motorist's reaction is a departure from the normal or standard, such conclusion may not be given unless the examiner is shown to have some skill or training which will qualify him to make an evaluation." But even if no qualifying experience or training of the police officer witness can be shown, it does not follow that their testimony must be excluded. It is entirely proper for police witnesses to describe the tests or maneuvers they had the defendant perform and then testify as to what his physical reaction was when he undertook to execute them. "The reaction should be described in terms of what they Observed [sic] when the tests were undertaken by defendant." State v. Morton, 39 N.J. 512, 514-15, 189 A.2d 216 (1963).

Appellate Division

Refusal to perform—The refusal by a defendant to perform any field sobriety tests may be considered as evidence of his intoxication. State v. Bryant, 328 N.J. Super. 379, 746 A.2d 44 (App. Div. 2000).

Horizontal gaze nystagmus test (HGN)—The horizontal gaze nystagmus (HGN) test has not been sufficiently established as a scientifically reliable test to be used as substantive proof of guilt in New Jersey. However, the results of the HGN test may be used to establish probable cause to arrest for drunk driving. State v. Doriguzzi, 334 N.J. Super. 530, 760 A.2d 336 (App. Div. 2000).[FN42]

Non-testimonial evidence—The administration of field sobriety tests produces evidence that is non-testimonial in nature. Accordingly, Miranda warnings are not necessary prior to the administration of this type of test. State v. Green, 209 N.J. Super. 347, 507 A.2d 743 (App. Div. 1986).

Chapter 9 – The Allowing Offense

[P]ermits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood….

Leading Cases

ALLOWING INTOXICATED OPERATION

Appellate Division

Negligent supervision—The operators of a bar have an affirmative duty to protect a visibly intoxicated person on the premises, even in those instances where that person has not been drinking while at the bar. Failure to do so may give rise to a cause of action for negligent supervision. Bauer v. Nesbitt, 399 N.J. Super. 71, 942 A.2d 882 (App. Div. 2008).

Duty of a passenger to warn other passengers—Absent a special relationship between the operator and passenger, such as guardian and ward, a passenger owes no duty under New Jersey law to warn other passengers in a motor vehicle of the intoxicated condition of the operator. Champion ex rel. Ezzo v. Dunfee, 398 N.J. Super. 112, 939 A.2d 825 (App. Div. 2008).

Duty of a passenger to render aid to an injured victim—The passengers of a motor vehicle that has been operated by an intoxicated driver have an affirmative duty to come to the aid of a person injured by the intoxicated driver as well as a duty to refrain from thwarting the intoxicated operating from seek help or aiding the injured victim. Podias v. Mairs, 394 N.J. Super. 338, 926 A.2d 859 (App. Div. 2007).

Requirement of proof of knowledge—Although the allowing violation as set forth under N.J.S.A. 39:4-50(a) appears to be a strict liability offense, such is not the case. The elements of the allowing offense have been defined by the Appellate Division as follows. "Accordingly, we hold that before a person may be convicted of permitting another person to operate a motor vehicle under the influence of intoxicating liquor or drugs, or in violation of the statutory standard for blood alcohol level, the State must produce evidence from which the trier of fact may reasonably infer, beyond a reasonable doubt, that such owner or custodian knew or reasonably should have known, of the permittee's impaired condition to drive." State v. Skillman, 226 N.J. Super. 193, 199-200, 543 A.2d 1016 (App. Div. 1988).[FN1]

27.

Trial Level Courts

Objective test of knowledge—The allowing offense under N.J.S.A. 39:4-50(a) requires a showing of knowledge in an objective sense, not subjective. Thus the test is what a reasonable person knew or should have known from the attendant circumstances, not what the defendant actually knew regarding the intoxicated state of the person whom he permitted to drive. State v. Zanger, 370 N.J. Super. 360, 851 A.2d 134 (Law Div. 2004).

Proof of knowledge required—A conviction for violating N.J.S.A. 39:4-50(a) by permitting an intoxicated driver to operate one's motor vehicle requires proof that the defendant owner knew, or reasonably should have known, that the operator was intoxicated or had a blood alcohol concentration of .10% or more. State v. Michalek, 207 N.J. Super. 340, 504 A.2d 155 (Law Div. 1985).

N.J.S.A. 39:4-50(a) requires the State to prove that defendant knew or should have known that the operator was under the influence of alcoholic or intoxicating beverages at the time the permission was granted. State v. Wetmore, 121 N.J. Super. 90, 296 A.2d 92 (County Ct. 1972) (overruled by, State v. Gormley, 139 N.J. Super. 556, 354 A.2d 674 (App. Div. 1976)).

28.

Chapter 10 – Blood Testing

BLOOD TESTS

N.J. Supreme Court

Use of force in extracting blood sample—Force used by police to extract defendant's blood in hospital emergency room was unreasonable under totality of circumstances. The defendant was terrified of needles and voiced his strong objection to procedures used on him, he shouted and flailed as nurse drew his blood, several persons, including police, and mechanical restraints were needed to hold defendant down. State v. Ravotto, 169 N.J. 227, 777 A.2d 301 (2001).

Patient and physician privilege—Communications related to the results of tests performed on a blood sample taken by hospital personnel are not protected by the Patient and Physician Privilege under N.J.R.E. 506 (N.J.S.A. 2A:84A-22.1). State v. Schreiber, 122 N.J. 579, 585 A.2d 945 (1991).

In order obtain results of a blood test protected by patient-physician privilege, police should make an ex parte application to a municipal court judge for a subpoena duces tecum. Upon a showing by police that they have a reasonable basis[FN2] to believe defendant was operating a motor vehicle while under the influence, a judge may issue a subpoena. State v. Dyal, 97 N.J. 229, 478 A.2d 390 (1984).[FN3]

Appellate Division

Testimony by person who drew blood/notice to prosecution—Due to the potential for hardship to nurses and laboratory technicians, the Court discourages the *pro forma* insistence that such witnesses appear for trial to vouch for the contents of their reports if there are no *bona fide* subject matters in dispute upon which the defense intends to cross-examine. Rather, the Court will require that defense counsel provide reasonable advance notice to prosecutors of their intention to cross-examine these witnesses. In the absence of such notice, a defendant will be deemed to have waived his right to confrontation. State v. Kent, 391 N.J.Super. 352, 918 A.2d 626, 2007 WL 845874 (N.J.Super.A.D. Mar 22, 2007).

Testimony by person who drew blood/confrontation under Crawford—One of the conditions of admissibility for the results of the analysis of a blood sample in a drunk driving case is that the sample was taken from the body of the defendant in a medically acceptable manner. Under N.J.S.A. 2A:62A–11, a person who draws a blood sample at the request of the police in a drunk driving case need not appear in court to personally testify at trial. Rather, that person may submit a certificate under oath, indicating that the sample was properly taken. Despite the statutory authority for this procedure, the evidence it produces is "testimonial" within the meaning of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) . Thus, in the absence of consent by the defendant to its admissibility or unavailability at trial by the witness and a previous opportunity for cross-examination, the certificate is inadmissible. State v. Renshaw, 2007 WL 419621 (N.J. Super. Ct. App. Div. 2007).[FN4]

Blood test result certificates—In order to protect the defendant's rights under the confrontation

clause of the 6th Amendment to the United States Constitution[FN5], the procedures for the introduction in evidence of a certificate of blood test results in a drunk driving case should generally conform to the procedures set forth in the Comprehensive Drug Reform Act as provided under N.J.S.A. 2C:35–19.[FN6] If the defendant imposes an objection to the means and methods used for testing his blood sample, the chemist who tested the blood sample should appear at trial to testify as to the procedures used. State v. Berezansky, 386 N.J. Super. 84, 899 A.2d 306 (App. Div. 2006).

Refusal to provide blood sample—A refusal to give a blood sample may provide proof of consciousness of guilt by the defendant. State v. Cryan, 363 N.J. Super. 442, 456, 833 A.2d 640 (App. Div. 2003)

Certification of person drawing blood—Under N.J.S.A. 2A:62A-10 and N.J.S.A. 2A:62A-11, it makes no difference whether the person who avers that blood sample has been drawn from the body of the defendant in a medically acceptable manner do so by way of affidavit or certification. State v. DeFrank, 362 N.J. Super. 1, 826 A.2d 773 (App. Div. 2003).

Admissibility in evidence—The general rule relating to the admissibility of blood test results in a drunk driving case was explained by the Appellate Division as follows. "N.J.R.E. 808 permits the admission of a business record or public record, such as the laboratory report here in issue, without accompanying testimony when the report concerns an uncomplicated subject matter and the likelihood of accuracy is high. Traditionally, blood-alcohol analysis has been viewed as a simple and accurate procedure warranting admission of a report without additional testimony from the person who performed the test." State v. Oliveri, 336 N.J. Super. 244, 250, 764 A.2d 489 (App. Div. 2001).[FN7]

Forensic vs. diagnostic test of blood samples—In determining the blood alcohol concentration of in blood sample, there are differences in the methodology used by law enforcement for forensic purposes in comparison to those conducted by a hospital for diagnostic purposes. However, despite the difference is testing procedures, in order for the results to be admissible in evidence, it must be shown that the blood sample of a suspected drunken driver was extracted in a medically acceptable manner. State v. Lutz, 309 N.J. Super. 317, 707 A.2d 159 (App. Div. 1998).

Conversion of blood serum results to BAC—The procedure for converting a blood serum alcohol reading into a blood alcohol level has been described by the Appellate Division as follows: "Serum is derived when the tube containing whole blood is spun so that the solid and fluid portions separate. The fluid portion is then analyzed providing a 'serum alcohol value.' Serum contains more water than does blood, so that the resulting alcohol reading is sixteen percent higher in serum than it would be in blood. A serum alcohol value is therefore converted to blood alcohol by dividing the serum value by 1.16." State v. Lutz, 309 N.J. Super. 317, 322, 707 A.2d 159 (App. Div. 1998) (note 2).[FN8]

Subpoena duces tecum for hospital blood test results—A subpoena duces tecum for blood test results in a drunk driving case may issue upon less than probable cause. The required level of proof is only a reasonable and well-grounded basis to believe that the defendant operated a motor vehicle while under the influence of alcohol. State v. Bodtmann, 239 N.J. Super. 33, 570 A.2d 1003 (App. Div. 1990).

Destruction of blood sample during testing—The good faith use of an entire blood sample during the testing process does not preclude admission of the blood test results. State v. Mercer,

211 N.J. Super. 388, 511 A.2d 1233 (App. Div. 1986).[FN9]

Destruction of blood sample during testing—When "the State in good faith, uses up, consumes or even disposes of the balance of a blood specimen in good faith, this does not preclude the admission of competent evidence of the test and the results at trial." State v. Casele, 198 N.J. Super. 462, 471, 487 A.2d 765 (App. Div. 1985).

Use of force—Generally, a defendant has no right to refuse to give a blood sample at the request of the police during a drunk driving investigation and the police may use a reasonable amount of force to extract such a sample in a medically acceptable manner. State v. Woomer, 196 N.J. Super. 583, 483 A.2d 837 (App. Div. 1984)

Blood sample consumed during testing—"We hold to the view that where an entire sample of a specimen, such as blood, is, as here, in good faith, consumed or destroyed during the testing process by a recognized law enforcement or other qualified laboratory, the consumption or destruction of the specimen does not constitute an act of suppression of evidence by the State sufficient to trigger a due process violation, warranting the suppression of the test results." State v. Kaye, 176 N.J. Super. 484, 490, 423 A.2d 1002 (App. Div. 1980).

Admissibility of hospital laboratory report—In prosecution for operating motor vehicle while under influence of intoxicating liquor, hospital laboratory report setting forth result of blood test for alcohol was admissible under business entries exception to hearsay rule. State v. Martorelli, 136 N.J. Super. 449, 346 A.2d 618 (App. Div. 1975).

Medically acceptable manner—The authority to extract a blood sample from a living human being is not limited by law to physicians. Accordingly, it is not necessary that a blood sample needed for police purposes in a DWI investigation be extracted by a licensed physician. All the law requires is that the sample be extracted in a medically acceptable environment and in a medically acceptable manner. State v. McMaster, 118 N.J. Super. 476, 288 A.2d 583 (App. Div. 1972).

Trial Level Courts

Admissibility in evidence—State Police blood-alcohol laboratory reports qualify as both business records under N.J.R.E. 803(c)(6), and public documents under then N.J.R.E. 803(c)(8). The report of the results of blood tests from the State Police forensic laboratory may be admitted without accompanying testimony from the qualified forensic chemist who performed the tests. State v. Weller, 225 N.J. Super. 274, 542 A.2d 55 (Law Div. 1986).[FN10]

Admissibility in evidence—In a blood case, there is no burden upon the State to exclude every conceivable event that might affect such sample's admissibility, absent some affirmative indication to the contrary. "That is, without some scintilla of evidence that could place the chemical integrity of the blood sample in doubt, proof that such sample was obtained in a hospital and by qualified medical personnel will suffice to establish the requirement that the blood was withdrawn in a medically acceptable manner and environment." State v. Rypkema, 191 N.J. Super. 388, 392, 466 A.2d 1324 (Law Div. 1983).

Chapter 11 – Burdens of Proof

BURDENS OF PROOF

N.J. Supreme Court

Establishing conditions of admissibility—In establishing the conditions of admissibility of the results of a breathalyzer test, the burden is on the State to satisfy those conditions by clear and convincing evidence. Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984).[FN11]

Burden at trial—The burden of proof allocated to the State in a drunk driving prosecution is proof of guilt beyond a reasonable doubt. State v. Fearon, 56 N.J. 61, 264 A.2d 446 (1970).

Chapter 12 – Discovery

DISCOVERY

Appellate Division

Data-downloads and repair logs—Data downloads from the date of the last calibration until the date of defendant's test and repair logs are relevant and must be supplied to the defendant upon request by way of a discovery demand. State v. Maricic, 417 N.J. Super. 280, 9 A.3d 1026 (App. Div. 2010).

Sanctions for failure to provide—The municipal court may impose sanctions upon a prosecutor who fails to comply with a request for discovery. Such sanction may take the form of a monetary penalty or limiting the admissibility of evidence at trial. State v. Holup, 253 N.J. Super. 320, 601 A.2d 777 (App. Div. 1992).

Role of court staff—The responsibility for providing discovery is a function uniquely committed to the prosecution. Thus, court officials and other court personnel have no responsibility or function in either providing discovery or managing discovery requests. State v. Prickett, 240 N.J. Super. 139, 572 A.2d 1166 (App. Div. 1990).

Relevant items—A defendant's right to discovery in a drunk-driving case is limited to those relevant items within the limitations of the Rules of Court related to discovery "which there is a reasonable basis to believe will assist the defense." State v. Ford, 240 N.J. Super. 44, 49, 572 A.2d 640 (App. Div. 1990).

Ampoules—There is no requirement that the prosecution provide ampoules from the same batch used to test the defendant as part of routine discovery. State v. Young, 242 N.J. Super. 467, 577 A.2d 520 (App. Div. 1990).

Entitlement to discovery—Because the Rules of Court permit discovery in any case involving a consequence of magnitude, a defendant charged with drunk driving is entitled to demand and receive discovery.[FN22] State v. Utsch, 184 N.J. Super. 575, 446 A.2d 1236 (App. Div. 1982).

Trial Level Courts

Relevant items—Discovery in a drunk driving case is restricted to relevant evidence. Relevant evidence for purposes of discovery constitutes evidence that concerns an issue involved in the prosecution and tends to prove (or disprove) a fact material to that issue. State v. Tull, 234 N.J. Super. 486, 560 A.2d 1331 (Law Div. 1989).

Chapter 13 – Defenses

DEFENSES

New Jersey Supreme Court

Unsigned summons—A police officer who has probable cause to believe that a defendant has violated N.J.S.A. 39:4-50(a) may correct a technically invalid, unsigned ticket by signing the ticket, even if the statute of limitations has expired. As a matter of policy, New Jersey traffic cases are to be decided on the merits whenever possible and not on the basis of technical deficiencies related to pleadings or process. State v. Fisher, 180 N.J. 462, 852 A.2d 1074 (2004). This case overrules State v. Brennan, 229 N.J. Super. 342, 551 A.2d 560 (App. Div. 1988).

Double jeopardy/partial acquittal—The New Jersey drunk driving statute comprises only one offense that may be proved in a variety of different ways. Accordingly, a finding of insufficient evidence under one method of proof does not constitute an acquittal where there is proof beyond a reasonable doubt on one of the other methods of proof. State v. Kashi, 180 N.J. 45, 848 A.2d 744 (2004).

Duress—Although the defenses generally available under the New Jersey Code of Criminal Justice are not available to a defendant in a drunk driving case, common law defenses may be asserted. For example, the defense of duress under New Jersey common law may be used as a defense in a drunk-driving case. State v. Fogarty, 128 N.J. 59, 607 A.2d 624 (1992).

Common law defenses—Although defenses available under the New Jersey Code of Criminal Justice may not be used in a drunk-driving case, the defenses that exist at under the New Jersey common law are available to a defendant charged with a motor vehicle violation. State v. Hammond, 118 N.J. 306, 571 A.2d 942 (1990).

A defendant charged with a motor vehicle offense does not forfeit all constitutional and common-law defenses. State v. DeLuca, 108 N.J. 98, 527 A.2d 1355 (1987), cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987).

Double jeopardy—A plea of guilty in municipal court to drunk driving, which included merged offenses of reckless driving and failure to keep right, prevented a subsequent Superior Court prosecution death by auto arising from the same incident based upon the double jeopardy clauses of State and Federal Constitutions. State v. Dively, 92 N.J. 573, 458 A.2d 502 (1983).[FN12]

Appellate Division

Double jeopardy—The defendant entered plea of guilty in Superior Court to an indictable offense for which the intoxicated operation of a motor vehicle provided the evidence on the required element of recklessness. Thus, under the "same evidence" test, the Superior Court plea created a double jeopardy bar to a subsequent prosecution for drunk driving in municipal court. State v. Hand, 416 N.J. Super. 622, 7 A.3d 797 (App. Div. 2010).

Lost or destroyed video/motion to withdraw plea—"Because defendant did not establish that the videotape had exculpatory value that was apparent to the State when it was erased through reuse or that its potentially exculpatory value was destroyed in bad faith, defendant could not establish his entitlement to relief. Even if we were to assume that the videotape included exculpatory evidence and was available to the prosecution at the time of discovery, we could not conclude that defendant demonstrated that the videotape was material to his decision to plead guilty." State v. Mustaro, 411 N.J. Super. 91, 984 A. 2d 450 (App. Div. 2009).[FN13]

Expert witnesses/sequestration—Generally speaking, expert witnesses should not be sequestered during the conduct of a drunk-driving trial. State v. Popovich, 405 N.J. Super. 324, 964 A.2d 804 (App. Div. 2009).

Sequestration of experts —Generally speaking, the Rules of Evidence do not require to sequestration of an expert witness in a drunk driving case. The expert has no independent, first-hand knowledge of the facts of the case and thus is in no position to tailor his testimony to conform to the sworn evidence offered by other witnesses. Moreover, one of the expert's essential functions is to comment upon the testimony of other lay and expert witnesses in the case. State v. Popovich, 2009 WL 364108 (N.J. Super. Ct. App. Div. 2009).

Pre-Trial intervention—Neither a conviction for drunk driving nor completion of a drunk driving diversionary program in a foreign jurisdiction will statutorily bar a person from admittance to Pre-Trial Intervention for a criminal offense. State v. McKeon, 385 N.J. Super. 559, 897 A.2d 1127 (App. Div. 2006).

Rejection from PTI by prosecutor—"Here the judge and parties contemplated that the DWI would be remanded to the municipal court, presumably for trial, notwithstanding that it was a lesser included offense to the third-degree aggravated assault charge. Without commenting on the practice of remanding non-indictable offenses to municipal courts incident to a guilty plea on a related indictable charge, the prosecutor's objection to enrollment can hardly be deemed a patent and gross abuse of discretion given the fact that the disposition of motor vehicle charges could jeopardize the indictable charges if defendant did not successfully complete the PTI program and her participation was terminated. [Citations omitted.] Furthermore, as the alleged aggravated assault includes DWI, the public policy advanced by the prosecutor much be recognized." State v. Moraes-Pena, 386 N.J. Super. 569, 580, 902 A. 2d 318 (App. Div. 2006).

Advisement of right to independent test—Statute requirement an advisement of the right to independent testing of breath, blood or urine is not an element of N.J.S.A. 39:4-150 that must be proved at trial. Rather, a challenge based upon a failure to provide this statutory advisement must be raised in a motion to suppress the breath test results. It is only when such a pre-trial challenge is raised that the State prove that the proper statutory advisement was given to the defendant. State v. Howard, 383 N.J. Super. 538, 892 A. 2d 751 (App. Div. 2006).

Double jeopardy/administrative suspension—The imposition of an administrative suspension by the Motor Vehicle Commission, based upon a drunk driving conviction in another State, does not constitute double jeopardy. State, Div. of Motor Vehicles v. Pepe, 379 N.J. Super. 411, 879 A. 2d 747 (App. Div. 2005).

Double jeopardy—A finding of insufficient evidence in a prosecution for N.J.S.A. 39:4-50(a) as a per se violation does not necessarily constitute an acquittal of the charge since other evidence introduced at trial may prove the case under one of the alternative offenses under the statute. State v. Kashi, 360 N.J. Super. 538, 823 A.2d 883 (App. Div. 2003).

Unsigned summons—The signing of a drunk driving ticket acts as the complainant police officer's certification that there is probable cause to believe the offense has occurred. Based upon the current state of the law, the reasoning by the Court in State v. Brennan, 229 N.J. Super. 342, 551 A.2d 560 (App. Div. 1988) (overruled by, State v. Fisher, 180 N.J. 462, 852 A.2d 1074 (2004)) presents the proper outcome when a drunk driving ticket has not been signed within the statute of limitations period. State v. Fisher, 363 N.J. Super. 108, 831 A.2d 126 (App. Div. 2003) , rev'd, 180 N.J. 462, 852 A.2d 1074 (2004).

Common law necessity—Although statutory defenses set forth under the New Jersey Code of Criminal Justice are not available to the defendant in a drunk driving prosecution, the common law defense of necessity is available as a defense to such a defendant. State v. Romano, 355 N.J. Super. 21, 809 A.2d 158 (App. Div. 2002)

Statute of limitations: Unsigned summons—When a police officer neglects to sign a summons and complaint within the statute of limitations period, that failure constitutes a fatal defect to the ability of the State to proceed. State v. Brennan, 229 N.J. Super. 342, 551 A.2d 560 (App. Div. 1988).[FN14] The decision was overruled by State v. Fisher, 180 N.J. 462, 852 A.2d 1074 (2004).

Trial Level Courts

Plea bargaining on appeal to Law Division—Due to the absolute ban on plea bargaining drunk driving cases, the Law Division would not entertain a plea agreement related to a drunk driving case on appeal from municipal court. State v. Rastogi, 403 N.J. Super. 581, 959 A.2d 896 (Law Div. 2008).

Hearsay/business records—Even through the Crawford[FN15] ban against testimonial, out-of-court, hearsay statements by an unavailable witness may apply in DWI cases, the United States Supreme Court has specially excluded business records from the scope of that ban. State v. Godshalk, 381 N.J. Super. 326, 885 A. 2d 969 (N.J. Super. 2005).

Chapter 14 – Restrictions on Defenses

RESTRICTIONS ON DEFENSES

N.J. Supreme Court

Jury trial—There is no right to a jury trial on a drunk driving case. When the drunk driving charge is companion to indictable matters, the trial judge will decide the drunk driving case and the jury will decide the criminal charges. State v. Stanton, 176 N.J. 75, 820 A.2d 637 (2003).

Plea bargaining—All offenses set forth under N.J.S.A. 39:4-50(a), including the offense of permitting the intoxicated operation of a motor vehicle may not be the subject of plea bargaining in municipal court. State v. Hessen, 145 N.J. 441, 678 A.2d 1082 (1996).[FN16]

Quasi entrapment—The defense of quasi-entrapment has a strong likelihood of being based upon a mere pretext, and thus, its use as a defense in a drunk driving prosecution is not permitted. State v. Fogarty, 128 N.J. 59, 607 A.2d 624 (1992).

Jury trial—There is no right to a trial by jury on a drunk-driving case in municipal court. State v. Hamm, 121 N.J. 109, 577 A.2d 1259 (1990).

No defenses under Criminal Code—Motor vehicle violations, including violations of the DWI statute do not meet the statutory definition of "offenses" under New Jersey's Criminal Code. Thus, Code defenses do not apply to the motor vehicle offense of DWI. State v. Hammond, 118 N.J. 306, 571 A.2d 942 (1990).

Involuntary intoxication—Involuntary intoxication is not a defense to driving under the influence of alcohol. State v. Hammond, 118 N.J. 306, 571 A.2d 942 (1990).

Extrapolation—The defense of extrapolation is not permitted in a drunk driving case. State v. Tischio, 107 N.J. 504, 527 A.2d 388 (1987).[FN17]

Appellate Division

Involuntary intoxication/chemicals—"DWI is an absolute liability offense, [Citation omitted], and intoxication on chemicals or otherwise is not a defense. Much as involuntary alcohol intoxication is not a defense to a DWI charge, [Citation omitted], involuntary intoxication by chemicals cannot be. To hold otherwise would contravene the 'clear legislative intent and a strong legislative policy to discourage long trials complicated by pretextual [sic] defenses.' N.J.S.A. 39:4-50 prohibits operating a motor vehicle 'while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit forming drug,' which, by definition, 'includes an inhalant or other substance containing a chemical *capable* of releasing any toxic vapors or fumes for the purpose of inducing a condition of intoxication.'" State v. Federico, 414 N.J. Super. 321, 326–327, 998 A.2d 517 (App. Div. 2010).

Extreme sensitivity to alcohol—Hypersensitivity to the effects of alcohol does not constitute a defense to a charge of drunk driving. State v. Cryan, 363 N.J. Super. 442, 833 A.2d 640 (App. Div. 2003).

Post-operation consumption (glove box defense)—Although not explicitly banned by New Jersey law, the so-called "glove box" defense must be based upon reliable, credible and strong evidence of post-operation consumption of an alcoholic beverage. State v. Snyder, 337 N.J. Super. 59, 766 A.2d 316 (App. Div. 2001).[FN18]

Plea bargaining by police—The purpose behind the absolute ban on plea bargaining drunk driving cases in municipal court is to preserve "public confidence that a meritorious drunk driving offense will not be bargained away" by the prosecutor. State v. Marsh, 290 N.J. Super. 663, 667, 676 A.2d 603 (App. Div. 1996).

Involuntary workplace exposure to alcohol-containing substances—The involuntary ingestion of occupational volatiles or endogenous alcohol does not constitute a defense to drunk driving. State v. Carey, 263 N.J. Super. 377, 622 A.2d 1347 (App. Div. 1993)

Videotape rebuttal evidence—Evidence of a defendant on videotape that shows his positive performance during the administration of balance and coordination tests may not be admitted to rebut the results of a breathalyzer test in a per se prosecution. State v. Allex, 257 N.J. Super. 16, 608 A.2d 1 (App. Div. 1992).[FN19]

Jury trial—There is no right to a trial by jury on a drunk-driving case in municipal court. State v. Linnehan, 197 N.J. Super. 41, 484 A.2d 34 (App. Div. 1984).

Contributing factors that enhance effects of alcohol—Contributing factors of medication or physical or nervous conditions rendering defendant more susceptible to alcohol are not defenses if such factors caused or contributed to impairment of defendant's faculties. State v. Corrado, 184 N.J. Super. 561, 446 A.2d 1229 (App. Div. 1982).

Chronic alcoholism—The disease of alcoholism is not a defense to a prosecution for drunk driving. State v. Housman, 131 N.J. Super. 478, 330 A.2d 598 (App. Div. 1974).

Trial Level Courts

Hearsay/business records—Even through the Crawford[FN20] ban against testimonial, out-of-court, hearsay statements by an unavailable witness may apply in DWI cases, the United States Supreme Court has specially excluded business records from the scope of that ban. State v. Godshalk, 381 N.J. Super. 326, 885 A. 2d 969 (N.J. Super. 2005).

Insanity—"As with involuntary intoxication, entrapment, and duress, the insanity defense has a high potential for serving as an instrument of pretext." Allowing a defendant prosecuted under N.J.S.A. 39:4-50(a) to assert the common-law insanity defense would be contrary to the legislative policy embodied in the statute against permitting defenses based upon a mere pretext. Accordingly, the use of the insanity defense, under both the common law and the Code of Criminal Justice is not permitted in a DWI case. State v. Inglis, 304 N.J. Super. 207, 212, 698 A.2d 1296 (Law Div. 1997).[FN21]

Post-operation consumption (glove box defense)—In an effort to vitiate the defense of post-operation consumption of an alcoholic beverage (the so-called glove-box defense) one trial court ruled as follows: "The fact that he may have ingested additional alcoholic beverages at a time that he was pulled over by a police officer does not serve to destroy the efficacy of the breathalyzer test, nor does it force the State to engage in an exercise of extrapolation." State v. Lizotte, 272 N.J. Super. 568, 571, 640 A.2d 876 (Law Div. 1993).

Videotape rebuttal testimony—Expert testimony regarding observations of defendant's

videotaped behavior is inadmissible for the purpose of contradicting the results of an otherwise reliable breathalyzer test. State v. Manfredi, 242 N.J. Super. 708, 577 A.2d 1338 (Law Div. 1990).

Jury trial—There is no right to a trial by jury on a drunk-driving case in municipal court. State v. Zoppi, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984).

There is no right to a trial by jury on a drunk-driving case in municipal court. State v. Ferretti, 189 N.J. Super. 578, 461 A.2d 193 (Law Div. 1983).

39.

Chapter 15 – Speedy Trial

N.J. Supreme Court

Factors to be considered—There are four factors the court must weigh and balance when a defendant asserts a speedy trial claim arising from a delay in a municipal court drunk driving prosecution. The factors balanced include: (1) the length of the delay, (2) the reason(s) for the delay, (3) any assertion by the accused of speedy trial rights, and (4) any prejudice to the accused from the delay. State v. Gallegan, 117 N.J. 345, 567 A.2d 204 (1989).[FN33]

Appellate Division

32-month delay—The four factors[FN34] to be balanced in finding a deprivation of defendant's right to a speedy trial are related and must all be weighed together. In this case, there was a relatively lengthy delay (total 32 months) caused by the State's retention of the municipal court charges until PTI was resolved. It was defendant who applied for PTI and spent fourteen months successfully completing the program. As a result, the defendant achieved dismissal of the companion indictable charges, and through most of the delay failed to request a municipal court trial or even make an inquiry concerning his pending drunk driving charge. Accordingly, defendant's motion to dismiss on speedy trial grounds was properly denied. State v. Fulford, 349 N.J. Super. 183, 793 A.2d 112 (App. Div. 2002).

663 days over 13 court sessions—In balancing and applying the four factors of Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117-18 (1972), the court concluded that the delay in completing the case was far beyond what was reasonable and was plainly excessive. The reasons for the delay were the prosecution's clear inattention to his responsibilities along with the municipal court's patent failure to prepare itself to try the matter quickly and shepherd it to resolution efficiently. “These shortcomings were so egregious that no showing of prejudice” was required in order for this defendant to succeed on his argument that, in fundamental fairness terms, he was denied his adequately (and frequently) asserted right to a speedy trial. State v. Farrell, 320 N.J. Super. 425, 453, 727 A.2d 501 (App. Div. 1999).

7-month delay—A seven-month delay in the prosecution of a drunk-driving did not deny the defendant of his right to speedy trial. State v. Detrick, 192 N.J. Super. 424, 470 A.2d 933 (App. Div. 1983).

Trial Level Courts

Prosecutor unprepared on trial date—“A court's promise is sacrosanct[.]” If it is not based upon erroneous information or mistaken legal principle, it is a promise that must be kept. The integrity of the judicial system demands this. Accordingly, the failure of the trial court to dismiss a drunk driving prosecution as promised when the prosecution was unprepared to try the case on a date certain was an abuse of judicial discretion. State v. Perkins, 219 N.J. Super. 121, 125, 529 A.2d 1056 (Law Div. 1987).

40.

Chapter 16 – Sentencing

SENTENCING

N.J. Supreme Court

Prior refusal convictions—A prior conviction for refusing to submit to a breath test under N.J.S.A. 39:4-50.4a will not enhance a subsequent conviction for drunk driving under N.J.S.A. 39:4-50(a). State v. Ciancaglini, 2011 WL 148910 (N.J. 2011).

Uncounseled prior convictions/elements of proof—"A defendant is faced with a three-step undertaking in proving that a prior uncounseled DWI conviction should not serve to enhance the jail component of a sentence imposed on a subsequent DWI conviction. As a threshold matter, the defendant has the burden of proving in a second or subsequent DWI proceeding that he or she did not receive notice of the right to counsel in the prior case. He or she must then meet the two-tiered Laurick burden. [Citation omitted.] In that vein, if defendant proves that notice of the right to counsel was not provided, the inquiry is then bifurcated into whether the defendant was indigent or not indigent. '[I]f [the] defendant [was] indigent, [the defendant must prove that] the DWI conviction was a product of an absence of notice of the right to assignment of counsel and non-assignment of such counsel without waiver.' On the other hand, if the defendant was not indigent at the time of the prior uncounseled conviction, [the] defendant should have the right to establish such lack of notice as well as the absence of knowledge of the right to be represented by counsel of one's choosing and to prove that the absence of such counsel had an impact on the guilt or innocence of the accused or otherwise 'wrought a miscarriage of justice for the individual defendant.'" State v. Hrycak, 184 N.J. 351, 363, 877 A.2d 1209 (2005).

School zone offenses/merger—In order to be considered a second or subsequent offender for purposes of sentencing under the drunk driving school zone law, a defendant must have been previously convicted of a violation of N.J.S.A. 39:4-50(g). In addition the penalties for drunk driving under N.J.S.A. 39:4-50(a) and the school zone offense under N.J.S.A. 39:4-50(g) merge for purposes of sentencing with the defendant required to receive whichever set of penalties is harsher. State v. Reiner, 180 N.J. 307, 850 A.2d 1252 (2004).

Uncounseled prior convictions—In the absence of an effective waiver of the right to counsel, a prior uncounseled conviction may not be used to enhance the custodial component of a subsequent drunk driving sentence. State v. Laurick, 120 N.J. 1, 575 A.2d 1340 (1990).[FN35]

Correction of illegal sentence—Under New Jersey common law, a Court is without power to correct an improper or illegal sentence after it has been completely served by the defendant. State v. Laird, 25 N.J. 298, 135 A.2d 859 (1957).

41.

Appellate Division

***Laurick* relief requires uncounseled guilty plea**—It is fundamental that the relief available to defendants by way of post-conviction relief (Rule 7:10-2(g)) under State v. Laurick, 120 N.J. 1, 575 A.2d 1340 (1990) (abrogated on other grounds by, Nichols v. U.S., 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994)) applies only in those circumstances where the defendant entered a plea of guilty without the benefit of counsel. Thus, Laurick relief is unavailable to defendants who were represented by an attorney at the time of the prior drunk driving conviction and a municipal court order to the contrary is not binding upon the Superior Court Law Division. State v. Enright, 416 N.J. Super. 391, 4 A.3d 1027 (App. Div. 2010).[FN36]

Cap on jail term at 180 days—Under New Jersey law, drunk driving is a petty offense for which there is no right to a trial by jury. Accordingly, a defendant who has been convicted of drunk driving and other petty offenses arising from the same incident may not be sentenced to an aggregate term of imprisonment in excess of 180 days. The required jail terms must be served concurrently to achieve this sentence cap.[FN37] State v. Federico, 414 N.J. Super. 321, 328–330, 998 A.2d 517 (App. Div. 2010).

Time limitations—The general 5-year limitation on the filing of post-conviction relief applications seeking relief under State v. Laurick, 120 N.J. 1, 575 A.2d 1340 (1990) may be relaxed upon a showing of a *prima facie* case in the pleadings submitted with the petition. State v. Bringhurst, 401 N.J. Super. 421, 951 A.2d 238 (App. Div. 2008).

Ten-Year step-down based upon a Laurick application—A defendant who is successful on a post-conviction application based upon State v. Laurick, 120 N.J. 1, 575 A.2d 1340 (1990) is entitled to a 10-year step-down adjustment on the custodial term of his drunk driving sentence if more than 10 years have passed since the prior offense occurred. State v. Conroy, 397 N.J. Super. 324, 937 A.2d 328 (App. Div. 2008).

Third offenders: Weekend jail & SLAP—Neither weekend service of a jail term nor entry into the SLAP program as an alternative to jail is permitted for an offense that occurred under the version of the DWI statute in effect in 1993. State v. Kotsev, 396 N.J. Super. 389, 934 A.2d 642 (App. Div. 2007).[FN38]

Venue for Laurick applications—Post-conviction relief application filed under Rule 7:10-2(g) seeking relief under State v. Laurick, 120 N.J. 1, 575 A.2d 1340 (1990) must be filed in the original municipal court where the conviction occurred. Moreover, the provisions of Rule 7:10-2(g) apply in the cases for applications for relief filed prior to September 1, 2007, the date the Rule went into effect.State v. Schadewald, 2007 WL 2935044 (N.J. Super. Ct. App. Div. 2007).

Required jail term for third offenders—The amendments to the sentencing provisions of N.J.S.A. 39:4-50(a)(3) effective January 20, 2004 make it clear that a third or subsequent offender must be sentenced to 180 days in jail, subject to as much as 90 days credits for time spent in an IDRC-approved in-patient residential facility. Work release or credits for out-patient therapy are not permitted for these defendants. State v. Luthe, 383 N.J. Super. 512, 892 A.2d 736 (App. Div. 2006).

January 2004 amendments/prospective application—The amendments to the sentencing

provisions of N.J.S.A. 39:4-50(a) apply only to offenses occurring on or after January 20, 2004. State v. Chambers, 377 N.J. Super. 365, 872 A.2d 1109 (App. Div. 2005).

No sentencing enhancement for DWI based upon prior intoxicated boating offense—The legislature did not intend to enhance drunk driving sentences based on a prior conviction for intoxicated operation of a vessel under N.J.S.A. 12:7-46, State v. Solarski, 374 N.J. Super. 176, 863 A.2d 1095 (App. Div. 2005).

10-year step down provision—In order to receive the benefit of a step-down on sentencing, the defendant must have a period of a full ten years between his first and second offenses or a full ten years between his second and third offenses. State v. Burroughs, 349 N.J. Super. 225, 793 A.2d 137 (App. Div. 2002).

Merger—The penalties associated with drunk driving must still be imposed when a defendant has been found guilty of both drunk driving and aggravated assault, despite the fact that the drunk driving conviction merges with the assault conviction. State v. Baumann, 340 N.J. Super. 553, 775 A.2d 3 (App. Div. 2001).

Uncounseled prior convictions—In the absence of an effective waiver of the right to counsel, a prior uncounseled conviction may not be used to enhance the custodial component of a subsequent drunk driving sentence State v. Latona, 307 N.J. Super. 387, 704 A.2d 1045 (App. Div. 1998).

Error in prior sentence—An error in a prior sentence has no effect on the ability of the sentencing court to impose the correct enhanced sentence on a subsequent conviction. State v. Nicolai, 287 N.J. Super. 528, 671 A.2d 611 (App. Div. 1996).[FN39]

Enhancement of subsequent refusal conviction—A prior conviction for drunk driving will enhance a subsequent conviction for refusing to submit to a breath test under N.J.S.A. 39:4-50.4a. State v. Tekel, 281 N.J. Super. 502, 658 A.2d 1281 (App. Div. 1995).

Prior convictions for refusal—A prior conviction for refusing to submit to a breath test **does not** enhance a subsequent conviction for drunk driving. State v. DiSomma, 262 N.J. Super. 375, 621 A.2d 55 (App. Div. 1993).

Order of prior offenses—The mandatory enhanced penalty provisions for subsequent conviction of driving while intoxicated could be imposed even though second violation occurred prior to sentencing for first conviction. State v. Petrello, 251 N.J. Super. 476, 598 A.2d 927 (App. Div. 1991).

Retroactive jail credits for in-patient rehabilitation program—N.J.S.A. 39:4-50(a)(3) statute does not preclude retroactive credit for in-patient rehabilitation treatment where such credit is appropriate in the discretion of the sentencing judge. However, it is important to note that a defendant is not entitled to credit as a matter of right, as he would be for jail time under Rule 7:9-3. State v. Fyffe, 244 N.J. Super. 310, 582 A.2d 812 (App. Div. 1990).

Relevant date for prior offenses—In determining the relevant date for calculating sentence enhancements based upon a prior drunk driving offense, the **date of the prior offense controls** as opposed to the date of the prior conviction. State v. Bischoff, 232 N.J. Super. 515, 557 A.2d 717 (App. Div. 1989).

Rules of evidence at sentencing—The Rules of evidence do not apply during a drunk driving sentencing proceeding. State v. Carey, 232 N.J. Super. 553, 557 A.2d 1036 (App. Div. 1989)

.[FN40]

Out-of-State convictions—Legislature intended an out-of-state conviction for an offense equivalent to a violation of N.J.S.A. 39:4-50(a) to be considered as a prior offense under that statute. State v. Regan, 209 N.J. Super. 596, 508 A.2d 1149 (App. Div. 1986).[FN41]

Prior conviction for driving while impaired—A prior conviction for driving while impaired under the former N.J.S.A. 39:4-50(b) is to be counted as a prior conviction for purposes of sentence enhancement on a subsequent conviction under N.J.S.A. 39:4-50(a). State v. Culbertson, 156 N.J. Super. 167, 383 A.2d 729 (App. Div. 1978).

Proof of prior convictions—A certified abstract of defendant driving record from the State Motor Vehicle Commission is sufficient evidence upon which the sentencing judge may rely in determining the existence of prior convictions in a drunk driving case. State v. Burger, 74 N.J. Super. 208, 181 A.2d 30 (App. Div. 1962).

Trial Level Courts

Third offenders/weekend sentences—The 2004 amendments to N.J.S.A. 39:4-50 did not affect the statutory authority of a municipal court judge under N.J.S.A. 2B:12-22 to order that a required jail term for drunk driving be served on weekends. State v. Grabowski, 388 N.J. Super. 431, 908 A. 2d 861 (Law Div. 2006).

Sentence for a second offense—A defendant convicted of a second offense for N.J.S.A. 39:4-50(a) must receive a jail term ranging between 48 hours and 90 days. This jail term may not be suspended. State v. Walsh, 236 N.J. Super. 151, 564 A.2d 901 (Law Div. 1989).

44.

Chapter 17 – Collateral Consequences

COLLATERAL CONSEQUENCES

Appellate Division

Disqualification from PTI based prior upon out-of-state diversion— Generally speaking, neither a New Jersey drunk driving conviction nor a diversion from the criminal justice system for a drunk driving offense in another jurisdiction acts as a statutory bar to admittance into Pre-trial Intervention**.** State v. McKeon, 385 N.J. Super. 559, 897 A.2d 1127 (App. Div. 2006).

Disqualification from PTI based upon prior driving history—It is clear a past motor vehicle offense is not a criminal event for purposes of PTI evaluation. We recognize, however, that a driving history can have some limited relevance to a PTI application if there is a strong substantive and temporal relationship between the past motor vehicle offenses and the offense with which a PTI applicant has been charged. In such settings, a driving record could demonstrate that a defendant has engaged in a 'pattern of anti-social behavior' as contemplated in N.J.S.A. 2C:43–12e(8). State v. Negran, 178 N.J. 73, 77, 835 A.2d 301 (2003).

PIP coverage options—"The plain language of N.J.S.A. 39:6A-4.3(e) puts consumers on notice that election of a lower benefits option, in consideration of a reduced premium, denies eligibility for the $250,000 of benefits formerly mandated and evidences the clear intent of the Legislature that New Jersey PIP policies will often not contain identical benefits." Britten v. Liberty Mut. Ins. Co., 389 N.J. Super. 556, 914 A.2d 305 (App. Div. 2007).

Administrative suspensions—An administrative suspension based upon an out-of-state conviction must be as a result of an offense that is substantially similar to N.J.S.A. 39:4-50. In this case, the out-of-state violation was too dissimilar to support a suspension. New Jersey Div. of Motor Vehicles v. Ripley, 364 N.J. Super. 343, 835 A.2d 1252 (App. Div. 2003).

An administrative suspension imposed by the Motor Vehicle Commission as a result of a New York conviction was proper despite the fact that there was more than a nine month delay between the date of the New York conviction and a proposed notice of suspension from the New Jersey DMV. Boyd v. Division of Motor Vehicles, 307 N.J. Super. 356, 704 A.2d 1029 (App. Div. 1998).

Surcharges—Regardless of a defendant's state of residency, by virtue of N.J.S.A. 17:29A-35(b) he or she is subject to the insurance surcharge upon a conviction for drunk-driving in New Jersey. Wnuck v. New Jersey Div. of Motor Vehicles, 337 N.J. Super. 52, 766 A.2d 312 (App. Div. 2001).

Motor vehicles surcharges may be imposed when a New Jersey resident is convicted of a substantially similar offense to the New Jersey drunk driving statute in another jurisdiction. Matter of Johnson, 226 N.J. Super. 1, 543 A.2d 454 (App. Div. 1988).

45.

Trial Level Courts

Surcharges—Motor vehicle surcharges may be discharged in a Chapter 7 Bankruptcy. In re Pulley, 295 B.R. 28 (Bankr. D. N.J. 2003), aff'd, 303 B.R. 81 (D.N.J. 2003).

A motor vehicle insurance surcharge arising from a former wife's conviction for driving while intoxicated and leaving scene of accident, was a non-marital debt for which former husband owed no duty of contribution. Clark v. Clark, 324 N.J. Super. 587, 737 A.2d 189 (Ch. Div. 1999)
.

Part 2 – Implied Consent

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

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

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

(c) In addition to the samples taken and tests made at the direction of a police officer hereunder, the person tested shall be permitted to have such samples taken and chemical tests of his breath, urine or blood made by a person or physician of his own selection.

(d) The police officer shall inform the person tested of his rights under subsections (b) and (c) of this section.

(e) No chemical test, as provided in this section, or specimen necessary thereto, may be made or taken forcibly and against physical resistance thereto by the defendant. The police officer shall, however, inform the person arrested of the consequences of refusing to submit to such test in accordance with section 2 of this amendatory and supplementary act.[FN1] A standard statement, prepared by the chief administrator, shall be read by the police officer to the person under arrest.

CREDIT(S)

L.1966, c. 142, § 2. Amended by L.1977, c. 29, § 3; L.1981, c. 512, § 1, eff. Jan. 12, 1982; L.2007, c. 267, § 1, eff. March 1, 2008.

Chapter 18 – Notification to Defendants

N.J. Supreme Court

Paragraph 36 advisements in foreign languages—A drunk driving defendant has the right to be informed of his obligation to submit samples of his breath in a drunk driving case in a language he can understand. The defendant must bear the burden of raising this issue as a defense. Moreover, it is not a defense to claim that the defendant was too intoxicated to understand what the warnings in paragraph 36 meant. State v. Marquez, 202 N.J. 485, 510–514, 998 A.2d 421 (2010).

Elements of the refusal offense—"A careful reading of the two statutes [N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a] reveals four essential elements to sustain a refusal conviction: (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test." State v. Marquez, 202 N.J. 485, 503, 998 A.2d 421 (2010).

Paragraph 36—It is only necessary to read the second portion of paragraph 36 when a subject either offers conditional assent to submitting a breath sample or when the consent is ambiguous. State v. Spell, 196 N.J. 537, 959 A.2d 1209 (2008).[FN48]

Public policy—"The legislative history of the consent and refusal statutes clearly indicates that the Legislature enacted these statutes to facilitate drunk driving investigations. They were designed 'to enable the enforcing authorities to reach out during the very short window in time during which the scientific evidence of intoxication is available, in order to examine a class whose proximity to the event indicates that the members of that class may have a contribution to make to the search for the truth.' " State v. Wright, 107 N.J. 488, 502, 527 A.2d 379 (1987).

Appellate Division

Inability to understand paragraph 36 in English—A defendant who seeks to bar evidence related to the warnings given in English under paragraph 36 must do so through the filing of a motion to suppress evidence. State v. Kim, 412 N.J. Super. 260, 989 A.2d 864 (App. Div. 2010), certification denied, 202 N.J. 344, 997 A.2d 229 (2010).

Defendant does not speak English: Paragraph 36—New Jersey police need only inform an arrested motorist of the requirement to submit a breath sample in English. State v. Marquez, 408 N.J. Super. 273, 974 A.2d 1092 (App. Div. 2009).[FN49]

Trial Level Courts

Obligation to provide multiple samples—This statute provides that operators are deemed to have given their consent to the taking of samples of breath for the purpose of making chemical tests to determine the amount of alcohol in the blood. The clear wording of the statute indicates that operators are deemed to consent to give more than one breath sample to determine the amount of alcohol in the blood. Moreover, a "second breath sample is for the benefit of the accused because any disparate results will alert the operator to a potential mechanical malfunction of the machine." Inaccurate and false readings are discovered and may be disregarded. Those who test under 0.08% will not be prejudiced by the administration of a second test, "as law enforcement officials will count only the lower of two breathalyzer results, obtained 15 minutes apart, as evidence against the suspect." State v. White, 253 N.J. Super. 490, 498, 602 A.2d 295 (Law Div. 1991).

Public policy—"The implied consent statute was conceived and enacted for laudable public purposes and to serve valid state interests, including the avoidance of the use of force in obtaining samples, to assist in obtaining the most reliable evidence of driving while intoxicated, and to reduce the number of death-dealing drunken drivers on highways by administrative sanctions, including the suspension of drivers' license privileges." State v. Hudes, 128 N.J. Super. 589, 605, 321 A.2d 275 (County Ct. 1974).

Chapter 19 – *Miranda* & Right to Counsel

N.J. Supreme Court

Non-testimonial nature of evidence—The taking of a breathalyzer test is non-testimonial in nature and is not covered by the privilege against self-incrimination. State v. Stever, 107 N.J. 543, 527 A.2d 408 (1987).

Because the evidence obtained during the course of a breathalyzer test is non-testimonial in nature, it is not necessary to advise a defendant of his or her Miranda rights. State v. Green, 209 N.J. Super. 347, 507 A.2d 743 (App. Div. 1986).

The taking of a breath sample is non-testimonial. Furthermore, a simple request to submit to a chemical test does not constitute interrogation. State v. DeLorenzo, 210 N.J. Super. 100, 509 A.2d 238 (App. Div. 1986).

The taking of a breath sample is non-testimonial in nature. Accordingly, a driver accused of driving while under the influence of alcohol has no right to consult an attorney before determining whether to comply with the legal obligation to submit to a breathalyzer test. State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970).

No right to attorney or *Miranda* warnings—There is no right to consult with an attorney or to be advised of *Miranda* warnings prior to submitting to a breathalyzer test. State v. Leavitt, 107 N.J. 534, 527 A.2d 403 (1987).

Appellate Division

No right to attorney or *Miranda* warnings—Since the plain language of N.J.S.A. 39:4-50.2(a) "indicates that anyone driving a motor vehicle in this State 'shall be deemed to have given his consent to the taking of samples of his breath,' defendant may not assert that he had a right to consult with counsel before submitting to breathalyzer testing." State v. Green, 209 N.J. Super. 347, 355, 507 A.2d 743 (App. Div. 1986).

No right to consult with attorney—There is no right by a defendant to consult with an attorney for legal advice prior to submitting to a breathalyzer test. State v. Pandoli, 109 N.J. Super. 1, 262 A.2d 41 (App. Div. 1970).

Implied consent—A defendant has no legal right to refuse to take the breath test because driving upon the highway acts as his consent to the taking of samples of his breath. State v. Kenderski, 99 N.J. Super. 224, 239 A.2d 249 (App. Div. 1968).

Chapter 20 – Right to an Independent Test

RIGHT TO AN INDEPENDENT TEST

N.J. Supreme Court

No absolute right to be released—It is reasonable for the police to release a suspected drunk driver only to a responsible friend or family member. There is no absolute right to be released. State v. Greeley, 178 N.J. 38, 834 A.2d 1016 (2003).

Appellate Division

Not an element of DWI—Proof of compliance with the statutory requirement of informing a defendant of the right to an independent test is not an element of proof in a drunk driving prosecution. State v. Howard, 383 N.J. Super. 538, 892 A.2d 751 (App. Div. 2006).

Police policy for independent tests—A defendant may successfully challenge the introduction of a breathalyzer examination when he or she "is informed of his right to have an independent examination and attempts to take advantage of that right, but is not afforded a meaningful opportunity to have the independent test conducted. That is, it must be shown that the absence of established police procedures has interfered with or thwarted defendant's attempt to exercise the right to an independent examination." In this case, the arresting officer's summoning of the cab immediately upon completing the breathalyzer tests on defendant, taken in conjunction with his prior advice to defendant concerning the right to an independent test, was all that was necessary to further defendant's exercise of his right. Rather than seek an independent blood test, the defendant used the cab to take himself home. Thus, there was no thwarting of defendant's right to have an independent test. It is only where the absence of police procedures interfere with defendant's attempt to exercise his statutory right that relief must be given. State v. Jalkiewicz, 303 N.J. Super. 430, 434-35, 697 A.2d 155 (App. Div. 1997).

A police "policy that allows a defendant to contact his attorney or family member by telephone and to be released to such an escort in furtherance of the defendant's exercise of his or her right to arrange for independent testing does, in our view, provide a procedure affording the defendant reasonable access to such testing." State v. Ettore, 228 N.J. Super. 25, 31, 548 A.2d 1134 (App. Div. 1988).

Suppression of breathalyzer results—A defendant may successfully challenge the introduction of a breathalyzer examination when he or she is informed of the statutory right to take an independent examination, and attempts to take advantage of that right, but is not accorded a meaningful opportunity to have an independent test conducted. State v. Hicks, 228 N.J. Super. 541, 550 A.2d 512 (App. Div. 1988).

No police duty to arrange for independent test—There is no duty expressed under N.J.S.A. 39:4-50(a) for the police to arrange for an independent test for a defendant charged with drunk driving. State v. Weber, 220 N.J. Super. 420, 532 A.2d 733 (App. Div. 1987).

Trial Level Courts

Suppression of breath test results—Where the evidence demonstrates that the police thwarted

defendant's opportunity to arrange a meaningful independent blood test, the appropriate sanction is a suppression of the blood test results. However, a defendant may still be found guilty based upon observation evidence that he operated his motor vehicle while under the influence of alcohol. State v. Broadley, 281 N.J. Super. 230, 656 A.2d 1319 (Law Div. 1992).

Thwarted opportunity for an independent test—Breathalyzer test results may be excluded when the police fail in their obligation to afford a defendant a reasonable opportunity to take an independent test. State v. Nicastro, 218 N.J. Super. 231, 527 A.2d 492 (Law Div. 1986).

Inability to understand English—"Absent a valid constitutional argument", the evidence obtained by a breath test should not be excluded because the defendant "did not understand his statutory right to have an independent test performed by a person of his choosing after he had been informed of this right. All operators of motor vehicles give their implied consent to submit to breathalyzer tests. [Citation omitted.]To find that this consent can be negated by a defendant's claim that he did not understand his statutory right to have an independent test performed would defeat the purpose of the statute. Where the State has granted an individual the privilege of driving on its highways, the burden must be on the individual to understand the laws and regulations in furtherance of that privilege." State v. Nunez, 139 N.J. Super. 28, 34, 351 A.2d 813 (County Ct. 1976).

Delay attributed to defendant—A police department need not assume the responsibility or must assist a defendant in his arrangements for an independent test or transport a defendant to a doctor or to an independent laboratory for a blood test. State v. Hudes, 128 N.J. Super. 589, 321 A.2d 275 (County Ct. 1974).

Police procedures—The implied consent statute "is silent as to any given procedure to be employed in securing an independent analysis of a defendant's blood. The police could, as was done in this case, extend the use of the telephone to a defendant. On the other hand, a defendant could indicate his choice of a physician to the police who, in turn, would make the necessary arrangements. These and other reasonable means could be employed in the absence of any precisely defined procedure in the statute. Where a statute confers certain rights upon a defendant, the police are not thereby denied the authority to establish reasonable regulations in implementation of these rights; they are, perforce, charged with the duty of promulgating reasonable procedures to vouchsafe such rights to a defendant." State v. Hudes, 128 N.J. Super. 589, 321 A.2d 275 (County Ct. 1974).

Chapter 21 – Place of Operation

Appellate Division

Quasi-Public areas: Apartment complex parking garage – A private parking garage comstitutes a quasi-public area for the purpose of the Implied Consent Statute. State v. Bertrand, 408 N.J. Super. 584, 975 A.2d 967 (App. Div. 2009).

Quasi-Public areas—Unlike the drunk driving law, the refusal statute does not apply to all parts of the State. Rather, the obligation to take a breathalyzer test is confined to public roads, streets, highways and other quasi-public areas. This limitation in the statute eliminates the requirement to take a breathalyzer test when the intoxicated operation occurs on purely private property to which the public does not normally have access. The basis for limiting the territorial jurisdiction of the implied consent law, may be founded on a concern by the Legislature about the statute's constitutionality if it were to apply to private places. State v. Garbin, 325 N.J. Super. 521, 530, 739 A.2d 1016 (App. Div. 1999).

53.

Part 3 – Approved Breath-testing Devices

N.J.S.A. 39:4-50.3. Method of analyses; approval of techniques; certification of analysts; reports; forms

Chemical analyses of the arrested person's breath, to be considered valid under the provisions of this act, shall have been performed according to methods approved by the Attorney General, and by a person certified for this purpose by the Attorney General. The Attorney General is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct such analyses, and to make certifications of such individuals, which certifications shall be subject to termination or revocation at the discretion of the Attorney General. The Attorney General shall prescribe a uniform form for reports of such chemical analysis of breath to be used by law enforcement officers and others acting in accordance with the provisions of this act. Such forms shall be sequentially numbered. Each chief of police, in the case of forms distributed to law enforcement officers and others in his municipality, or the other officer, board, or official having charge or control of the police department where there is no chief, and the Director of the Division of Motor Vehicles and the Superintendent of State Police, in the case of such forms distributed to law enforcement officers and other personnel in their divisions, shall be responsible for the furnishing and proper disposition of such uniform forms. Each such responsible party shall prepare or cause to be prepared such records and reports relating to such uniform forms and their disposition in such manner and at such times as the Attorney General shall prescribe.

54.

Chapter 22 – Authorized Devices – In General

Leading Cases

N.J. Supreme Court

State police periodic inspection procedures—The action of the State Police in setting forth procedures to test breathalyzer machines is more like an intra-agency memorandum than rulemaking. Accordingly, the State Police procedures for the periodic inspection and testing of breathalyzers does not constitute rule making which is normally subject to promulgation requirements of Administrative Procedure Act. State v. Garthe, 145 N.J. 1, 678 A.2d 153 (1996).

Authorized breathalyzer models—The Smith and Wesson Breathalyzer Models "900 and 900A are scientifically reliable for the purpose of determining the content of blood alcohol." In addition, the results of a breathalyzer test are generally admissible in evidence when the breathalyzer instrument "is in proper working order, is administered by a qualified operator and is used in accordance with accepted procedures, and that such results may, upon the establishment of these conditions, form the basis upon which a conviction of violating N.J.S.A. 39:4-50 may be obtained." Romano v. Kimmelman, 96 N.J. 66, 82, 474 A.2d 1 (1984).

Appellate Division

Sequentially numbered forms—The failure by the police to follow the statutory provision concerning sequential numbering of alcohol influence reports does not justify the suppression of breath test results. State v. Jorn, 340 N.J. Super. 192, 774 A.2d 507 (App. Div. 2001).[FN50]

Breathalyzer Model 900—"N.J.A.C. 13:51-3.5 expressly provides that the Attorney General has approved the 'Breathalyzer, Model 900.' " State v. Samarel, 231 N.J. Super. 134, 555 A.2d 40 (App. Div. 1989).

Trial Level Courts

Sequentially numbered forms—"No constitutional rights are denied by the lack of sequentially numbered forms." State v. Hudes, 128 N.J. Super. 589, 321 A.2d 275 (County Ct. 1974).

55.

Part 4 –Refusal to Submit to Breath-testing

N.J.S.A. 39:4-50.4a. Refusal to submit to chemical test; penalties

a. Except as provided in subsection b. of this section, the municipal court shall revoke the right to operate a motor vehicle of any operator who, after being arrested for a violation of R.S.39:4-50 or section 1 of P.L.1992, c. 189 (C.39:4-50.14), shall refuse to submit to a test provided for in section 2 of P.L.1966, c. 142 (C.39:4-50.2) when requested to do so, for not less than seven months or more than one year unless the refusal was in connection with a second offense under this section, in which case the revocation period shall be for two years or unless the refusal was in connection with a third or subsequent offense under this section in which case the revocation shall be for ten years. A conviction or administrative determination of a violation of a law of a substantially similar nature in another jurisdiction, regardless of whether that jurisdiction is a signatory to the Interstate Driver License Compact pursuant to P.L.1966, c. 73 (C.39:5D-1 et seq.), shall constitute a prior conviction under this section.

The municipal court shall determine by a preponderance of the evidence whether the arresting officer had probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-producing drug or marijuana; whether the person was placed under arrest, if appropriate, and whether he refused to submit to the test upon request of the officer; and if these elements of the violation are not established, no conviction shall issue. In addition to any other requirements provided by law, a person whose operator's license is revoked for refusing to submit to a test shall be referred to an Intoxicated Driver Resource Center established by subsection (f) of R.S.39:4-50 and shall satisfy the same requirements of the center for refusal to submit to a test as provided for in section 2 of P.L.1966, c. 142 (C.39:4-50.2) in connection with a first, second, third or subsequent offense under this section that must be satisfied by a person convicted of a commensurate violation of this section, or be subject to the same penalties as such a person for failure to do so. For a first offense, the revocation may be concurrent with or consecutive to any revocation imposed for a conviction under the provisions of R.S.39:4-50 arising out of the same incident. For a second or subsequent offense, the revocation shall be consecutive to any revocation imposed for a conviction under the provisions of R.S.39:4-50. In addition to issuing a revocation, except as provided in subsection b. of this section, the municipal court shall fine a person convicted under this section, a fine of not less than $300 or more than $500 for a first offense; a fine of not less than $500 or more than $1,000 for a second offense; and a fine of $1,000 for a third or subsequent offense. The person also shall be required to install an ignition interlock device pursuant to the provisions of P.L.1999, c.

417 (C.39:4-50.16 et al.).

b. For a first offense, the fine imposed upon the convicted person shall be not less than $600 or more than $1,000 and the period of license suspension shall be not less than one year or more than two years; for a second offense, a fine of not less than $1,000 or more than $2,000 and a license suspension for a period of four years; and for a third or subsequent offense, a fine of $2,000 and a license suspension for a period of 20 years when a violation of this section occurs while:

(1) 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;

(2) 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

(3) 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 paragraph (1) of this subsection.

It shall not be relevant to the imposition of sentence pursuant to paragraph (1) or (2) of this subsection 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.

COMMENT

A person who is convicted of refusing to submit to a breathalyzer test must pay additional monetary sanctions beyond the fine imposed upon conviction. These include a $100 Drunk Driving Enforcement Fund Surcharge under N.J.S.A. 39:4-50.8 and court costs of $33 imposed under N.J.S.A. 22A:3-4. Another $6 must be added to the fine as well under N.J.S.A. 39:5-41(d) to (h). The Violent Crimes Assessment, Safe Neighborhoods Assessment and other penalties associated with a drunk driving conviction do not apply to the refusal offense.

Collateral consequences include a $3000 surcharge payable to the DMV by virtue of N.J.S.A. 17:29A-35(b)(2)(b) and nine insurance eligibility points to be assessed by the defendant's own insurance company under N.J.A.C. 11:3-34 (appendix). In the event that the defendant is convicted of both drunk driving and refusal, there will be only one surcharge of $3000 imposed.

Chapter 23 – Acts Constuting a Refusal

N.J. Supreme Court

Paragraph 36—It is only necessary to read the second portion of paragraph 36 when a subject either offers conditional assent to submitting a breath sample or when the consent is ambiguous. State v. Spell, 196 N.J. 537, 959 A.2d 1209 (2008).[FN59]

Alcotest 7110 and women over age 60—The firmware controlling the Alcotest is to be reprogrammed so as to require a breath sample of only 1.2 liters of air from women over age 60. Pending that change, a woman over age 60 who has made a good faith attempt to provide a breath sample but was unable to do so may not be prosecuted for a refusal. However, evidence that the defendant provided one sample of at least 1.5 liters of air may be considered by the trial judge as evidence of guilt in a refusal trial. State v. Chun, 194 N.J. 54, 104-05, 943 A.2d 114 (2008).

Appellate Division

Curing – Bright line rule—Defendant refused at least 10 requests from the State Police to submit to a breath test. The police considered his conduct to constitute a refusal. However, after he spoke by phone with his attorney, the defendant informed the police he would take the test, however the police declined to administer it. The Appellate Division held that there is a bright line rule of law in New Jersey that there is no right for a defendant to cure an initial refusal to submit to a breathalyzer test by agreeing to submit to a test after an initial refusal. State v. Bernhardt, 245 N.J. Super. 210, 584 A.2d 854 (App. Div. 1991).[FN61]

Curing – Public policy—Under the public policy of the implied consent law, there is no right to cure an initial refusal to submit to a breathalyzer test. State v. Corrado, 184 N.J. Super. 561, 446 A.2d 1229 (App. Div. 1982).

Silence as a refusal—A defendant who simply remains silence in the face of a police request to submit to a breathalyzer test has refused to take the test within the intendment of N.J.S.A. 39:4-50.4a. Police have no obligation, when confronted by a defendant who remains utterly silent when requested to take a breathalyzer test, to set up the machine and lead the defendant to the machine and hold the hose to his or her mouth. State v. Sherwin, 236 N.J. Super. 510, 566 A.2d 536 (App. Div. 1989).

Obligations of defendant—It does not take much to constitute a refusal to submit to a breath test. The state of the law is that "anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so. [citations omitted.] The occasion is not one for debate, maneuver or negotiation, but rather for a simple 'yes' or 'no' to the officer's request." State v. Pandoli, 109 N.J. Super. 1, 4, 262 A.2d 41 (App. Div. 1970).[FN60]

Trial Level Courts

Short samples—A defendant failed to provide an adequate sample on 5 of the 6 attempts he

made blowing into a breathalyzer. These actions by the defendant, coupled with his hostile, uncooperative attitude toward the arresting police were evidence of an intent to refuse to take the breath test. State v. Geller, 348 N.J. Super. 359, 791 A.2d 1138 (Law Div. 2001).

Failure to provide more than one sample—A defendant is required to provide a sufficient number of samples in order for the police officer operating the breathalyzer to receive an accurate reading. Normally, this requires a minimum of two samples. There may be occasions where more than two samples are required. Accordingly, the failure of the defendant to provide more than one sample constitutes a refusal. State v. White, 253 N.J. Super. 490, 498, 602 A.2d 295 (Law Div. 1991).

59.

Chapter 24 – Trial Procedures

TRIAL PROCEDURES

N.J. Supreme Court

Elements of the refusal offense—"A careful reading of the two statutes [N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a] reveals four essential elements to sustain a refusal conviction: (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test." State v. Marquez, 202 N.J. 485, 503, 998 A.2d 421 (2010).

Paragraph 36 advisements in foreign languages—A drunk driving defendant has the right to be informed of his obligation to submit samples of his breath in a drunk driving case in a language he can understand. The defendant must bear the burden of raising this issue as a defense. Moreover, it is not a defense to claim that the defendant was too intoxicated to understand what the warnings in paragraph 36 meant. State v. Marquez, 202 N.J. 485, 510–514, 998 A.2d 421 (2010).

Alcotest 7110: Women over age 60—The firmware controlling the Alcotest is to be reprogrammed so as to require a breath sample of only 1.2 liters of air from women over age 60. Pending that change, a woman over age 60 who has made a good faith attempt to provide a breath sample but was unable to do so may not be prosecuted for a refusal. However, evidence that the defendant provided one sample of at least 1.5 liters of air may be considered by the trial judge as evidence of guilt in a refusal trial. State v. Chun, 194 N.J. 54, 104-05, 943 A.2d 114 (2008).

Suppressed evidence—Evidence that has been suppressed as a result of constitutional violations is not available in a prosecution of a companion refusal violation. State v. Badessa, 185 N.J. 303, 885 A. 2d 430 (2005).

Probable cause standard—In order for the police to legally compel a person to submit to a breath test, the officer must have probable cause to believe that the subject person operated a motor vehicle while under the influence of alcohol. State v. Wright, 107 N.J. 488, 527 A.2d 379 (1987).

Attempted operation—A person who is under the influence of alcohol who unsuccessfully attempts to operate a motor vehicle must submit to a breath test at the request of the police. State v. Mulcahy, 107 N.J. 467, 527 A.2d 368 (1987).

60.

The Confusion Doctrine—There is an inherent contradiction in informing a defendant under Miranda that he generally has the rights to remain silent and speak to an attorney for legal advice, but that these rights do not apply to the taking of a breath sample. This contradiction may cause confusion in an intoxicated defendant. Accordingly, a defendant may, under certain limited factual circumstances interpose a defense to a refusal charge based upon confusion. As the Supreme Court has held, "We recognize that despite the best of efforts some confusion may remain. Without resolving whether any defendant may validly assert the defense, we agree with the view expressed in the Attorney General's brief that the" exclusive, narrow exception to the general rule that refusals cannot be validly justified, "would have to be premised on a record developed by a defendant to show that he had indeed been confused. We also agree that it is entirely appropriate that a defendant bear the burden of persuasion if he wishes to establish a confusion claim. We suspect that in most cases the defendant makes a more practical rather than legal judgment about exercising the statutory right to refuse a blood-alcohol test in light of the generally known consequences." State v. Leavitt, 107 N.J. 534, 542, 527 A.2d 403 (1987).

Adverse inference—The trial court may draw an adverse inference of guilt on a drunk driving charge based upon a defendant's refusal to submit to a breathalyzer test. State v. Stever, 107 N.J. 543, 527 A.2d 408 (1987).

Burden of proof—Despite the burden imposed by statute, the constitutionally required burden of proof in a refusal prosecution is proof beyond a reasonable doubt. State v. Cummings, 184 N.J. 84, 875 A.2d 906 (2005).

Suppressed evidence—Evidence that has been suppressed as a result of constitutional violations is not available in a prosecution of a companion refusal violation. State v. Badessa, 185 N.J. 303, 885 A. 2d 430 (2005).

Appeal by prosecution—Despite the statutory civil burden of proof required to prove a refusal violation, the penalties associated with a conviction are so severe as to render the statute quasi-criminal for double jeopardy purposes. Accordingly, the State may not pursue an appeal of an acquittal of a defendant in a refusal case on grounds of double jeopardy. State v. Widmaier, 157 N.J. 475, 724 A. 2d 241 (1999).

Elements of offense—The Supreme Court has divided the offense of refusal to submit to a breath test into three basic elements that must be independently proved by a preponderance of the evidence. The Court has noted, "We hold that proof of actual operation is not required. To secure a conviction under N.J.S.A. 39:4-50.4a, the State must prove only that: (1) the arresting officer had probable cause to believe that defendant had been operating a vehicle while under the influence of alcohol; (2) defendant was arrested for driving while intoxicated; and (3) defendant refused to submit to a breathalyzer test." State v. Wright, 107 N.J. 488, 490, 527 A.2d 379 (1987).

***Miranda* and right to remain silent**—There is no right to consult with an attorney or remain silent under Miranda when a person who has been arrested for drunk driving is requested by the

police to take a breathalyzer test. State v. Leavitt, 107 N.J. 534, 527 A.2d 403 (1987).

61.

Appellate Division

Inability to understand paragraph 36 in English—A defendant who seeks to bar evidence related to the warnings given in English under paragraph 36 must do so through the filing of a motion to suppress evidence. State v. Kim, 412 N.J. Super. 260, 989 A.2d 864 (App. Div. 2010), certification denied, 202 N.J. 344, 997 A.2d 229 (2010).

Motion to suppress/attenuation of taint—Defendant's act of refusing to submit to a breath test was so far attenuated from the unconstitutional stop of his motor vehicle so as to not be subject to suppression. State v. Badessa, 373 N.J. Super. 84, 860 A.2d 962 (App. Div. 2004), rev'd, 185 N.J. 303, 885 A.2d 430 (2005).

Alcotest/Twenty-minute waiting period—The twenty-minute observation period may be accomplished by a police officer who is not the operator of the Alcotest instrument. This is because "[o]ne of the benefits associated with the Alcotest is its automation, which is intended to reduce the role of the operator and thereby minimize the potential for human error. To construe the twenty-minute observation requirement as bestowing upon the operator the exclusive responsibility to monitor the test subject elevates form over substance and places an importance on the operator that is inconsistent with what [the Supreme Court in State v. Chun, 194 N.J. 54 (2008)] envisioned to be his or her diminished role." State v. Ugrovics, 410 N.J. Super. 482, 490, 982 A.2d 1211 (App. Div. 2009).[FN63]

Semi-Annual Alcotest calibration—The requirement of semi-annual calibration of Alcotest instruments as ordered by the Supreme Court in State v. Chun, 194 N.J. 54 (2008) is to be applied prospectively. State v. Pollock, 407 N.J. Super. 100, 969 A.2d 522 (App. Div. 2009)

Speedy trial—"We do not suggest that any delay beyond the sixty-day goal is excessive. However, for the standard to have any meaning, municipal courts must continuously strive to assure prompt prosecution of DWI matters. Here, the 344 day dispositional period is more than five times the stated objective, and, as discussed below, the delays were numerous, [each one of which was caused by the State's failure to be ready to proceed] mostly avoidable and largely unexplained." State v. Tsetsekas, 411 N.J. Super 1, 983 A. 2d 1155 (App. Div. 2009).[FN62]

Burden of proof—Traditionally, refusal cases have been considered to be civil in nature. Accordingly, the civil standard of proof by a preponderance of the evidence has been used to establish guilt. That standard of proof has been incorporated into the present statute by the Legislature. State v. Todaro, 242 N.J. Super. 177, 576 A.2d 307 (App. Div. 1990).

Severance—Despite the different burdens of proof, there is no requirement that the municipal court severe the trial of a drunk driving case and a companion refusal charge.[FN56] State v. Grant, 196 N.J. Super. 470, 483 A.2d 411 (App. Div. 1984).

62.

Trial Level Courts

Alcotest/twenty-minute waiting period—State must demonstrate that the subject defendant was continuously observed for twenty minutes prior to providing a breath sample for the Alcotest. State v. Filson, 409 N.J. Super. 246, 976 A.2d 460 (2009).
N.J.S.A. 39:4-50.5. Severability

Territorial jurisdiction—A refusal to submit to a breathalyzer test is a continuing offense. Accordingly, the territorial jurisdiction to try a refusal charge may properly be maintained within the jurisdiction where the drunk driving conduct occurred. In this case, the defendant was arrested for drunk driving in one municipality and then transferred to a neighboring municipality for the purpose of taking a breathalyzer test. The defendant refused and was charged with both DWI and refusal. Since a refusal is a continuing offense related to the drunk driving conduct, both the refusal and drunk driving cases can be tried together in the municipality where the drunk driving conduct occurred, even though the act of refusal occurred in a different municipality. State v. Potts, 186 N.J. Super. 616, 453 A.2d 300 (Law Div. 1982).

Language barriers—The fact that a defendant does not speak English and may not have understood his statutory right to an independent test of his own blood, breath or urine is not a basis to suppress or exclude the results of a breathalyzer test. State v. Nunez, 139 N.J. Super. 28, 351 A.2d 813 (County Ct. 1976).

Administrative Law

Unconscious defendant—A defendant who was unconscious at the time of the attempted administration of the breath test was deemed not to have refused. Division of Motor Vehicles v. Massuk, 2 N.J.A.R. 408 (N.J. Admin. Ct. 1977).

Too intoxicated to take test—The combination of injuries from an accident, combined with a profound level of intoxication was insufficient justification to prevent the loss of driving privileges for refusing to take the breath test. Division of Motor Vehicles v. Festa, 6 N.J.A.R. 173 (N.J. Admin. Ct. 1982).

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63.

Chapter 25 – Sentencing

N.J. Supreme Court

Prior refusal convictions—A prior conviction for refusing to submit to a breath test under N.J.S.A. 39:4-50.4a will not enhance a subsequent conviction for drunk driving under N.J.S.A. 39:4-50(a). State v. Ciancaglini, 2011 WL 148910 (N.J. 2011).

"Under this section": Enhancement for subsequent offenses—A prior conviction for operating a motor vehicle while intoxicated under N.J.S.A. 39:4-50(a) will enhance a future conviction for refusing to submit to a breath test in connection with a future drunk driving charge. Matter of Bergwall, 85 N.J. 382, 427 A.2d 65 (1981) (rev'g on dissent, 173 N.J. Super. 431, 436, 414 A.2d 584 (App. Div. 1980)).[FN51]

Appellate Division

Prior refusal conviction to enhance DWI—In construing the sentencing requirements of N.J.S.A. 39:4-50.4a in the context of recent case law, it is now proper to consider a conviction for refusing to submit to a breath test as a prior DWI conviction for purposes of sentence enhancement for a violation of N.J.S.A. 39:4-50(a). This decision abrogates an earlier Appellate Division decision to the contrary in State v. DiSomma, 262 N.J. Super. 375, 621 A.2d 55 (App. Div. 1993). State v. Ciangalini, 411 N.J. Super 280, 986 A. 2d 1 (App. Div. 2010).

Merger of DWI and refusal—The offenses of Drunk Driving under N.J.S.A. 39:4-50(a) and Refusal to Submit to a Breath Test in violation of N.J.S.A. 39:4-50.5a do not merge for sentencing purposes as a matter of law. State v. Eckert, 410 N.J. Super. 389, 982 A.2d 469 (App. Div. 2009).

Prior refusal conviction under preponderance standard—A prior conviction for refusing to submit to a breath test that was taken under the standard of proof by a preponderance of the evidence may be used to enhance the sentence for a future violation of the refusal statute taken under the beyond a reasonable doubt standard. State v. Breslin, 392 N.J. Super. 584, 921 A.2d 1163 (App. Div. 2007).

Third offenders/mandatory incarceration—The 2004 amendments to N.J.S.A. 39:4–50 and N.J.S.A. 39:4–51 evidenced the Legislature's intention that every person who has been convicted of drunk driving for a third or subsequent offense be sentenced to serve 180 in jail, less any applicable credit for time spent in an approved in-patient rehabilitation facility approved by the Intoxicated Driver Resource Center. State v. Luthe, 383 N.J. Super. 512, 892 A.2d 736 (App. Div. 2006).

64.

Ten-year step down provision—Assuming that the ten-year step-down sentencing provision for drunk drivers included in N.J.S.A. 39:4-50(a)(3) also applies to people convicted of refusing to submit to a breathalyzer test, there is no permitted step-down beyond a third offense. State v. Lucci, 310 N.J. Super. 58, 707 A.2d 1370 (App. Div. 1998).[FN52]

The refusal offense in this case occurred during the time when a second or subsequent offense for a refusal carried a two-year suspension. Defendant was charged in 1993 with a refusal to submit to a breathalyzer test, an incident that was his first violation. However, the defendant also had two prior offenses for drunk driving (DWI) that had occurred 12 years earlier in 1981. The Court ruled that since he would have been entitled to second offender-level treatment due to the passage of more than 10 years since his previous conviction had he been convicted of DWI, it was appropriate that he be treated as a second offender on the refusal violation. In essence, his refusal conviction was in connection with a subsequent DWI offense that would have been entitled to second offender treatment for sentencing purposes. State v. Fielding, 290 N.J. Super. 191, 675 A.2d 653 (App. Div. 1996).[FN53]

Prior DWI will enhance a subsequent refusal conviction—A conviction for drunk driving will enhance a future conviction for refusing to take a breathalyzer test. For example, a defendant with two convictions for DWI in 1997 should properly be treated as a third offender and subject to a 10-year loss of driving privileges in the event he were to be convicted of a refusal charge in 2001. This is because the two prior DWI convictions count as prior refusal convictions for sentencing purposes.[FN54] State v. Tekel, 281 N.J. Super. 502, 658 A.2d 1281 (App. Div. 1995).

Prior refusal does not enhance subsequent DWI conviction—A conviction for refusal to submit to a breathalyzer test does not enhance a subsequent conviction for DWI. State v. DiSomma, 262 N.J. Super. 375, 621 A.2d 55 (App. Div. 1993).

"Under this section": Enhancement for subsequent offenses—A person who has been previously convicted of a refusal violation will be subject to enhanced penalties under N.J.S.A. 39:4-50.4a if that person is subsequently convicted of a second or subsequent refusal charge. Thus, the simple rule of law is that a prior refusal conviction will enhance a subsequent refusal conviction. State v. Fahrer, 212 N.J. Super. 571, 515 A.2d 1240 (App. Div. 1986).

Prior DWI will enhance a subsequent refusal conviction—The language "under this section" (now in N.J.S.A. 39:4-50.4a(a)) stands for the proposition that a prior conviction for DWI will enhance a subsequent conviction for refusing to submit to a breath test. State v. Wilhalme, 206 N.J. Super. 359, 502 A.2d 1159 (App. Div. 1985).

Independent suspension—The suspension of driving privileges imposed for refusing to submit to a breath test must be served consecutively to any suspension imposed for a companion drunk driving conviction. Bean v. Strelecki, 101 N.J. Super. 310, 244 A.2d 316 (App. Div. 1968).

Trial Level Courts

Third offenders/weekend sentences—The 2004 amendments to N.J.S.A. 39:4–50 did not affect the statutory authority of a municipal court judge under N.J.S.A. 2B:12–22 to order that a required jail term for drunk driving be served on weekends. State v. Grabowski, 388 N.J. Super. 431, 908 A.2d 861 (Law Div. 2006).

65.

Part 5 Footnotes

[FN1] One of the first cases construing the "allowing" component of N.J.S.A. 39:4-50(a) held that proof of knowledge of the intoxication of the permitted driver by the defendant is not a required element of offense of permitting intoxicated operation. State v. Carlston, 40 N.J. Super. 559, 123 A.2d 822 (County Ct. 1956). The decision in Skillman effectively voids this decision.
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[FN2] Note that the level of proof required is not probable cause as would normally be needed for a search warrant. See State v. Bodtmann, 239 N.J. Super. 33, 570 A.2d 1003 (App. Div. 1990).
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[FN3] It may well be that this case no longer applies to cases that only involve allegations of drunk driving under N.J.S.A. 39:4-50(a). See State v. Schreiber, 122 N.J. 579, 585 A.2d 945 (1991).
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[FN4] This statutory procedure was invalidated in State v. Renshaw, 2007 WL 419621 (N.J. Super. Ct. App. Div. 2007). See also State v. Kent, 391 N.J. Super. 352, 918 A.2d 626, 2007 WL 845874 (N.J. Super. A.D. Mar 22, 2007).
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[FN5] See generally Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).
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[FN6] See generally State v. Miller, 170 N.J. 417, 428-31, 790 A.2d 144 (2002); State v. Simbara, 175 N.J. 37, 811 A.2d 448 (2002).
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[FN7] Overruled by State v. Berezansky, 386 N.J. Super. 84, 899 A.2d 306 (App. Div. 2006).
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[FN8] Due to the fact that this conversion formula has now been recognized and accepted in a published opinion, it may be the subject of judicial notice under N.J.R.E. 201.
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[FN9] This point of law was initially established by the United States Supreme Court in California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

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[FN10] This trial level decision, although still good law, should be read in conjunction with the later Appellate Division ruling in State v. Oliveri, 336 N.J. Super. 244, 764 A.2d 489 (App. Div. 2001).

- 66.

[FN11] The Supreme Court provides a comprehensive definition of the standard of proof by clear and convincing evidence in Matter of Seaman, 133 N.J. 67, 74, 627 A.2d 106 (1993). "Clear-and-convincing evidence is "that which 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,' evidence 'so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.' "

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[FN12] See also State v. DeLuca, 108 N.J. 98, 527 A.2d 1355 (1987).

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[FN13] This case should be read and considered in conjunction with State v. Slater, 198 N.J. 145, 966 A.2d 461 (2009) (factors to consider in granting a motion to withdraw a plea) and State v. Parsons, 341 N.J. Super. 448, 775 A.2d 576 (App. Div. 2001) (factors to consider following destruction of potentially exculpatory evidence).

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[FN14] A different panel of the Appellate Division came to an opposite conclusion later in 1988. See State v. Latorre, 228 N.J. Super. 314, 549 A.2d 871 (App. Div. 1988).

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[FN15] Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

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[FN16] See Rule 7:6-2(d) and Guideline 4 to Guidelines for the Operation of Plea Agreements in the Municipal Courts of New Jersey, Rule VII appendix.

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[FN17] Evidence involving extrapolation may be used by the prosecution. State v. Oriole, 243 N.J. Super. 688, 581 A.2d 142 (Law Div. 1990).

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[FN18] For another example where an attempt at the "glove box" defense was tried and rejected on its facts, see State v. Chapman, 43 N.J. 300, 204 A.2d 139 (1964).

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[FN19] This opinion expresses disagreement with another panel of the Appellate Division as set forth in State v. Ghegan, 213 N.J. Super. 383, 517 A.2d 490 (App. Div. 1986). The current state of the law is probably best expressed by the decision in Allex.

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[FN20] Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

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[FN21] Note that the court bars the use of insanity as a common law defense here. Normally, common law defenses are available to a defendant in a drunk-driving case. See State v. Hammond, 118 N.J. 306, 571 A.2d 942 (1990); State v. Romano, 355 N.J. Super. 21, 809 A.2d 158 (App. Div. 2002).

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[FN22] The current Rules of Court provide for discovery under Rule 7:7-7(b).

- 67.

[FN23] This decision overrules the Appellate Division State v. Bealor, 377 N.J. Super. 321, 872 A.2d 1081 (App. Div. 2005).

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[FN24] This opinion specifically overrules the decisions in State v. Siegmeister, 106 N.J. Super. 577, 256 A.2d 319 (County Ct. 1969) and State v. Tiernan, 123 N.J. Super. 322, 302 A.2d 561 (County Ct. 1973).

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[FN25] The decision, in this case, anticipated the current use at trial of the specialized lay witness, usually a police officer with considerable experience and expertise who participated in the case as it occurred in real time. See generally, State v. LaBrutto, 124 N.J. Super. 1, 304 A. 2d 565 (1989).

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[FN26] This opinion affirms a County Court decision, State v. Lyons, 152 N.J. Super. 533, 378 A.2d 83 (County Ct. 1977). It also specifically disapproves a contrary holding in State v. Gilfesis, 148 N.J. Super. 369, 372 A.2d 680 (County Ct. 1977). It is important to note that the intoxicated operation of a moped is now controlled by N.J.S.A. 39:4-14.3g.

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[FN27] The facts of this case are remarkably similar to the facts before the Supreme Court in State v. Mulcahy, 107 N.J. 467, 527 A.2d 368 (1987).

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[FN28] Apart from providing this definition of "operation" of a motor vehicle, the Court's opinion does nothing more than affirm a much more thorough Appellate Division opinion, State v. Sweeney, 77 N.J. Super. 512, 187 A.2d 39 (App. Div. 1962).

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[FN29] The Appellate Division decision in Stiene has come to be generally regarded as the leading case on the operation issue and has been cited in virtually every operation opinion since its publication in 1985.

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[FN30] It should be noted that the element of the vehicle being at least capable of operation was disapproved by the Appellate Division in an earlier case. See State v. Stiene, 203 N.J. Super. 275, 496 A.2d 738 (App. Div. 1985).

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[FN31] The Court in Prociuk neglected to mention that operation may also be proved by stipulation of the parties. Part of the decision in Prociuk has been subject to criticism. One of the holdings in the case is that in proving operation of a motor vehicle, there

must be proof that the vehicle was at least operable. This portion of the opinion was disapproved in State v. Stiene, 203 N.J. Super. 275, 496 A.2d 738 (App. Div. 1985).
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[FN32] However, it is important to note that the obligation to submit to a breath test is limited to operation of a motor vehicle that takes place on any public road, street, highway or quasi-public area of the State. See N.J.S.A. 39:4-50.2(a). This issue is discussed in State v. Garbin, 325 N.J. Super. 521, 739 A.2d 1016 (App. Div. 1999).
- 68.

[FN33] These are the same factors established by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117-18 (1972).
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[FN34] The factors balanced include (1) the length of the delay, (2) the reason(s) for the delay, (3) any assertion by the accused of speedy trial rights, and (4) any prejudice to the accused from the delay. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101, 117-18 (1972).
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[FN35] The New Jersey Supreme Court based its holding in Laurick upon the United States Supreme Court's plurality decision in Court in Baldasar v. Illinois, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). In a subsequent 1994 decision, the U.S. Supreme Court abrogated the holding in Baldasar and ruled that a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense so long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment. Nichols v. U.S., 511 U.S. 738, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). Not withstanding the fact that the constitutional justification for the Laurick holding had been eliminated, the decision in Laurick was reconsidered and re-affirmed as a matter of judicial policy in State v. Hrycak, 184 N.J. 351, 877 A.2d 1209 (2005).
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[FN36] The New Jersey Supreme Court has granted the defendant's petition for certification. The matter is pending before the Court as of this writing.
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[FN37] This holding by the Appellate Division was made on policy grounds and reflects the rule of law established by the New Jersey Supreme Court in State v. Owens, 54 N.J. 153, 254 A.2d 97 (1969). By contrast, in Lewis v. U.S., 518 U.S. 322, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996), the United States Supreme Court held that a defendant who faces multiple petty offenses with an aggregate sentence exposure in excess of 180 days is not entitled to a jury trial. This rule of sentencing law was anticipated by the New Jersey Supreme Court 27 years earlier in Owens, but was rejected at that time on policy grounds as noted above.
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[FN38] The Court's statement on page 391 of the opinion declaring, “The sentencing options in the 1993 statute for a third offender were 180 days ‘except that the court may lower such term for each day, not exceeding ninety days, served performing community

service.'" is technically incorrect. In 1993, periodic service of imprisonment was permitted by a different statute for terms of three months or less. See N.J.S.A. 2A:8-30.1. This particular statute was repealed effective February 15, 1994, but was in effect at the time of the defendant's offense in 1993.
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[FN39] This case overrules an earlier Law Division decision that came to the opposite conclusion. State v. Decher, 196 N.J. Super. 157, 481 A.2d 848 (Law Div. 1984).
- 69.

[FN40] This opinion conforms to the the New Jersey Rules of Evidence. See N.J.R.E. 101(a)(2)(C).
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[FN41] Subsequent to the publication of this opinion, the Legislature amended the provisions of N.J.S.A. 39:4-50(a)(3) to provide that a conviction of a violation of a law of substantial similar nature in another jurisdiction shall constitute a prior conviction for purposes of enhanced sentencing.
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[FN42] This opinion effectively reverses a Law Division opinion that came to a contrary conclusion. State v. Maida, 332 N.J. Super. 564, 753 A.2d 1240 (Law Div. 2000).
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[FN43] See N.J.R.E. 803(c)(6), 803(c)(8), 807 and 901.
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[FN44] This case affirms a similar holding by the Law Division in State v. Godshalk, 381 N.J. Super. 326, 885 A.2d 969 (Law Div. 2005)
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[FN45] This opinion stems from a remand order in a prior proceeding. See State v. Dohme, 223 N.J. Super. 485, 538 A.2d 1321 (App. Div. 1988) (*Dohme* I).
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[FN46] Although the ultimate holding in this case was reversed, the issue related to cross streets was not appealed to the Supreme Court and accordingly is still good law.
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[FN47] *Kirk* is the seminal case on New Jersey DWI road blocks. The case was decided under the New Jersey Constitution. The United States Supreme Court ruled five years after the publication of Kirk that DWI enforcement road blocks are reasonable under the Fourth Amendment to the United States Constitution. See Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 475 n.19, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).
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[FN48] This decision overrules State v. Spell, 395 N.J. Super. 337, 928 A.2d 921 (App. Div. 2007).
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[FN49] This appeal in this case has been certified to the Supreme Court. State v. Marquez, 200 N.J. 476, 983 A.2d (2009).
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[FN50] A trial level court had discussed the same issue in 1974 and had come to the same result. See in State v. Hudes, 128 N.J. Super. 589, 321 A.2d 275 (County Ct. 1974).
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[FN51] As an example, consider a defendant who is convicted of a first drunk driving in 1999. If he is convicted of refusing to submit to a breath test in 2003, he will be treated as a second offender on the 2003 refusal violation since it would have been charged in connection with a subsequent drunk driving charge.
- 70.

[FN52] The Appellate Division decisions in Lucci and State v. Fielding, 290 N.J. Super. 191, 675 A.2d 653 (App. Div. 1996) create confusion in the current state of the law. In neither opinion does the Court definitively state that the ten-year step-down provision under N.J.S.A. 39:4-50(a)(3) applies to refusal convictions under N.J.S.A. 39:4-50.4a.
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[FN53] The Appellate Division decisions in Fielding and State v. Lucci, 310 N.J. Super. 58, 707 A.2d 1370 (App. Div. 1998) create confusion in the current state of the law. In neither opinion does the Court definitively state that the ten-year step-down provision under N.J.S.A. 39:4-50(a)(3) applies to refusal convictions under N.J.S.A. 39:4-50.4a.
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[FN54] The more interesting issue is whether the 10-year step-down provisions of N.J.S.A. 39:4-50(a)(3) apply to a refusal violation. For example, if a defendant has 2 DWI convictions in 1988, should a refusal conviction in 1999 be treated as a third offense or a second offense based upon a 10-year step-down? Two Appellate Division decisions have not clearly resolved this issue. See State v. Fielding, 290 N.J. Super. 191, 675 A.2d 653 (App. Div. 1996) and State v. Lucci, 310 N.J. Super. 58, 707 A.2d 1370 (App. Div. 1998).
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[FN55] The New Jersey Supreme Court has granted certification. The case is pending before the Court as of this writing.
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[FN56] In this case, the Appellate Division left for another day the question as to whether the Fifth Amendment right of the defendant to not be called as a witness by the State at trial applied to a refusal case. Although the issue has not been specifically addressed to date, in light of the Supreme Court's holding in State v. Widmaier, 157 N.J. 475, 724 A.2d 241 (1999), it is likely that the correct ruling is that the quasi-criminal nature of the penalties for a refusal charge prevent the defendant from being called as a witness by the prosecution.
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[FN57] The New Jersey Supreme Court has granted certification. The case is pending before the Court as of this writing.
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[FN58] In dicta, the Court raises an interesting ethical issue. “However, since New Jersey law recognizes no legal right to refuse the test, we question whether an attorney could ethically advise a client to violate the Implied Consent Law in order to gain a strategic

advantage in defending against a charge of driving while under the influence. *See* RPC 1.2(d).” State v. DeLorenzo, 210 N.J. Super. 100, 106, 509 A.2d 238 (App. Div. 1986).

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[FN59] This decision overrules State v. Spell, 395 N.J. Super. 337, 928 A.2d 921 (App. Div. 2007).

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[FN60] This passage in Pandoli has become a well known and often quoted component of the law in refusal cases. For example, see State v. Liberatore, 293 N.J. Super. 580, 589, 681 A.2d 1248 (Law Div. 1996); State v. Sherwin, 236 N.J. Super. 510, 516, 566 A.2d 536 (App. Div. 1989).

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[FN61] This case overrules the holding in State v. Ginnetti, 232 N.J. Super. 378, 556 A.2d 1339 (Law Div. 1989), which seemed to suggest that there is a right to cure a refusal under some circumstances.

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[FN62] This case should be read in conjunction with State v. Farrell, 320 N.J. Super. 425, 727 A.2d 501 (App. Div. 1999) (633-day delay).

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[FN63] See also the similar Law Division holding in State v. Filson, 409 N.J. Super. 246, 976 A.2d 460 (Law Div. 2009).

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[FN64] It does not appear that the Legislature has made this alternative to incarceration available to a third offender who commits the drunk driving offense in a school zone or near a school crossing. See N.J.S.A. 39:4-50(g)(3).

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[FN65] The discretionary aspect of therapy as a substitute for a mandatory jail term is established in State v. Fyffe, 244 N.J. Super. 310, 582 A.2d 812 (App. Div. 1990).

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