

Garden State CLE Presents:

“Winning Defenses” in N.J.S.A. 2C:40-26 Cases



Lesson Plan

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Introduction

2C:40-26. Driving while license is suspended or revoked; degree of crime; minimum sentence

a. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [R.S.39:3-40](#), if the actor's license was suspended or revoked for a first violation of [R.S. 39:4-50](#) or section 2 of P.L.1981, c. 512 ([C.39:4-50.4a](#)) and the actor had previously been convicted of violating [R.S.39:3-40](#) while under suspension for that first offense. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

b. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [R.S.39:3-40](#), if the actor's license was suspended or revoked for a second or subsequent violation of [R.S.39:4-50](#) or section 2 of P.L.1981, c. 512 ([C.39:4-50.4a](#)). A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

c. Notwithstanding the term of imprisonment provided under [N.J.S.2C:43-6](#) and the provisions of subsection e. of [N.J.S.2C:44-1](#), if a person is convicted of a crime under this section the sentence imposed shall include a fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole.



Part I. Basic Characteristics & Elements of the Statute

a. Enacted into law on January 18, 2010: *Ex post facto* constitutionality, retroactivity and legislative history discussed in [State v. Carrigan, 428 N.J.Super. 609, 614 \(App.Div.2012\)](#).

b. Became effective August 1, 2011



c. No culpability state included as an element – thus the argument is whether it implies knowing or is a strict liability offense: See NJSA 2C:2-2(c)(3):

(3) Construction of statutes not stating culpability requirement. Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section. This provision applies to offenses defined both within and outside of this code.

See generally, State v. Eldakrouy, ___ NJ Super. ___ (App. Div. 2015) (Faulty grand jury instructions on "knowing" element result in dismissed indictment). See also Rule 3:6-6(b).



d. Elements of offense - culpability state

NJSA 2c:2-2(a). Minimum requirements of culpability. Except as provided in subsection c.(3) of this section, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(b)(2) *Knowingly*. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. “Knowing,” “with knowledge” or equivalent terms have the same meaning.



e. Elements of Offense under subsection a: [TWO Revokes + ONE DWI]

- 1. [Knowingly] Operate a motor vehicle;**
- 2. during a period of suspension (or revocation) in violation of NJSA 39:3-40;**
- 3. imposed for a first offense dwi or refusal;**
- 4. and has a prior conviction for NJSA 39:3-40 related to the same first offense DWI/Refusal suspension (or revocation).**

f. Elements of Offense under subsection b: [ONE Revoked + TWO DWI's]

- 1. [Knowingly] Operate a motor vehicle;**
- 2. During a period of suspension (or revocation) in violation of NJSA 39:3-40;**
- 3. that was imposed for a second offense DWI or refusal.**



Part II. "During period of suspension"

Multiple suspensions terms imposed at one time:

Defendant under suspension for DWI/Refusal - Defendant is deemed to be immediately under suspension for DWI/Refusal upon imposition of sentence even though he is serving an unrelated, previously imposed suspension at that time. State v. Cuccurullo, 228 NJ Super. 517, 521 (App. Div. 1988).

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



Driving after determinate suspension term for DWI/Refusal has expired

State v. Perry, ___ NJ Super. ___ (App. Div. 2015)

[N.J.S.A. 2C:40-26\(a\) and \(b\)](#) make driving while suspended a fourth-degree criminal offense punishable by a mandatory minimum jail term of 180 days under certain circumstances stemming from driving while intoxicated (DWI), [N.J.S.A. 39:4-50](#), or refusal to submit to chemical testing (refusal), [N.J.S.A. 39:4-50.4\(a\)](#). In these seven appeals, consolidated for decision, we address whether charges can be brought under the statute when the act of driving occurs beyond the determinate sentenced term of suspension, but before reinstatement, while the driver continues on administrative suspension. We conclude that the statute criminalizes the operation of a motor vehicle only while the operator is serving the court-imposed term of suspension, and not thereafter.



Perry Timeline examples

1/10/13-----**8/08/13**-----**9/15/13**-----**1/13/14**-----à
DWI Suspension **Term ends** **39:3-40** **39:3-40**
7 months **remains revoked** **first offense** **second offense**

1/10/13-----**3/08/13**-----**7/15/13**-----**8/08/13**-----à
DWI Suspension **39:3-40** **39:3-40** **Term ends**
7 months **first offense** **Second offense** **Remains revoked**

1/10/13-----**3/08/13**-----**2/15/15**-----**8/08/13**-----à
2 yr DWI Suspension **39:3-40** **Term ends** **39:3-40**
2nd offense **first offense** **Remains revoked** **Second offense**



***Perry* decision Distinguishes *State v. Zalta*, 217 NJ Super. 209 (App. Div. 1987) and probably abrogates the App. Div. unpublished decision in *State v. Panico*, 2011 WL 4633877:**

Applying our reasoning in *Zalta* here, the source of the MVC's authority to continue defendant's license suspension beyond the seven-month period imposed by the court was defendant's non-compliance with the statutory requirement that she participate in the IDRC program by virtue of her conviction for the refusal offense. The requirement that defendant participate in the IDRC program is statutorily linked to defendant's refusal conviction. Thus, whether the most recent charge for driving while on the revoked list arose out of defendant's failure to pay the requisite restoration fee or from the continuation of the revocation by the MVC for non-compliance with the IDRC aspect of her sentence is of no consequence. The basis for that part of the sentence requiring her to participate in the IDRC program finds its roots in the refusal conviction.



Accordingly, *Perry* might also affect sentencing under NJSA 39:3-40(a) and (f)

NJSA 39:3-40(a). Upon conviction for a first offense, a fine of \$500.00 and, if that offense involves the operation of a motor vehicle during a period when the violator's driver's license is suspended for a violation of [R.S.39:4-50](#) or section 2 of P.L.1981, c. 512 ([C.39:4-50.4a](#)), revocation of the violator's motor vehicle registration privilege in accordance with the provisions of sections 2 through 6 of [P.L.1995, c. 286](#) ([C.39:3-40.1](#) through [C.39:3-40.5](#));

NJSA 39:3-40(f)(1). In addition to any penalty imposed under the provisions of subsections a. through e. of this section, any person violating this section while under suspension issued pursuant to section 2 of P.L. 1972, c. 197 ([C.39:6B-2](#)), upon conviction, shall be fined \$500.00, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.



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

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



Part III. Ethical Issues under RPC 3.3(a)(5)

The prosecutor/police have not charged your guy. What is your obligation as defense attorney under RPC 3.3(a)(5)?

a. Plea to 39:3-40 will establish a bar to prosecution in Superior Court. See *State v. Hand*, 416 NJ Super. 622 (App. Div. 2010); *State v. DeLuca*, 108 NJ 98 (1987); *State v. Dively*, 92 NJ 573 (1983).

b. See *State v. Seelig*, 180 NJ 234 (2004). *State v. Colon*, 374 NJ Super. 199 (App. Div. 2005).



RPC 3.3(a) A lawyer shall not knowingly:

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

State v. Kane, 2015 WL 657667 - UNPUBLISHED App. Div.

There also was nothing “illegal” about defendant pleading guilty to the *Title 39* violation as a lesser-included offense of NJSA 2C:40-26



To be sure, [N.J.S.A. 2C:40–26\(b\)](#) was a relatively new statute as of March 2012, and it is conceivable that the court and the municipal prosecutor may not have been well-attuned to its potential application in DWI cases. Nevertheless, we reject the State's claim that defense counsel was obligated under [R.P.C. 3.3\(a\)\(5\)](#) or other ethical rules to spotlight the statute's potential application adverse to his client's interests. The situation here is markedly distinguishable from [In re Seelig, 180 N.J. 234 \(2004\)](#), in which a defense attorney affirmatively misled a municipal judge about the facts in a vehicular case, i.e., whether the victims had died. As the municipal prosecutor honestly acknowledged here, it was his responsibility to be aware of the *Title 2C* provision's potential applicability, and to refrain from participating in the entry of a guilty plea to a lesser charge that would have double jeopardy implications for a future prosecution for an indictable offense. The fact that the municipal prosecutor accepted that the original plea was his mistake and decided not to file an application or pursue means to have the plea vacated speaks volumes. There was no “fraud” or unethical behavior by the defense here. Instead, as Judge Wild aptly found, defendant's first attorney was deficient in advising her to withdraw the plea to her detriment without explaining to her the consequences of that course of action. Even giving all due respect to the court and cooperating with its request to have the case re-listed, a proper advocate for defendant would have politely resisted the efforts to have the plea withdrawn.



Part IV. Limitations on past-conviction relief

State v. Sylvester, 437 NJ Super. 1 (App. Div. 2014)

a.) Post-conviction relief - Liability under N.J.S.A. 2C:40-26 - The fact that a defendant is able to obtain post-conviction relief following charges of N.J.S.A. 39:3-40 and N.J.S.A. 2C:40-26 does not erase the fact that the defendant initially drove during a period of suspension. As the Supreme Court noted in [State v. Gandhi, 201 N.J. 161, 190 \(2010\)](#), "We insist on compliance with judicial orders to promote order and respect for the judicial process. Compliance is required, under pain of penalty, unless and until an individual is excused from the order's requirements. Thus, as long as a court order exists and a defendant has knowledge of it, the defendant may be prosecuted for a violation thereof, regardless of its deficiencies."

Sylvester Timeline example

2011-----2012-----2013-----à

| | | |
|--------------------------|--------------------|---------------------------------|
| Suspension 2-year DWI | 2C:40-26 Charge | Vacate 2011 sentence via PCR |
|--------------------------|--------------------|---------------------------------|



Part V. Plea and Sentencing

a. No fine specified in statute. Maximum for 4th degree is \$10,000 NJSA 2C:43-3(b)(2).

b. Jail term requires a parole disqualifier of 180 days;

State v. French, 437 N.J. Super 333 (2014).

Inpatient credit - Concurrent time with N.J.S.A. 2C:40-26

N.J.S.A. 39:4-50(a)(3) allows a judge to authorize as much as 90-days credit against the mandatory 180-day jail term required for third offenders for time spent in an IDRC-approved in-patient rehabilitation facility. By contrast, N.J.S.A. 2C:40-26 requires a minimum jail term of 180 days, all of which must be served without parole eligibility. As a result, a defendant who has been sentenced to concurrent 180 jail terms for both N.J.S.A. 2C:40-26 and a third offense drunk driving may not reduce any period of his incarceration by enrolling in an IDRC-approved drug or alcohol in-patient rehabilitation program.



State v. Harris, ___ N.J. Super ___ (2015).

NJSA 2C:40-26 Custodial term must be served in county jail

The Legislature's purpose in requiring a mandatory period of “imprisonment” for this offense, with no possibility of parole, is also clear. Alternatives to jail, like the inpatient drug rehabilitation program involved in *French*, or the home detention and community service programs at issue here, do not protect the public in the same way as incarceration. This public safety consideration is especially relevant in the case of a defendant who loses his or her driving privileges for DWI, but then continues to drive despite the license suspension.



Because *N.J.S.A. 2C:40–26c* requires a “fixed minimum sentence of not less than 180 days” without parole eligibility for violations of *N.J.S.A. 2C:40–26b*, a sentence to a non-custodial “alternative program,” instead of jail, is plainly illegal. We therefore reverse the sentences imposed upon Harris, Kaczak, Mitchell, Hangstorfer, and Filer, who were convicted of violating *N.J.S.A. 2C:40–26b*, and remand to the Law Division to resentence each defendant to 180 days to be served in jail without eligibility for parole.

No Drug Court alternative - *State v. Nazario*, 2014 WL 3672133



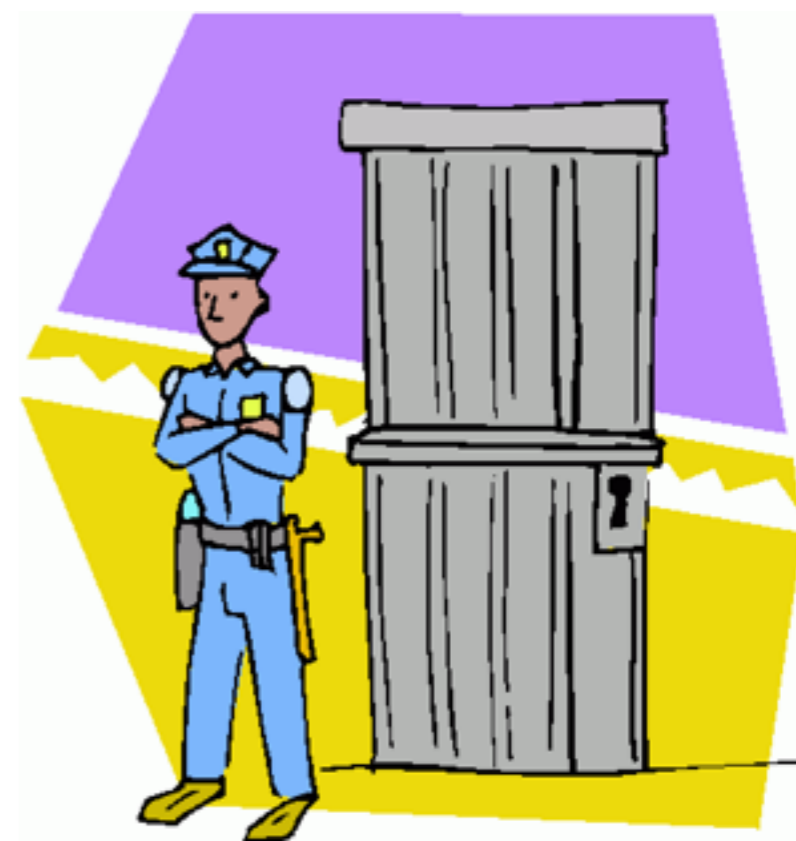
NJSA 2B:12-22. Periodic service of imprisonment:

A court may order that a sentence of imprisonment be served periodically on particular days, rather than consecutively. The person imprisoned shall be given credit for each day or fraction of a day to the nearest hour actually served.

State v. Grabowski, 388 NJ Super. 431 (Law Div. 2006)

But see State v. Kotsev, 396 NJ Super. 389 (App. Div. 2007).

c. Jail term could be as long as 18 months with a 180- day parole disqualifier – NJSA 2C:43-6(a)(4);



d. License suspension under NJSA 2C:43-2(c) probably not permitted. See State v. Gross, 225 NJ Super. 28 (App. Div. 1988);

e. Presumption of non-incarceration for first offenders does not apply – NJSA 2C:44-1(e);



f. PTI is not specifically excluded from consideration but prosecutors will object based upon mandatory jail (coupled with a lack of idiosyncratic factors in the defendant's case) and ample evidence of non-amenable to correction. (See NJSA 2C:43-12(b) “Admission of an applicant into a program of supervisory treatment shall be measured according to the applicant's amenability to correction, responsiveness to rehabilitation and the nature of the offense.”) State v. Calliguri, 158 NJ 28 (1999).

Unreported App. Div. PTI rejection cases for 2C:40-26:

See State v. Kerr, 2015 WL 773551

State v. MGM, 2014 WL 700155

State v. Sharp, 2013 WL 3956276

State v. Chauhan, 2013 WL 3581538



g. Merger – A violation of NJSA 39:3-40 will always be companion to the indictable offense. Since this is a lesser-included offense of NJSA 2C:40-26 and must be dismissed by way of merger on double jeopardy grounds. However, the penalties survive the merger. See State v. Baumann, 340 NJ Super. 553, 556-557 (App. Div. 2001)

Since we conclude that the State's only evidence of recklessness was intoxication, we are satisfied that the DWI must merge into the assault conviction. But that conclusion does not dispose of the DWI penalties mandated by [N.J.S.A. 39:4-50](#), including a six-month license suspension. Those penalties, in our view, must survive the merger, particularly since they represent not only punishment for the offender but also protection for the driving public. Nor do we have any doubt that the criminal jurisprudence of this State permits the survival of mandatory penalties attendant upon a lesser charge when merged with a more serious offense that does not carry those penalties. (Accord State v. Wade, 169 NJ 302, 303 (2001).



Part VI Trial Issues

a. Jury will try the Indictment for NJSA 2C:40-26 while Superior Court judge will try NJSA 39:3-40 and related motor vehicle offenses. State v. Muniz, 118 NJ 319 (1990).

b. Sanitizing Defendant's motor vehicle history to remove prejudicial or irrelevant entries. Certified driving abstract is admissible as evidence. See unpublished App. Div. holding in State v. Frezza, 2014 WL 6991799

c. Jury charge & "knowingly" element



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