Mercer County Bar Association

Online Meeting of June 25, 2020

CLE Lesson Plan – Criminal Law Update

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State v. Thompson, 462 N.J.Super. 370(App. Div. 2020).

Intoxicated operation of a motor vehicle

Police officers were called to and arrived at a 7-Eleven in Wanaque on September 7, 2017, around 10:30 p.m., because a male – the defendant – was observed sleeping in his car in the parking lot. The car's engine was running. The officers observed a half-eaten sandwich and prescription bottles on the front passenger seat, and as the officers woke defendant, they smelled a "strong odor of alcoholic beverage." Defendant said he had been sleeping for about thirty to forty minutes. In response to the officers' inquiries, defendant acknowledged he had had "a couple of drinks." After unsatisfactorily performing several field sobriety tests, defendant was arrested. He later acknowledged at the police *374 station that he was under the care of a physician and was prescribed Methadone, Hydrocodone, Xanax, and Cymbalta. He also admitted he had two drinks within a three-hour period. After careful review of the record, we are satisfied there was ample evidence from which the fact finder could conclude that defendant was intoxicated when he was sleeping behind the wheel of his parked car. The sole question we focus on is whether an intoxicated individual, seated behind the wheel of a vehicle with its engine running, is in violation of N.J.S.A. 39:4-50(a).

This well-established legislative goal would be frustrated if we were to seek or encourage irrelevant distinctions between what occurred here and what the Supreme Court and this court has already found to be "operation" within the meaning of N.J.S.A. 39:4-50(a).
In so holding, we readily acknowledge this opinion expresses nothing new. We have been driven to publish because of the extraordinary number of times the court has recently faced this precise issue. Seven other times within the last twelve months – each time by unpublished opinion – we have considered whether an intoxicated person, sleeping behind the wheel of a parked car with its engine running, can be convicted of N.J.S.A. 39:4-50(a).[3] For the benefit of the public, as well as the bench and bar, we deem it appropriate to express our holding in a published opinion.

State v. Hager, 462 N.J.Super. 377 (App. Div. 2020)

Incomplete Miranda warnings

Miranda **requirements were not met when officer reading defendant** ***Miranda*** **warning was interrupted by defendant before officer could inform defendant of his right to have attorney appointed if he could not afford one and officer never had opportunity to complete warnings, and thus statements made by defendant at police station as to location of BB gun in apartment and location of key to open box containing BB gun should have been excluded, where defendant was never informed of all** ***Miranda*** **rights, defendant was never advised of his right to appointed counsel if he could not afford to hire attorney, and defendant never acknowledged waiving his rights orally or in writing.**

State v. Patel, 239 N.J. 424 (2019)

New Rules for *Laurick* Applications

We now clarify the standard for indigent and non-indigent defendants who challenge a custodial enhancement from a prior uncounseled DWI conviction. A defendant who was non-indigent at the time of the earlier uncounseled DWI proceeding must establish that

> **(1) he was not advised or did not know of his right to counsel and**
>
> **(2) had he known of his right to counsel, he would have retained a lawyer.**

A defendant contending he was indigent in the earlier uncounseled DWI proceeding must establish that

> **(1) he was not advised and did not know of his right to appointed counsel,**
>
> **(2) he was entitled to the appointment of counsel under the applicable financial means test, R. 7:3-2(b), and**
>
> **(3) had he been properly informed of his rights, he would have accepted appointed counsel.**

The defendant has the burden of proving that his prior uncounseled DWI conviction was based on the municipal court's failure to advise him of his right to counsel. If municipal courts retain the records mandated by our rules and jurisprudence, determining whether there was compliance with the notice requirements should not be difficult

The defendant must secure the relevant court documents or the electronic recording or transcript of the proceeding to establish a violation of the notice requirement. In the absence of documentary evidence or witnesses with a recollection, the defendant is in a position to do no more than file an affidavit or certification averring that he was not advised of his right to counsel and did not know that he could retain counsel. The defendant who claims he was indigent at the time of the prior proceeding should attest that he was not advised and did not know of his right to appointed counsel, and was unable to afford an attorney. In future cases, he also should attach to his affidavit or certification relevant documents -- bank statements or other financial documents that would establish his indigence in accordance with the standards set forth in N.J.S.A. 2A:158A-14 and N.J.S.A. 2B:24-9.

State v. Roman-Rosado, 462 N.J.Super. 183 (App. Div. 2020)

MV stop based upon obscured plate

NJSA 39:3-33 provides that no person shall drive a motor vehicle which has a license plate frame or identification marker holder that conceals or otherwise obscures any part of any marking imprinted upon the vehicle's registration plate or any part of any insert which the director, as hereinafter provided, issues to be inserted in and attached to that registration plate or marker.

In this case, a stop and a warrantless search of a car defendant was driving uncovered a handgun. After the trial court denied his motion to suppress the search and seizure of the handgun, defendant pled guilty to second-degree certain persons not to possess a weapon. In defendant's appeal, we are asked to decide: (1) whether there was reasonable suspicion to stop the car for violating N.J.S.A. 39:3-33, because the license plate frame on the car's rear license plate concealed or otherwise obscured the words "Garden State" at the bottom of the license plate; and (2) whether the subsequent search and seizure of the handgun was legally permissible. Having considered the record and applicable law, we conclude there was no reasonable suspicion to stop defendant for violating N.J.S.A. 39:3-33, and thus the seizure of the gun is inadmissible to prove a second-degree certain persons offense.

By applying the common definition of obscure to the statute, we agree with defendant that N.J.S.A. 39:3-33 is unambiguous because it prohibits the concealment and obfuscation of identifying information on license plates. We do not read the statute to establish a motor vehicle violation for cosmetic license plate frames that make minimal contact with lettering on the license plate and do not make the plate any less legible.

Related license plate case law: Wooley v. Maynard, 430 U.S. 705 (1977) New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message or suffer a penalty, as Maynard already has. As a condition to driving an automobile a virtual necessity for most Americans the respondent must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

State v. Lentz, ___ N.J. Super. ___ (App. Div. 2020)

Search incident to arrest (Gunshot residue)

Although defendant was arrested pursuant to the arrest warrant, he was also a suspect in the shooting because as he was being led away from the scene, an officer was informed by another witness that defendant was the shooter. As a result, in addition to being handcuffed behind his back, plastic bags were placed over his hands, and taped at the wrist to preserve GSR evidence and keep defendant from essentially rubbing his hands. Defendant did however have "the ability to grasp things" because the bags were only partially inflated and the taping of his wrists was not particularly tight. Defendant was then transported to Asbury Park police headquarters for processing. A swab of his hands showed the presence of gunshot residue.

We conclude defendant was subjected to a search when his hands were swabbed for GSR evidence following his lawful arrest. Although the search did not occur at the same time or place as his arrest, under the totality of the circumstances, the delay and proximate location were objectively reasonable, and the search itself, which was minimally intrusive in nature and limited in purpose, was objectively reasonable in scope. Thus, we conclude the search was constitutionally permissible under the search incident to arrest exception to the warrant requirement and the motion judge erred in ruling otherwise. By tailoring our holding to warrantless searches for GSR evidence following a lawful arrest, we neither un-tether the search incident to arrest exception to the warrant requirement from its justification nor give police free reign to conduct warrantless searches without probable cause at any point after a lawful arrest.

State v. Williams, 461 N.J.Super. 80 (App. Div. 2019)

Consent to refuse entry into a residence

It has long been the law in New Jersey that consent to conduct a search must be based upon an express showing of knowledge of the subject of an affirmative right to refuse consent. State v. Johnson, 68 N.J. 349, 353-54 (1975). This case deals for the first time with the question as to whether such knowledge is also a prerequisite for initial entry into a residence by the police.

The police entry was motivated by a child custody dispute and an effort to locate two murder suspects. Upon entry the police conducted a protective sweep and arrested the two suspects and seized evidence in plain view.

Defendant argues the "police were ... not lawfully inside the home" because they were required to "inform [her] that she had the right to refuse" consent for the officers to enter her apartment and "concededly" failed to do so. It is well-established in New Jersey case law that officers seeking to search a residence by consent must inform the occupant that he or she has a right to refuse the search. This State's case law is not as clear, however, on whether officers must inform occupants they have a right to refuse the officers' request to simply enter a residence.

We are persuaded that in the circumstances presented here, there was no requirement that defendant be advised of her right to refuse entry to the police. Based on the information they received regarding the custody dispute and the possible presence of murder suspects in the apartment, the officers were obligated to investigate. Thus, the officer's decision to knock, request permission to enter, and thereafter enter the apartment was entirely reasonable and lawful. Further, we are satisfied that defendant giving the officers permission to enter "was the same as that of any other social guest or business visitor, and did not constitute a Fourth Amendment search. Thus, we agree with the motion judge that the officers did have a legitimate purpose to be present at the scene and are satisfied that those findings are supported by sufficient, credible evidence in the record. Because the officers obtained consent to enter the apartment and were "lawfully within private premises for a legitimate purpose," specifically, investigating a child custody dispute and ensuring the safety of the child, their presence in the apartment was constitutionally permissible, and satisfied the first element of a protective sweep.

State v. Williams, 461 N.J.Super. 1 (App. Div. 2019)

Expectation of privacy in a boarding house hallway

Our courts have not squarely determined whether common areas in a rooming or boarding house are within the zone of privacy protected by the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution. Instead, our case law has focused primarily on multi-family apartment buildings.

One seeking to invoke the protection of the Fourth Amendment must establish that a reasonable expectation of privacy was invaded by government action. To determine whether an expectation of privacy is protectable, federal courts employ a two-prong test: first, a person must have exhibited an actual expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable or legitimate.

The New Jersey Supreme Court, however, has defined an objective test asking only whether a person has a reasonable expectation of privacy. Such expectations of privacy are established by general social norms, and must align with the aims of a free and open society.

Based on the facts elicited at the suppression hearing, we conclude the State failed to establish that Estevez was in a lawful viewing area when he observed the marijuana because defendant had a reasonable expectation of privacy in the common hallway of the boarding or rooming house, as that area was not proven to be clearly open to the public. We stress that our decision is limited to the specific facts of this case, and further conclude the cases cited by the State, which primarily address either curtilage, or common areas of apartment buildings or similar self-contained multi-unit dwellings, are of limited utility in resolving the issues on appeal. Those cases are factually and legally inapposite as the living arrangements at issue in those cases are dissimilar to defendant's boarding or rooming house, which Estevez described as resembling a single or multi-family home. This distinction is significant.

In re Expungement of C.P.M., 461 N.J.Super. 573(App. Div. 2019)

Construing the crime spree exception for expungements

This 2018 statutory exception under N.J.S.A. 2C:52-2(a) permits an expungement when the person has been convicted of multiple crimes or a combination of one or more crimes and one or more disorderly persons or petty disorderly persons offenses under the laws of this State, which crimes or combination of crimes and offenses were interdependent or closely related in circumstances and were committed as part of a sequence of events that took place within a comparatively short period of time, regardless of the date of conviction or sentencing for each individual crime or offense, and the person does not otherwise have any prior or subsequent conviction for another crime or offense in addition to those convictions included in the expungement application, whether any such conviction was within this State or any other jurisdiction....

We are satisfied the plain language of N.J.S.A. 2C:52-2(a) bars the expungement of C.P.M.'s convictions as the offenses were not interdependent or closely related in circumstances. C.P.M.'s first offense occurred in April 2005, following which he pleaded guilty to CDS possession. Two and a half months later, in June 2005, he was charged with multiple counts of burglary, aggravated assault, criminal mischief, and weapons offenses; he later pled guilty to burglary and criminal mischief. He was not charged with a drug-related offense.

The offenses at issue – drug possession, burglary, and criminal mischief – do not share common elements. See N.J.S.A. 2C:17-3(a)(1); N.J.S.A. 2C:18-2; N.J.S.A. 2C:35-10(a)(1). The crimes also are not similar in nature.

In April 2005, C.P.M. was arrested for driving while intoxicated and cocaine was found in his pocket. He told a probation officer in March 2006 that he was under the influence of alcohol while driving that day but the cocaine was purchased for a friend. In June 2005, C.P.M. broke into his ex-girlfriend's home and broke down her bedroom door with a baseball bat when he found her there with another man. These offenses

were not committed as part of some larger criminal scheme; each offense was a distinct crime perpetrated under entirely different and unrelated circumstances.

In interpreting the newly amended statute, the judge accepted C.P.M.'s argument that his offenses were "closely related in circumstances" because he was addicted to drugs during this several-month period. Although the amendment to N.J.S.A. 2C:52-2 sought to expand expungement eligibility, it did not increase its reach as broadly as C.P.M. contends. The amendment increased the number of convictions that could be expunged but did not allow for the expungement of all offenses with any arguable nexus among the crimes.

State v. Melendez, 240 N.J. 268 (2020)

Use of statements made in a civil forfeiture action at a parallel criminal trial

After defendant's arrest on drug and weapons charges, the State filed a civil forfeiture action against $2928 in cash. The police found most of the money during a search of an apartment. In the criminal case, the State alleged that the cash -- as well as drugs, drug paraphernalia, and a handgun also found in the apartment -- belonged to defendant.

Defendant faced a dilemma about whether to answer the civil complaint. Under the forfeiture statute, a claimant must file an answer and assert an "interest in the property." That step, however, can incriminate a defendant in a related criminal case. On the other hand, if a defendant fails to respond to a forfeiture complaint, he risks losing his property.

Here, without the benefit of an attorney, defendant filed an answer. He asserted that the cash belonged to him and came from a lawful source. The State, in turn, introduced that answer in defendant's criminal trial to try to link him to the incriminating items found in the apartment.

Defendant faced an untenable situation -- forced to choose between his Fifth Amendment right against self-incrimination and his right not to be deprived of property in the forfeiture matter without due process. Under Garrity v. New Jersey, 385 U.S. 493 (1967) (coerced confessions), defendants cannot be compelled to give up their Fifth Amendment protections by way of threat or coercion. We therefore hold that a defendant's statements in an answer to a civil forfeiture action cannot be introduced in a parallel criminal proceeding in the State's case in chief.

Note - The rule against utilizing an answer filed in a civil forfeiture action as substantive evidence in a parallel criminal trial does not apply to all pleadings associated with a forfeiture matter. By way of example, in State v. Covil, 240 N.J. 448, 223 A.3d 153 (2020).

State v. Horne, ___ N.J. Super. ___ (App. Div. 2020)

Who is a child under the New Jersey spousal privilege?

The spousal privilege, NJRE 501(2)(b) provides:

The spouse or one partner in a civil union couple of the accused in a criminal action shall not testify in such action except to prove the fact of marriage or civil union unless (a) such spouse or partner consents, or (b) the accused is charged with an offense against the spouse or partner, a child of the accused or of the spouse or partner, or a child to whom the accused or the spouse or partner stands in the place of a parent, or (c) such spouse or partner is the complainant.

Following an altercation with his twenty-seven-year-old stepson, Matthew Farrell, defendant Brian Horne was charged with fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4), and second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1). Prior to trial, the State filed a motion to compel the testimony of an eye witness, Irene Kropp, defendant's wife and Farrell's mother.

The meaning of child must have the same meaning in both portions of the same section of the same statute. We thus hold that "child" in the spousal privilege exception, codified in N.J.S.A. 2A:84A-17(2)(b) and set forth in N.J.R.E. 501(2)(b), means an un-emancipated child.