

Garden State CLE Presents:

Evidence Issues in a DWI Trial



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Presenters for
our Next
Lunchtime
Learning Event:



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Lesson Plan

Part I

Foundational Concepts

1) N.J.R.E. 401 - “Relevant evidence” means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

2) N.J.R.E. 402 - All relevant evidence is admissible, except as otherwise provided in these rules or by law.

3) N.J.R.E. 403 - Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of:

Undue prejudice, confusion of issues, or misleading the jury;
or

Undue delay, waste of time, or needless presentation of cumulative evidence.

4) N.J.R.E. 104 - Preliminary questions

The court shall decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege and Rule 403. Examples:

Admissibility of breath-test results
Motions to suppress evidence
Qualifications of a witness or expert

5) Note that even though the formal Rules of Evidence do not apply to these hearings, the tendered evidence must be relevant, trustworthy and in the interests of justice N.J.R.E. 101(a)(3).

6) Use of evidence from preliminary hearing at trial – N.J.R.E. 104(d). Unlike the scope of cross-examination at trial, by testifying on a

preliminary matter, a defendant in a criminal proceeding does not become subject to cross-examination on other issues in the case. Essentially, the preliminary hearing testimony of the defendant is never to be considered as substantive evidence if guilty. However, it may be used for cross-examination purposes if the defendant chooses to testify at trial.

7) N.J.R.E. 611 - Mode and order of interrogation and presentation

(a) Control by Court; Purposes. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness' credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls an adverse party or a witness identified with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

8) Recusal of the judge following exposure to evidence that will be relevant at trial – State vs. Medina, 349 N.J.Super 108(App.Div.2002).

A judge must recuse himself when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so. Rule 1:12-1(g). However, exposure to inadmissible evidence in the course of pretrial proceedings generally does not require disqualification of the judge even where the judge is to serve as the factfinder. A judge sitting as the factfinder is certainly capable of sorting through admissible and inadmissible evidence without resultant detriment to the decision-making process. Trained judges have the ability “to exclude from their consideration irrelevant or improper evidence and materials which have come to their attention. Having said this, a judge should be sensitive to the perception of the litigants, counsel, or the informed public that his exposure to inflammatory material might irredeemably preclude him from serving as a neutral and impartial arbiter of the facts.

Part II

Standard Trial Proofs

a) Burdens of proof and production

i) Proof beyond a reasonable doubt

This level of proof is required in a DWI trial on both proof of every element of the offense and the voluntariness of a confession following a Miranda hearing under NJRE 104(c). The burden of proof on the issue of guilt comes from the case law. State vs. Grant, 196 N.J.Super 470, 477, 483 A.2d 411(App.Div.1984); State vs. Glynn, 20 N.J.Super 20, 89 A.2d 50(App.Div.1952). It is also required on refusal cases. State vs. Cummings, 184 N.J. 84(2005).

Definition:

“A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.

Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt.

If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.” State vs. Medina, 147 N.J. 43, 61, 685 A.2d 1242(1996).

ii. Clear and convincing evidence

This is the level that is required of admissibility of Alcotest readings. Romano vs. Kimmelman, 96 N.J. 66, 90, 474 A.2d 1(1984); State vs. Campbell, 436 N.J.Super 264, 93 A.3d 416(App.Div.2014). This is also the stand to be applied in considering the admissibility of searches based upon consent. Also required burden for a challenge to an out-of-state conviction. N.J.S.A. 39:4-50(a)(3).

Definition:

Clear-and-convincing evidence is that which produces 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 fact-finder to come to a clear conviction, without hesitancy, of the precise facts in issue. Matter of Seaman, 133 N.J. 67, 74, 627 A.2d 106(1993).

iii. Preponderance of the evidence

This level of proof is used in motions to suppress evidence and post-conviction relief applications.

Definition:

Under the preponderance standard, a proponent must establish that a desired inference is more probable than not. The most acceptable meaning to be given to the expression, proof by preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence. Liberty Mutual vs. Land, 186 N.J. 163, 169 (2006).

iv. Presumptions & Inferences

Technically, there are no conclusive presumptions in a quasi-criminal case. See State v. Humphreys, 54 NJ 406 (1969). Thus, a presumption is

regarded as a permissive inference which the trial judge in municipal court is free to either accept or reject. In a drunk-driving case, examples include:

Refusal to submit to a breath test allows the Court to draw an inference of guilt on the related DWI charge. State vs. Tabisz, 129 N.J.Super 80, 322 A.2d 453(App.Div.1974); State vs. Stever, 107 N.J. 543, 527 A.2d 408(1987).

Refusal to perform field sobriety tests allows the Court to draw an inference of guilt on the related DWI charge. State vs. Bryant, 328 N.J.Super 379, 746 A.2d 44(App.Div.2000).

An unreasonable refusal to cooperate in a blood test allows the Court to draw an inference of guilt on the related DWI charge. State vs. Cryan, 363 N.J.Super 442, 833 A.2d 640(App.Div.2003).

Consumption of while operating - An open, partially-consumed container of an alcoholic beverage found in the passenger compartment of a motor vehicle may allow the judge to infer that the beverage was drunk while the vehicle was being operated if appearance or conduct of the operator of the motor vehicle or a passenger may be associated with the consumption of an alcoholic beverage. N.J.S.A. 39:4-51a(b).

v. Sufficiency of evidence

Defense may question sufficiency of the evidence at any time, especially during summation, after the case is over and both sides have rested. See State vs. Campbell, 436 N.J.Super 264, 271–74(App.Div.2014).

A court's decision to admit proof into evidence against a party, even if it is over objection, does not preclude the party from disputing the strength of that evidence at the end of trial. See N.J.R.E. 104(e), making clear that a court's ruling to admit proof into evidence does not limit the right of a party to contest the “weight or credibility” of such evidence);

Before a final judgment of a defendant's guilt can be entered, the evidence must have shown beyond a reasonable doubt that he or she is guilty. Thus, although Alcotest BAC results are admissible into evidence upon a proffer by the State satisfying the Chun conditions to a clear-and-convincing degree, the State's ultimate burden of proof at the end of trial is more rigorous. After hearing all of the testimony and considering all of the admitted exhibits, the judge ultimately must be persuaded that the elements of the offense, including the defendant's offending BAC level, have been proven beyond a reasonable doubt.

vi. Proof of operation

Proof may come in the form of:

Direct evidence
Circumstantial evidence
Admission
Stipulation

Part III

Blood Evidence

Obtaining a Blood Sample - Confrontation and Hearsay Issues

1) N.J.S.A. 2A:62A-11 - Any person taking a specimen pursuant to section 1 of this act shall, upon request, furnish to any law enforcement agency a certificate stating that the specimen was taken pursuant to section 1 of this act and in a medically acceptable manner. The certificate shall be signed under oath before a notary public or other person empowered to take oaths and shall be admissible in any proceeding as evidence of the statements contained therein.

2) Confrontation - Entitlement to appearance of technicians and phlebotomists at trial. State vs. Berezansky, 386 N.J.Super 84, 899 A.2d 306(App.Div.2006); State vs. Renshaw, 390 N.J.Super 456, 915 A.2d 1081(App.Div.2007)

3) Laboratory technician must testify, not a surrogate witness. State vs. Rehmann, 419 N.J.Super 451, 17 A.3d 278(App.Div.2011)

4) Required Notice to prosecutor

We deem it appropriate prospectively to require, as a condition of our treatment of lab reports and blood sample certificates as ‘testimonial’ documents, that defense counsel provide reasonable advance notice to prosecutors that they wish to cross-examine the authors of those documents at trial. In the absence of such reasonable notice, a defendant shall be deemed to have waived his or her right to confrontation. See State vs. Kent, 391 N.J.Super 352, 380-81(App.Div.2007).

5) Chain of custody and relevance under N.J.R.E. 401

A defect in the chain of custody goes to the weight to the evidence and not to its admissibility. Moreover, the sufficiency of the chain of custody evidence is a matter of judicial discretion that will not be disturbed on appeal unless clear a mistaken exercise thereof. State vs. Morton, 155 N.J. 383, 715 A.2d 228(1998).

Part IV

Opinion evidence as to intoxication

A) Intoxication by alcohol – It has long been recognized that this is an area appropriate for lay opinion.

1) N.J.R.E. 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences may be admitted if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue.

It is entirely proper for [lay police officers] 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 when the tests were undertaken by the defendant. Of course the ultimate determination of defendant's intoxication within the meaning of the statute rests with the trial court on all the evidence in the case. State vs. Morton, 39 N.J. 512, 514-515, 189 A.2d 216(1963).

2) For u/i alcohol, use the following definitions:

“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 vs. Tamburro, 68 N.J. 414, 420, 346 A.2d 401(1975).

“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 him of that clearness of intellect and control of himself which he would otherwise possess.” State vs.

Rodgers, 91 N.J.L. 212, 215, 102 A. 433(N.J.Ct.Err.&App. 1917).

N.J.S.A. 39:4-50 “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 vs. Emery, 27 N.J. 348, 355, 142 A.2d 874(1958).

At the one pole, since “intoxication” is not the expression used, it is not requisite that the accused be absolutely “drunk,” in the sense of being sodden with alcohol. [Citation omitted] At the other extreme, the described condition means something more than having partaken of a single drink even though, physiologically, the smallest amount of alcohol has some slight effect or influence on an individual. The obvious intention of the Legislature was 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 vs. Johnson, 42 N.J. 146, 165, 199 A.2d 809(1964).

B) Intoxication by drugs – At present, the proof of this fact is the subject of expert testimony.

1) N.J.R.E. 702 - If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. [S.K.E.E.T.]

2) N.J.R.E. 703 - The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made

known to the expert at or before the proceeding. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

3) State vs. Bealor, 187 N.J. 574(2006). Police officers may qualify as experts on the issue of marijuana intoxication. Other types of drug intoxication require expert testimony. The municipal court judge may also make this factual determination without expert testimony entirely based upon the evidence at trial.

4) State vs. Olenowski, 253 N.J. 133(2023) will determine the admissibility of expert opinion on this topic from DRE personnel based upon the standards set forth in State vs. Harvey, 151 N.J. 117(1997) (adopting the standards in Daubert vs. Merrell Dow Pharms. Inc. 509 U.S. 579(1993) in civil cases.)

5) Definitions - Under the influence of drugs subsumes narcotics, hallucinogenic or habit-producing drugs and chemical inhalants. No particular substance need be identified. The definition of being under the influence of drugs is found in the case law:

“[A]n 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 [produces] 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 vs. DiCarlo, 67 N.J. 321, 338 A.2d 809(1975).

The statute does not require that the particular narcotic be identified. It is enough if, from the subject's conduct, physical and mental condition and the symptoms displayed, a qualified expert can determine that he or she is ‘under the influence’ of a narcotic. This, of course, would include a drug which produces a narcotic effect. State vs. Tamburro, 68 N.J. 414, 421, 346 A.2d 401(1975).

Part V

Video Evidence at Trial

1) In general - Video recordings at trial should be treated exactly like any other type of physical evidence. That is to say it should be marked as an exhibit, authenticated and offered in evidence when it has been deemed to be relevant and otherwise admissible. The rules at trial for narration, lay and expert opinion based upon a video are set forth in State vs. Watson, 254 N.J. 558(2023).

2) In both direct and cross-examination, counsel should note for the record the time codes in the recording so that reference will be obvious on appeal.

3) Missing video – There is a statutory rebuttable presumption under N.J.S.A. 40A:14-118.5(q) - that, where law enforcement either fails to adhere to the statutory retention requirements found in N.J.S.A. 40A:14-118.3 to 118.5 for body worn camera (BWC) recordings, or intentionally interferes with a BWC's ability to accurately capture audio and video recordings, the law presumes exculpatory evidence was destroyed or not captured. This rule applies in both trials and motions to suppress evidence. State vs. Jones, 475 N.J.Super 520(App.Div.2023)

Part VI
Per se Violations – Burden of Production is on the
Prosecutor – Burden of Proof is Clear & Convincing

1) Core foundational documents

Each of these must be in evidence to support admissibility of test results on Alcotest 7110 MKIIC - State vs. Kuropchak, 221 N.J. 368 (2015).

- 1. Operator's Qualification Card
- 2. Most recent calibration report from NJSP
 - Calibration Record - Cover sheet
 - Part I Control
 - Part II Linearity
 - New Standard Solution (if relevant)
 - Trooper's Alcotest Cards
- 3. Most recent standard solution change report
- 4. Cert. of analysis used in Def's control tests
- 5. The Alcohol Influence Report
- 6. Worksheet A Tolerance Calculations

2) Alcotest Official Testing Procedures

- Twenty-minute observation period
 - Began at:
 - Ended at:
 - No Mouth alcohol detected
 - Swallow
 - Regurgitate
 - Gum (restart)
 - Tobacco (restart)
 - Tongue rings & other oral devices
-
- Administration of test sequences
 - Woman over age 60
 - New mouthpiece for each test
 - Cell phone/portable electronics
 - Proper test instruction (language)

Two proper samples (1.5 litres/4.5 seconds)
Test Administered within a Reasonable Time
Copy of Result to Defendant (requested)