Garden State CLE presents:

Fifteen (15) DWI Defenses that Actually Worked!

Instructor:

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CLE Lesson Plan

a.) Common Law Defenses

1.) Necessity – State v. Romano, 355 NJ Super 21 (App. Div. 2002)

However, a person charged with a motor vehicle offense does not forfeit all constitutional and common-law defenses. [C]ommon-law defenses may be available as long as they have not been precluded by the statute defining the offense.

The elements of the common-law defense of necessity are:
(1) There must be a situation of emergency arising without fault on the part of the actor concerned;

(2) This emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;

(3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and

(4) The injury impending from the emergency must be of sufficient seriousness to out measure the criminal wrong.

b.) Intent to operate

1.) Stuck inn a ditch – State v. DiFrancisco, 232 N.J. Super. 317 (Law Div. 1988)

State v. Stiene, 203 *N.J.Super.* 275 (App.Div.1985) discussed, but did not decide, the question of whether a person could be convicted of DWI when occupying an inoperable car, noting that out-of-state authorities are divided on the issue. The court held, as indicated above, that a car which could be "rolled or pushed" was "operable." The present case raises the issue directly; DiFrancisco's vehicle could not be "rolled or pushed" and had to be towed; it was inoperable in every sense of the word.
3 Under these circumstances it cannot be said that DiFrancisco was "operating" his pickup truck at the time he was apprehended. He could not operate after he landed in the ditch and could not effectively have intended to operate. Intent not only was not proved, its presence, if proved, would be immaterial when operation was impossible. *Daly* required "the possibility of motion." Consequently, DiFrancisco cannot be convicted of *driving* while intoxicated on October 28, 1987 at 3:10 a.m.

2.) Intent to operate – State v. Daly, 64 NJ 122 (1973)

In the instant case, defendant denied any intent to move or drive his car until he had sobered up and, contrary to the State's contention; there was no evidence from which any such intent could be inferred beyond a reasonable doubt. The tavern, concededly, was required to close at 2:00 A.M. and there was no proof that it did not. Defendant had, thus, been in his car for at least one hour and twenty minutes without driving when come upon by the police.

The State argues that intent to move the vehicle should not be a required element of the offense of operating a motor vehicle while intoxicated. The State's position is that an intoxicated person who enters a motor vehicle and starts the engine is a threat to himself and to the public because of the hazard that either he may try to drive the vehicle, or accidentally cause it to be moved.

We recognize that there is a risk involved. However, the statutory sanction is against 'operating' a motor vehicle while intoxicated. We conclude, as we did in Sweeney, that in addition to starting the engine, evidence of intent to drive or move the vehicle at the time must appear.

c.) Allowing offense

1.) Requirement of knowledge – State v. Skillman, 226 NJ Super. 193 (App. Div. 1988)

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.

d.) Extraction of blood sample

1.) Unreasonable use of force - State v. Ravoto, 169 NJ 227 (2001)

With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. More specifically, *Graham* instructs courts to employ a balancing test to determine whether the use of force in a given case is reasonable. The Supreme Court explained that the proper application [of the balancing test] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

In applying those tenets, we conclude that the force used by the police to extract defendant's blood was unreasonable under the totality of the circumstances. Defendant was terrified of needles and voiced his strong objection to the procedures used on him. He shouted and flailed as the nurse drew his blood. Several persons, including the police, and mechanical restraints were needed to hold defendant down. Defendant's fear is relevant to our analysis. A suspect's reaction to law enforcement officials is part of the fact pattern considered by a reviewing court when it determines whether police behavior was objectively reasonable.

We also consider the offense that was under investigation as part of the totality of the circumstances. Although the Court does not diminish defendant's suspected offense or in any way condone driving while intoxicated, we note that the charge against defendant is quasi-criminal rather than criminal in nature. Moreover, defendant had been in a one-car accident and was not under suspicion for causing the death of or injury to any other person.

e.) Admissibility of evidence at trial

1.) Core Foundational Documents – State v. Koropchak, 221 NJ 368 (2015)

We conclude that the foundational documents required under *Chun* were not admitted into evidence. Therefore, the State presented no evidence as to the reliability or accuracy of the Alcotest results. We thus hold that defendant's conviction of per se intoxication was improper.

2.) Burden of proof – State v. Campell, 436 NJ Super. 264 (App. Div. 2014)

It is conceivable that the trial judge might conclude, upon further reflection in light of the evidence as a whole, that the defendant's .08 percent BAC level was not sufficiently proven by the State beyond a reasonable doubt. The judge's earlier decision to admit the BAC proof—a ruling that is interlocutory in nature and surely can be reconsidered—does not prevent the court from doubting the strength of that admitted evidence at the end of the case. In fact, the court can even reconsider its previous decision to admit the evidence, if subsequent developments support such reconsideration.

To be sure, we are mindful that DWI defendants commonly do not "hang back" and save until the defense case at trial their competing witnesses and arguments challenging the prosecution's BAC results. Such a strategy may pose risk, perhaps depriving the defendant of a realistic chance to have the case dismissed at the suppression stage. Even so, regardless of the trial strategies that may bear on the actual flow of evidence, our conceptual point is simple and unassailable: the court's *threshold* decision to admit Alcotest results by clear-and-convincing evidence does not always dictate how the court *ultimately* will regard that same proof at the end of trial, when a more rigorous standard of persuasion applies.

We discern no constitutional flaw in the evidential aspects that govern per se DWI cases prosecuted in our State. The State will always bear in each prosecution the burden of proving a defendant's guilt beyond a reasonable doubt. The fact that a somewhat lower proof standard is used for admitting the BAC results into evidence does not dilute that ultimate burden.

f.) Speedy Trial

1.) Twenty-nine month delay - State v. Cahill, 213 NJ 253 (2013)

The first inquiry is the length of the delay. We measure the length of the delay from the date of filing of the driving-while-intoxicated charge to the notice of trial in the municipal court of the remanded charge. The inquiry is therefore whether this twenty-nine-month period is reasonable or whether it violated defendant's right to a speedy trial. Sixteen months elapsed from remand to the municipal court until notice of the first trial date. This delay is long enough to trigger consideration of the remaining *Barker* factors. Moreover, the remaining charge, driving while intoxicated, is a straightforward quasi-criminal offense. The legal issues were not complicated. All necessary witnesses were available. Under these circumstances, we conclude the length of the delay is too long to resolve a driving-while-intoxicated charge, and we weigh it against the State.

The State offers no justification for the delay. None of the usual circumstances that typically contribute to trial delays in the municipal court, such as a conflict of interest requiring recusal of the judge or the prosecutor or missing witnesses, have been identified as the source of the delay. There is a suggestion that the municipal court clerk never received or lost the prosecutor's November 14, 2008 letter returning the matter to the municipal court. In the end, however, the State offers no explanation for the delay. This factor also weighs heavily against the State.

Defendant did not inquire about a trial date or demand a trial date at any time after remand of the driving-while-intoxicated charge to the municipal court. Instead, he filed a motion to dismiss the driving-while-intoxicated charge promptly after receipt of the trial notice and argued the motion the date of trial. The State suggests defendant's failure to even inquire about the resolution of this remaining charge undercuts the merits of his speedy trial claim. The assertion of a right to a speedy trial is measured heavily in the speedy trial analysis. A defendant does not, however, have the obligation to bring himself to trial. It is the State's obligation to prosecute and do so in a manner consistent with defendant's right to a speedy trial. Failure to assert the right is a factor that must be considered in any analysis of an asserted speedy trial violation. Assertion of the right, however, is not dispositive of the merits of the claim and is certainly not a pre-condition to the invocation of a defendant's right to a speedy trial.

The final factor is prejudice. A speedy trial violation can be established without evidence of prejudice. Some authorities even suggest that every unresolved case carries with it some measure of anxiety. Defendant does not identify any particular prejudice to him. Instead, he outlines the employment choices he made in recognition of the impending suspension of his license to operate a motor vehicle. According to defendant, he sought short-term employment and positions that did not require a driver's license or could be accessed by mass transportation or a ride from a friend. These self-imposed limitations narrowed his employment options and relegated him to lower-paying positions.

We must assume that any person who has had limited involvement with the criminal justice system would experience some measure of anxiety by the existence of a pending and long-unresolved charge. This is particularly true when one of the sanctions, a license suspension would have a dramatic impact on defendant's daily activities and ability to earn a living.

It is suggested that dismissal of the driving-while-intoxicated charge is a windfall for defendant. We must remember, however, that the events of October 27, 2007, led to a conviction of a fourth-degree offense. Defendant has not avoided punishment for his conduct that evening. Balancing the relevant factors and the facts of the specific case, we conclude that the extensive and unexplained delay, coupled with the generalized anxiety and personal prejudice occasioned by the protracted resolution of this matter, requires a finding that the State violated defendant's right to a speedy trial. The only remedy that will address this violation is dismissal of the charge.

2.) 633 day-delay – State v. Farrell, 320 NJ Super. 425 (App. Div. 1999)

Excessive delay in completing a prosecution can potentially violate a defendant's constitutional right to a speedy trial as a matter of fundamental fairness, apart from whether double jeopardy standards have been contravened. In cases arising from municipal court DWI prosecutions, just as with criminal prosecutions, consideration whether the right to a speedy trial has been violated is guided by the four factors announced in Barker v. Wingo. Specifically, the court must engage in a multi-element balancing process of the four factors: the length of the delay, the reasons for the delay, whether the defendant asserted his right to speedy trial, and any prejudice to the defendant occasioned by the delay. Delay caused or requested by the defendant is not considered to weigh in favor of finding a speedy trial violation. Further, because the evaluative process involves a balancing of considerations, if the other factors weigh heavily enough, a speedy trial violation can be established without an affirmative showing of prejudice to the defendant. In a related vein, the defendant's demonstration of prejudice is not strictly limited to a "lessened ability to defend on the merits." *Ibid.* Rather, prejudice can be found from a variety of factors including "employment interruptions, public obloquy, anxieties concerning the continued and unresolved prosecution, the drain on finances, and the like.

3.) SACROSANCT – State v. Perkins, 219 NJ Super. 121 (Law Div 1987)

Perkins was put to the cost and inconvenience postponements always cause—all resulting from the State's lack of preparation and discourteous failure to warn defendant of the need for postponements. The first postponement was allowed over the defense objection with a clear warning to the State that it must be ready on the new date then set. That date was fixed by the court as a "date certain," its promise that the case would then be tried. That promise was underlined by the court's further promise that the complaint would be dismissed, if the State was not then ready to proceed. The State, despite these promises and the dismissal warning, was not ready. The court was nevertheless accommodating and granted its second postponement request. This was an arbitrary, and therefore improper, discretionary decision. A court's promise is sacrosanct, if, as here, it is not based upon erroneous information or mistaken legal principle. It is a promise which must be kept. The integrity of the judicial system demands no less.

g.) Expert witnesses

1.) Right to be in court during the trial – State v. Popovich, 405 NJ Super 324 (App. Div. 2009)

Further, we are of the view that to interpret *N.J.R.E.* 615 to authorize the routine sequestration of expert witnesses in a matter such as this is contrary to the terms of *N.J.R.E.* 703, which provides that an expert may base his opinion upon "facts or data ... perceived by or made known to the expert at or before the hearing." By its use of the preposition "at," the rule clearly envisions an expert observing trial proceedings and then commenting upon what he has heard.

h.) Discovery

1.) Sanctions – State v. Holup, 253 NJ Super. 320 (App. Div. 1992)

By way of clarification of the situation where discovery has not been provided, we would also recommend that defense counsel serve a motion, on the papers, with certification similar to *R.* 1:6–2, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting time for the production of discovery and upon the municipal prosecutor's failure to do so, dismissal of the action. Such an application and the ensuing order would alert the municipal prosecutor and enforcement authorities to their discovery responsibilities and avoid the inconvenience to litigants and witnesses that occurs with such frequency when all parties appear in court for trial. Another salutary affect of such a practice is to expedite the processing of cases by assuring both sides of the certainty of the trial date and eliminating the unnecessary work, expense and delay resulting from the continuance of a case because the discovery process has not been completed.

In the State's brief counsel infers that the sanction imposed by the Law Division judge would be paid by the municipality. We believe that sanctions imposed pursuant to *R.* 1:10–5 in the form of relief to a litigant, in the municipal court context, will only rarely be paid by the municipality. If the failure is that of the municipal prosecutor, then the burden falls personally upon that officeholder. After all, the municipality relies upon the municipal prosecutor to perform his job properly and with due diligence and should not be charged with paying for his individual failures.

Lastly, we are constrained to comment on the effect of *R.* 7:4–2(e), which permits motions in the municipal courts to be made "orally and informally." As our municipal courts mature and become responsible for the disposition of more complex, more serious in terms of penal consequence and more communally important cases, more formal practices become essential. We understand that much of the subject matter in controversy in the municipal courts is minor and, in such cases, informal practices **780 should continue, but in the more significant cases, a more careful, thorough procedure is warranted. There is a recognizable difference in the analysis of the discovery in a drunk driving case as compared to one involving a stop light violation. The mere fact that the Court Rule allows informality does not give broad license to counsel. Motions and supporting documents assist the municipal court judge in making a fair and considered decision. A motion limiting the time for completion of discovery in this case would have ensured notice to the prosecutor and avoided the waste of time by defendant, the expert witness and defense counsel.

2.) Video tape – State v. Stein, 225 NJ 582 (2016)

The recordings from a patrol car's dashboard camera that depict the interactions between a DWI suspect and police officers or the sobriety tests performed by the suspect are clearly relevant, and if the recordings contradict an officer's testimony, such evidence has vital impeachment value to the defense. A video recording of a Breathalyzer test or a defendant's appearance, behavior, and motor skills at police headquarters is also relevant *597 because it may have "a tendency in reason to prove or disprove" that the defendant was under the influence. *See* *N.J.R.E.* 401. To ensure the availability of such relevant evidence, a defendant should give written notice to the municipal prosecutor to preserve pertinent videotapes pursuant to *Rule* 7:7–7. Although the defense carries this obligation, the State also has a duty to preserve evidence that it knows is relevant to a DWI prosecution.

i. Prior out-of-state offenses

1.) NJ Division of Motor Vehicles v. Ripley, 364 N.J. Super. 343 (App. Div. 2003)

We conclude that the offense of alcohol-related reckless driving, for purposes of Ripley's guilty plea to *U.C.A.* 41–6–45(1)(a), and in the context of *U.C.A.* 41–6–44–9(a)(i) and (ii), is not substantially similar to New Jersey's offense of driving while under the influence. Reckless driving under the Utah statute is similar to our reckless driving statute, *N.J.S.A.* 39:4–96, which proscribes driving a vehicle "heedlessly, in willful or wanton disregard of the rights or safety of others, in manner so as to endanger ... a person or property."

Where a defendant is initially charged with DWI, a prosecutor in Utah is permitted to downgrade to the alcohol-related reckless charge by providing a factual basis, "including whether or not there had been *consumption* of alcohol ... *in connection with* the violation." *U.C.A.* 41–6–44(9)(a)(i) (emphasis added). The elements of this lesser offense do not include any specific or minimum level of intoxication or blood alcohol, but merely require some consumption of alcohol in connection with the reckless driving. The statutory terms comport with Ripley's position that the consumption of *any* alcohol would suffice, whether or not it rendered the driver "under the influence" and thus unfit to drive, as defined in our case law. In our view, this is not an equivalent offense to our DWI.

j.) Novel scientific evidence

1.) HGN – State v. Doriguzzi, 334 NJ Super. 530 (App. Div. 2000)

The relationship of nystagmus to the consumption of alcohol or drugs is a scientific principle. The manifestation under different circumstances is also a scientific theory that would not be known by the average person. Accordingly, we find HGN testing to be scientific.

A novel scientific test not previously approved by this court or our Supreme Court, in order to achieve admission into evidence, must meet the test articulated in *Frye v. United States,* 293 *F.* 1013 (D.C.Cir.1923). Although *Frye* has been replaced in the federal court system in favor of the more lenient standards of *Federal Rule of Evidence* 702 as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 *U.S.* 579, 113 *S.Ct.* 2786, 125 *L.Ed.*2d 469 (1993), in New Jersey, with the exception of toxic tort litigation, *Frye* remains the standard. The *Frye* test asks whether the scientific test is generally accepted in the relevant scientific community. That acceptance may be demonstrated as follows: A proponent of a newly-devised scientific technology can prove its general acceptance in three ways:

(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis;

(2) by authoritative scientific and legal writings indicating that the scientific community accepts the premises underlying the proffered testimony; and

(3) by judicial opinions that indicate the expert's premises have gained general acceptance.

The burden to “clearly establish” each of these methods is on the proponent.