Garden State CLE Presents:

Affirmative Defenses
To
DWI & Refusal

Instructors

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Lesson Plan

PART I
INTRODUCTION

The New Jersey DWI statute, N.J.S.A. 39:4-50(a) contains little information related to trial procedures. Everything from the burdens of proof to the admissibility of relevant evidence has been developed over the years through the case law.

In fact, there is only one defense discussed in the DWI statute relating to avoiding sentence enhancements for convictions that occur in another jurisdiction - i.e., substantially similar offenses. N.J.S.A. 39:4-50(a)(3).

Among the published decisions are various cases wherein the trial-level and appellate courts have recognized certain affirmative defenses.

a) What is an affirmative defense?

An affirmative defense is a factual allegation raised by the defendant that essentially admits the contentions in the prosecution's case but, introduces new facts that, if believed by the trial judge in a DWI case, would either excuse or justify the defendant's actions.

b) Procedural issues

The modern view is that there is no particular burden of proof that the defendant must meet in putting forward an affirmative defense. The defendant simply has the burden of going forward with the evidence. Once some relevant evidence of the defense has been offered at trial to the DWI judge, the burden shifts and it becomes incumbent on the prosecutor to disprove the defense beyond a reasonable doubt. State vs. Romano, 355 N.J.Super 21, 36(App.Div.2002).

c) Prohibited affirmative defenses:

The Supreme Court and Appellate Division have banned the use of certain defenses in a DWI case over the years, usually due to the risk of the defense advancing a defense based upon a mere pretext. Among the banned defenses are:

> All Statutory defenses under the Code of Criminal Justice. State vs. Hammond, 118 N.J. 306(1990).
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> Retrograde extrapolation. State vs. Tischio, 107 N.J. 504(1987).
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> Hyper-sensitivity to alcohol. State vs. Cryan, 363 N.J.Super 442,457(App.Div.2003).
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> Involuntary intoxication (vapors). State vs. Federico, 414 N.J.Super 321(App.Div.2010) (spiked drink); State vs. Hammond, 118 N.J. 306(1990).
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> Insanity. State vs. Baverov, __ N.J.Super __(App.Div.2025), 2025 WL 2301219 (adopting State vs. Inglis, 304 N.J.Super 207(LawDiv.1997).

d) Common law defenses:

When the New Jersey Code of Criminal Justice went into effect in 1979, it abolished all common law offenses. N.J.S.A. 2C:1-5(a). However, it did not eliminate common law defenses, each of which has a parallel statutory enactment in the Code. Thus, based upon the Court's decision in Hammond, although Code defenses are prohibited in a DWI case, common law defenses are not. Common-law defenses are available as long as they have not been precluded by the statute defining the offense. State vs. Fogarty, 128 N.J. 59, 70(1992).

PART II
AFFIRMATIVE DEFENSES IN DWI CASES

a) PSYCHIATRIC. Both the *per se* and under the influence components of N.J.S.A. 39:4-50(a) are strict liability offenses. The subjective motivations, knowledge or purpose of the defendant, are irrelevant. Thus, if the defendant is insane, his inability to formulate a culpability state is also irrelevant. This principle was first reported in State vs. Inglis, 304 N.J.Super 207(Law Div.1997) and has been approved by the Appellate Division in State vs. Baverov, __ N.J.Super __(App.Div.2025), 2025 WL 2301219.

Notwithstanding the rule of law, psychological or psychiatric maladies can be effective defenses in a DWI case. ADHD, PTSD, Generalized Anxiety Disorder and other recognized conditions can be mistaken for intoxication by untrained police officers and have the capacity to significantly affect the defendant's performance of field sobriety tests, his understanding of instructions, and his interactions with police. This defense has real potential in a prosecution that is NOT based upon *per se* evidence.

b) NECESSITY. This affirmative defense was approved in a DWI case in State vs. Romano, 355 N.J.Super 21, 36(App.Div.2002) (defendant drove while intoxicated to escape a savage beating).

The necessity defense is based on public policy. Essentially, it reflects a determination that if, in defining the offense, the legislature had foreseen the circumstances faced by the defendant, it would have created an exception. The defense is available at common law only when the legislature has not foreseen the circumstances encountered by a defendant. If the legislature has in fact anticipated the choice of evils and determined the balance to be struck between the competing values, defendants and courts alike are precluded from reassessing those values to determine whether certain conduct is justified.

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;
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> (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;
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> (3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
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> (4) The injury impending from the emergency must be of sufficient seriousness to out-measure the criminal wrong.

c) ENTRAPMENT. This defense was initially rejected by the Supreme Court in State vs. Fogarty, 128 N.J. 59, 70(1992). Factually, the defendant was intoxicated in the parking lot of a wedding reception. A brawl broke out among other attendees and the police ordered the defendant, under threat of arrest, to leave. He complied and backed into a police car.

At common law, entrapment existed in two forms: subjective and objective. Subjective entrapment arises when police implant a criminal plan in the mind of an innocent person who otherwise would not have committed the crime so that they may prosecute that person. Objective entrapment, on the other hand, does not consider the predisposition of the defendant. Rather, objective entrapment focuses on the conduct of the police. It exists when the police conduct causes an average law-abiding citizen to commit the crime, or when the conduct is so egregious as to impugn the integrity of the court that permits a conviction.

In New Jersey, entrapment is a matter of due process. The defense arises when conduct of government is patently wrongful in that it constitutes an abuse of lawful power, perverts the proper role of government, and offends principles of fundamental fairness.

It is vital to note that this was a 4-3 decision with a strong dissent written by Justice Stein, the logic of which was the foundation for the holding in Romano.

d) JURISDICTION. Rule 7:7-1 provides that a motion to dismiss based upon lack of jurisdiction or the unconstitutionality of a municipal ordinance may be made at any time. See State v. Streater, 233 N.J.Super 537, 541(App.Div.1989). In most instances, a motion to dismiss based upon a lack of subject-matter or territorial jurisdiction should be made at the conclusion of the prosecution's case at trial. But see State vs. Ryfa, 315 N.J.Super 376(Law Div.1998).

i) TERRITORIAL. Jurisdiction is an element in every DWI case and when contested by the defendant, must be proved beyond a reasonable doubt. State v. Sylvia, 424 N.J.Super 151(App.Div.2012).

The Court's territorial jurisdiction is provided by statute. N.J.S.A. 2B:12-16, N.J.S.A. 39:5-3(c). DWI is a continuing offense that may be prosecuted in any jurisdiction through which the vehicle was driven. However, operation that crosses municipal lines does not create a new DWI offense. State vs. Willhite, 40 N.J.Super 405(LawDiv.1956); State vs. Francis, 67 N.J.Super 377(App.Div.1961).

ii) DOUBLE JEOPARDY. Protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense - e.g., following a grant of PCR. This protection applies to defendants in a DWI case, State vs. Tropea, 78 N.J. 309(1978), and applies both to retrial following an acquittal or an appeal finding that there was insufficient evidence at trial. It also applies to re-sentencing. State vs. Laird, 25 N.J. 298(1957) (where driver is sentenced as a first offender for

DWI and later is discovered to be a second offender, sentence cannot then be revised to reflect more severe penalties applicable to second offenders). Once again, this application should be made after the State's case.

e) GLOVE BOX. The essence of this affirmative defense is that the defendant consumed alcohol after the operation of the vehicle terminated, thus making his subsequent BAC level both unreliable and irrelevant. The seminal case on this defense is State vs. Snyder, 337 N.J.Super 59(App.Div.2001)). That panel noted the Supreme Court has not directly addressed the question of further ingestion of alcohol after operation. The panel speculated that it would be unlikely to do so in a case where such ingestion was purely voluntary and in circumstances so closely intertwined with the events immediately surrounding operation of a vehicle and an accident. As a result, this defense should be reserved for cases where there is strong direct or circumstantial evidence of post-operation consumption.

f) OPERATION. Operation is broadly construed in DWI cases and can include defendants who are found asleep in their vehicles. It can be proved via direct or circumstantial evidence as well as by admission or stipulation. There is an element of intention that must be proved by the State. In State vs. Daly, 64 N.J. 122(1973), the Court found the State failed to prove the defendant intended to move the motor vehicle where he had been found sleeping in the parking lot of the tavern. The defendant in Daly credibly testified he got into his car after leaving the tavern in order to sleep, reclined the seat, and turned on the motor to keep warm. The Court held operation could not be inferred beyond a reasonable doubt as the defendant had not demonstrated an intention to drive. See also State vs. DiFrancisco, 232 N.J.Super 317(LawDiv.1988), where defendant had driven his vehicle into a ditch. The State could not prove that he 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, but its presence, if proved, would be immaterial when

operation was impossible. Daly required "the possibility of motion." Consequently, DiFrancisco could not be convicted of DWI. Further, he could not be convicted of DWI at any earlier time on that date. While the facts permit an inference that he was driving at some time prior to 3:10 a.m., there is no proof that he did so while he was intoxicated. Finally, the State could not prove that the breath test was administered within a reasonable period of time after operation (requiring proof by clear and convincing evidence).

PART III
DEFENSES IN A REFUSAL CASE

a) THE CONFUSION DOCTRINE. State vs. Leavitt, 107 N.J. 534, 542(1987). The Supreme Court recognized that, despite the best efforts of police officers, some confusion may remain. The Court, however, found it unnecessary to the disposition of that case to resolve the issue of whether a defendant may validly assert confusion as a defense.

The Court stated that, if the confusion doctrine were accepted, it would have to be premised on a record developed by a defendant to show that he had indeed been confused.

There is plenty to be confused about in Paragraph 36. The current version was released in 2012 and has not been updated despite numerous changes to the law. For example, the defendant has the right to be informed in a language he speaks and understands. State vs. Marquez, 202 N.J. 485(2010) (4-3 decision). State vs. Rodriguez-Alejo, 419 N.J.Super 33(App.Div.2011).

b) PULMONARY INSUFFICIENCY. State vs. Schmidt, 206 N.J. 71, 85(2011) (inveterate smoker, cancer, COPD, cystic fibrosis, pneumonia, upper respiratory infection, etc.).

At the outset, it is telling that the defendant never asserted that he was somehow unable to provide the volume and length of breath required for a valid reading. He claims no limitation, whether by physical condition, disease, or some other verifiable cause, that somehow prevented him from providing the breath samples as required. Note that this defense is analogous to the "women over 60" rule announced in State vs. Chun, 194 N.J. 54 (2008) that permits reduced breath samples due to reduced lung capacity.

c) PRIVATE PROPERTY REFUSAL. Although the operation component of DWI applies on all property under the jurisdiction of the State, State vs.

McColley, 157 N.J.Super 525(App.Div.1978), the same is not true in the refusal statute.

> N.J.S.A. 39:4-50.2. 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[.]
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> N.J.S.A. 39:4-50.4a(a)(3). 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[.] Note that the State's burden is proof beyond a reasonable doubt. State vs. Cummings, 184 N.J. 84(2005).
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> State vs. Garbin, 325 N.J.Super 521(App.Div.1999). Operation within a private garage does not mandate a breath test.
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> State vs. Bertrand, 408 N.J.Super 584(App.Div.2009). Residential parking garage constitutes a quasi-public area.

d) Equivocal Consent Refusal. State vs. Duffy, 348 N.J.Super 609, 610-11(App.Div.2002) ("I'll take the test, but it's under duress." Police must read the second paragraph of the standard statement when the defendant's answer is equivocal or incomplete.