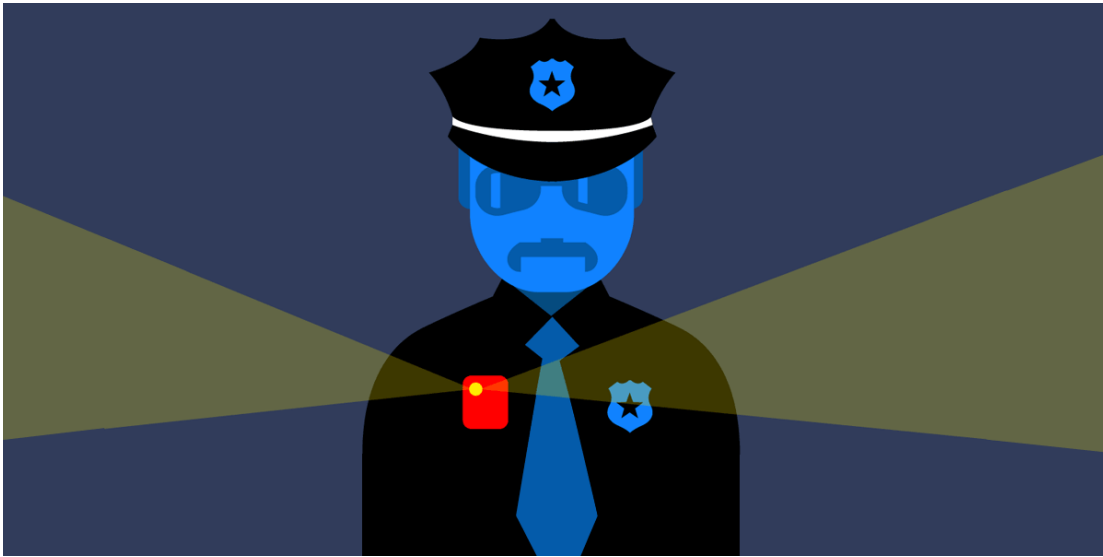


**Garden State CLE Presents:**

**Police Body-Worn Cameras**  
**and the Law**



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**Lesson Plan**

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**Part I**  
**Introduction**  
**New Jersey Common Law**

a) At common law, there was no requirement that the police produce evidence to sustain their burden of proof. This concept was discussed by the Appellate Division in State vs. Gordon, 261 N.J.Super 462, 464-65(App.Div.1993).

In Gordon, the State's failure to videotape the defendant did not violate his due process rights. There is no duty on the part of the police to create evidence by videotaping suspected drunken drivers. Moreover, the defendant has not shown that any failure to videotape him was caused by bad faith and he has shown no prejudice from the lack of a videotape. Thus, even if videotaping were required, he would not be entitled to relief.

Videotaping is merely a mechanical reproduction of the observations made by the individuals who witnessed the actions of defendant at the time of videotaping. Even under our criminal discovery rules, a prosecutor is not obligated to create tangible items of evidence; he is only required to turn over items within the possession, custody or control of the prosecuting attorney.

We are aware of no case in any jurisdiction which imposes a duty to create evidence. The United States Supreme Court has not held that the police have any duty to create evidence through the use of any particular investigative technique. Even the loss of a drunken-driving videotape does not automatically deprive a defendant of due process. Indeed, [the case law reflects] the fact that the videotape is not an essential element of a drunken-driving prosecution.

b) The law began to change with the enactment in 2015 of N.J.S.A. 40A:14-118.1 which mandated that every new or used municipal police vehicle purchased, leased, or otherwise acquired on or after March 15, 2015, which is primarily used for traffic stops must be equipped with a mobile video recording system. The cost of this equipment was to be partially funded through a surcharge of \$25 assessed against every convicted drunk driver and paid to the local municipality that arrested the defendant. N.J.S.A. 39:4-50(i).

c) As noted by the Supreme Court in Fuster vs. Township of Chatham, \_\_\_ N.J. \_\_\_ (2025), the murder of George Floyd in Minneapolis in May of 2020 triggered the enactment of a statute requiring the mandatory use of BWC by police in November 2020. The underlying statute has been amended several times, the last change having occurred in 2022.

## **Part II**

### **BWC Statutory Enactments**

a) New Jersey common law as expressed in the Gordon decision was abrogated in 2020 by N.J.S.A. 40A-14.118.3 – USE of BWC by Police.

b) Notwithstanding the provisions of any other law to the contrary and subject to the limit of funds appropriated or otherwise made available for this purpose, every uniformed State, county, and municipal patrol law enforcement officer shall wear a body worn camera that electronically records audio and video while acting in the performance of the officer's official duties, except:

- (1) While engaging in an undercover assignment;
- (2) When assigned to non-uniformed duties;
- (3) While serving in an administrative position within the department;
- (4) While meeting with a confidential informant;
- (5) While engaging in union representation of a member of the collective bargaining group;
- (6) When directed by the Chief or a superior officer for a lawful purpose;
- (7) A detective or investigator of a county prosecutor's office or Division of Criminal Justice when authorized by the County Prosecutor or Attorney General; or
- (8) As may be otherwise provided in accordance with guidelines or directives promulgated by the Attorney General.

c) For the purposes of this section, “body worn camera” means a mobile video recording system worn by a law enforcement officer.

d) N.J.S.A. 40A-14.118.5 – BWC Activation

This statute sets forth in great detail when a BWC should and should not operate in the field. The statute is also supplemented by extensive Guidelines from the attorney general, the most recent version of which can be found at this link:

<https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2022-1.pdf>

A broad review of the major parts of the statute highlights the following:

c. [The] video and audio recording functions of a body worn camera shall be activated whenever the officer is responding to a call for service or at the initiation of any other law enforcement or investigative encounter between an officer and a member of the public, in accordance with applicable guidelines or directives promulgated by the Attorney General; provided however, if an immediate threat to the officer's life or safety makes activating the body worn camera impossible or dangerous, the officer shall activate the body worn camera at the first reasonable opportunity to do so. The body worn camera shall remain activated until the encounter has fully concluded and the officer leaves the scene.

Instructors’ Commentary – The failure of the police to capture audio or video footage of a law enforcement activity in violation of the statute or the Attorney General’s Directive is not a Fourth Amendment violation.

“Defendant cites no authority for the proposition that a violation of an Attorney General Directive triggers the exclusionary rule when, as in this instance, the directive imposes a procedural requirement that neither the United States nor New Jersey Constitutions impose [*sic*]. We decline defendant's invitation to create any such new legal principle.” State vs. Seligman, \_\_\_ N.J. Super \_\_\_ (App.Div.2025) 2025 WL 21437.

e) The video and audio recording functions of a body worn camera may be deactivated, consistent with directives or guidelines promulgated by the Attorney General, under the following circumstances:

(a) when a civilian conversing with the officer requests that the device be deactivated where it reasonably appears that the person will not provide information or otherwise cooperate with the officer unless that request is respected;

(b) when a person, other than an arrestee, is seeking emergency medical services for themselves or another person and requests that the device be deactivated;

(c) while the officer is participating in a discussion pertaining to criminal investigation strategy and planning, provided that the discussion is not conducted in the immediate presence of a civilian and further provided that the officer is not actively engaged in the collection of physical evidence; or

(d) when specifically authorized to do so by an assistant prosecutor or an assistant or deputy attorney general for good and sufficient cause as determined by the assistant prosecutor or assistant or deputy attorney general.

f) Unless the officer is actively engaged in investigating the commission of a criminal offense, or is responding to an emergency or call for service, or reasonably believes that he or she will be required to use constructive authority or force, the officer shall not activate the video

and audio recording functions of a body worn camera, or shall deactivate a device that has been activated, while the officer:

(a) is in a school or youth facility or on school or youth facility property under circumstances where minor children would be in view of the device;

(b) is in a patient care area of a healthcare facility, medical office, or substance use disorder treatment facility under circumstances where patients would be in view of the device;  
or

(c) is in a place of worship under circumstances where worshippers would be in view of the device.

### **Retention Periods**

A body-worn camera recording shall be retained by the law enforcement agency that employs the officer for a retention period consistent with the provisions of this section, after which time the recording shall be permanently deleted. A body worn camera recording shall be retained for not less than 180 days from the date it was recorded, which minimum time frame for retention shall be applicable to all contracts for retention of body worn camera recordings executed by or on behalf of a law enforcement agency on or after the effective date of this act, and shall be subject to the following additional retention periods:

(1) a body worn camera recording shall automatically be retained for not less than three years if it captures images involving an encounter about which a complaint has been registered by a subject of the body worn camera recording.

Instructors' commentary – The ability of an interested party to review BWC video in an effort to seek the three-year retention period or to view the video under the Open Public Records Act OPRA, N.J.S.A. 47:1A-1, et seq., is discussed in detail by the Supreme Court in Fuster vs. Township of Chatham, \_\_\_ N.J. \_\_\_ (2025), 2025 WL 248744. BWC

footage is generally not law enforcement investigative materials and thus is subject to review under OPRA.

### **Permissive Inferences**

q. If a law enforcement officer, employee, or agent fails to adhere to the recording or retention requirements contained in this act, or intentionally interferes with a body worn camera's ability to accurately capture audio or video recordings:

(1) the officer, employee, or agent shall be subject to appropriate disciplinary action;

(2) there shall be a rebuttable presumption that exculpatory evidence was destroyed or not captured in favor of a criminal defendant who reasonably asserts that exculpatory evidence was destroyed or not captured[.]

Instructors' commentary – The inferences permitted by this statute apply both at trial and during a motion to suppress evidence. State vs. Jones, 475 N.J.Super 520(App.Div.2023). In addition, notwithstanding the Legislature's use of the term "rebuttable presumption," the better way to analyze the statute is to regard it as a permissive inference.

“[A] statutory presumption which mandates a finding that the presumed fact exists simply by proving the underlying fact offends the due process clause of the Fifth and Fourteenth amendments to the Constitution because it undermines the defendant's presumption of innocence and diminishes the State's obligation to prove guilt beyond a reasonable doubt. Thus, in order to observe the demands of due process a court may not accord any greater weight than that of a permissive inference to the statutory presumption, “no matter how mandatory the phraseology creating the presumption appears to be.” State vs. McCandless, 190 N.J.Super 75, 81(App.Div.1983). Accord State vs. Walten, 241 N.J.Super 529(App.Div.1990).

## Part III

### BWC as Evidence at Trial

N.J.S.A. 40A:14-118.5(j)(3)(a) provides:

[W]hen a body worn camera recording pertains to a criminal investigation or otherwise records information that may be subject to discovery in a prosecution, the recording shall be treated as evidence and shall be kept in accordance with the retention period for evidence in a criminal prosecution.

a) Relevance of video evidence – N.J.R.E. 401

The critical nature of video evidence has been recognized by our Supreme Court. The adage that a picture is worth a thousand words is an apt expression of the value and importance of video and sound recordings. Indeed, a video recording of events in many cases may be equal or superior to testimonial evidence. Clearly, if such evidence is relevant to proving guilt, then the converse must hold true. By way of example, evidence that would have a tendency in reason to disprove a DWI defendant's intoxication is relevant and therefore must be disclosed to a defendant, if such evidence is in the State's custody or control. *See State vs. Stein*, 225 N.J. 582, 596(2016).

As our Supreme Court stated, referring to the recording of an alleged child abuse victim's statement, video:

"convey[s] not only the exact words spoken by the child, but their finer shades of meaning through facial expressions, body movements and inflections of voice." In addition, a video recording creates an objective, reviewable record, enhances the reliability of confessions, protects police officers from false allegations, improves the overall quality of police work, and may well "preserve judicial resources" by discouraging defendants from raising frivolous pre-trial challenges to the admission of the child's statement.

[State vs. P.S., 202 N.J. 232, 253(2010) (citations omitted).]

## b) Trial procedures

A video recording is merely a digital reproduction of the conduct of the defendant and when relevant within the meaning of N.J.R.E. 401 is unquestionably admissible, when properly authenticated. A video recording meets the definition of a “writing” under N.J.R.E. 1001(a) and N.J.R.E. 801(e). It also meets the definition of a photograph under N.J.R.E. 1001(b).

Of course, like any piece of real evidence, the video recording must be marked for identification and authenticated under N.J.R.E. 901 prior to its admission in evidence. From a procedural standpoint, the authentication of a video recording is the same as the authentication of a film or photograph. The proponent of the video must offer evidence as to the circumstances surrounding its recording. The evidence should also include information regarding the playing of the video in court. Finally, the proponent should elicit testimony from a witness who was present at the time the video was made. This witness should be able to testify that the activities shown on the recording fairly and accurately depict what the witness recalls of the events that were recorded. State vs. Nemesh, 228 N.J.Super 597, 604 n.3(App.Div.1988). Typically, the officer who recorded the video on his BWC can provide this evidence.

The chain of custody is normally not a significant issue in video cases. Unless there is some question that the recording has been modified, corrupted, or that the digital images presented in court are not those of the defendant, chain of custody matters are not of great moment. However, when there is an objection to the video on this basis, the proponent of the evidence will have to account for all of the links in the chain of custody of the videotape, as would be required with any other piece of real evidence.

After the foundational aspects of admissibility have been established and court has viewed the video to determine its admissibility, it should be offered in evidence, marked and preserved with any other exhibits in the case that have also been received in evidence. Note, that in a sense, there are two pieces of evidence when using video: the physical object

that contains the digital images (DVD, thumb drive, etc.) and the contents of the video which have been shown to the finder of fact.

c) Slow motion surveillance video replay –In a comprehensive opinion that was affirmed by the Supreme Court,<sup>1</sup> the Appellate Division ruled that, subject to off-setting concerns of undue prejudice under N.J.R.E. 403, surveillance video footage may be presented to jurors in slow motion or at other varying speeds, or with intermittent pauses, if the trial court in its discretion reasonably finds those modes of presentation would assist the jurors' understanding of the pertinent events and help them resolve disputed factual issues. Moreover, the surveillance video may be viewed during deliberations in such modes one or more times, provided that the playbacks occur in open court under the judge's supervision and in the presence of counsel.

Instructors' commentary – When conducting direct or cross-examination of a witness who is narrating a video, it is vital to make constant references for the record as to the current time code numbers on the video. This will enable a reviewing court to orient itself to the same segment of video that is subject to the witness examination.

Video that is either irrelevant or has not been introduced into evidence must be excluded from consideration by the fact-finder. See discussion by the Supreme Court in State vs. A.R. , 213 N.J. 542(2013).

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<sup>1</sup>State vs. Knight, 477 N.J.Super 400, 405(App.Div.), affirmed \_\_\_ N.J. \_\_\_ (2024), 2024 WL 5148457.

## Part IV

### Miranda Objections to BCW Footage at Trial

a) The most frequent objection to the admissibility of video evidence is that the recording contains statements by the defendant that are excludable as a matter of law. Normally, the basis for this argument is that the defendant made admissions to the police on video without having been properly advised of his right to remain silent. While there is no longer any question that Miranda warnings apply to custodial interrogations related to motor vehicle violations, the video is intended to capture more than just the admissions of the defendant. The defendant may engage in an array of conduct which may prove highly probative on the issue of intoxication. The difficulty, from a legal standpoint, comes in drawing the line between testimonial and non-testimonial evidence. If the defendant makes admissions as a result of a custodial interrogation without the benefit of Miranda warnings, the evidence will generally be deemed to be testimonial. Such statements on recording should be ordered to be suppressed following a hearing under N.J.R.E. 104(c).

b) State vs. McGuigan, 478 N.J.Super 284(App.Div.2024). The defendant was the subject of a police investigation related to a strict-liability drug-induced death. As part of the process, the police conducted a videotaped interview of the defendant at police headquarters. Prior to administering Miranda warnings, the police elicited several incriminating admissions from the defendant. Following the subsequent administration of Miranda warnings, the police conducted a comprehensive interrogation of the defendant without informing her that the person who was the focus of their questioning had died. In fact, the police detective purposefully avoided that topic by making repeated references to the decedent as if she were still alive.

The video of the defendant's interview by the police was shown to the jury at her criminal trial on two occasions. Significantly, neither the prosecution nor the defense sought to have a Miranda hearing under

N.J.R.E. 104(c) to gauge the voluntariness of the defendant's recorded statements prior to having them considered by the jury. However, this issue was raised on appeal and the Appellate Division ruled that the failure of the trial court to require a Miranda hearing during the course of the trial as to the voluntariness of the defendant's confession constituted plain error.

c) Non-testimonial evidence - However, as a matter of law, evidence which is non-testimonial in nature is not subject to Miranda warnings and, if relevant, is admissible against the defendant. Thus, Miranda warnings are not required when the evidence involves such non-testimonial issues as fingerprinting, photographing, measuring, writing or speaking for identification, appearing in court to stand, to assume a stance, to walk, or to make a particular gesture. Likewise, the nonverbal conduct required of a defendant when he engages in "psycho-physical" examinations as part of a drunk-driving investigation is also non-testimonial in nature. State vs. Macuk, 57 N.J. 1(1970).

d) Miranda hearings in municipal court based upon BWC evidence present special problems since the motion judge will also be the fact-finder at trial. Even if the judge orders the incriminating statements suppressed, he has still heard the evidence. Although this quandary may serve as a basis for recusal under Rule 1:12-1(g), the case law holds that judges are capable of ignoring this inadmissible evidence and deciding the case based solely upon the relevant, credible evidence that was admitted at trial. See State vs. Medina, 349 N.J. Super 108(App.Div.2002). But see State vs. Jones, 475 N.J. Super 520, 534(App.Div.2023) (matter to be assigned to a different judge on remand based upon the motion judge's credibility determinations at the initial motion to suppress hearing). See also (App.Div.1998) (remanding a matter to a different judge because the motion judge expressed opinions, weighed evidence, "and may have a commitment to his findings").

e) In summary, if the BWC video contains statements of the defendant given in violation of his right to remain silent under Miranda, the sound portion of the video should be redacted to suppress the offending

statements. However, any and all non-testimonial evidence, if otherwise relevant, is admissible. Even redacted statements might be admissible on the limited issue of the defendant's level of intoxication. It is not the words that the defendant utters that would be the evidence, but rather the way the defendant says those words. The defendant's tone, voice inflection, slurred speech, if any, attitude and demeanor, as expressed by in the redacted statement may prove to be powerful evidence of intoxication or sobriety.

Instructors' commentary – Notwithstanding the foregoing inferences, video evidence may not be used at trial to rebut or undermine the results of a properly administered breath test. State vs. Alex, 257 N.J.Super 16(App.Div.1992). A contrary holding by the Appellate Division in State vs. Ghegan, 213 N.J.Super 383(App.Div.1986) was implicitly overruled by the Supreme Court.