Garden State CLE Presents:

Forbidden Defenses in a New Jersey Drunk Driving Case

Lesson Plan

Instructors

Evan Levow, Esquire

Robert Ramsey, Ed.D.

Part I
The Ban on Defenses Begins
Welcome to the Wilentz Era

The Edson Theory

Chronology

State vs. Tischio - argued 11/5/86

In re Edson - argued 5/4/87

State vs. Tischio - Decided 6/30/87

In re Edson, 108 N.J. 464, 470-71(1987)

[T]he record is clear that respondent advised two clients to manufacture evidence in the defense of their drunk driving cases, contrary to R.P.C. 1.2(d). Respondent also knowingly permitted a client to offer false evidence in a trial, contrary to R.P.C. 3.3(a)(4) and counseled and assisted a witness to testify falsely in a trial, contrary to R.P.C. 3.4(b). Respondent also participated in a fraud by giving false information to his expert witness for the purpose of having him testify under oath in reliance upon those facts, and he gave false information to a municipal prosecutor, contrary to R.P.C. 8.4(a), (b), (c) and (d).

In re Edson, 108 N.J. 464, 472-73 (1987)

One need but listen to the tapes. The reaction to what is portrayed is at once fascinating and chilling. The members of this Court are not babes in the woods. We are invested with at least minimally acceptable levels of sophistication, of worldliness. Our professional backgrounds have exposed us, in varying degrees, to some of life's seamier aspects. We have travelled on different roads in our professional careers. We practiced in different fields and encountered, collectively, all kinds of lawyers-most very good, some perhaps indifferent, and a mere handful bad. In short, we have been around enough that not much surprises us. But rarely have we encountered in our colleagues at the bar the kind of shocking disregard of professional standards, the kind of amoral arrogance, that is illustrated by this record. There could hardly be a plainer case of dishonesty touching the administration of justice and arising out of the practice of law.

Part II
Absolutely banned Defenses

1) Retrograde Extrapolation

State vs. Tischio, 107 N.J. 504 (1987)

The overall scheme of these laws reflects the dominant legislative purpose to eliminate intoxicated drivers from the roadways of this State. To this end, the Legislature, working in tandem with the courts, has consistently sought to streamline the implementation of these laws and to remove the obstacles impeding the efficient and successful prosecution of those who drink and drive. One such impediment has been the introduction of conflicting expert testimony at trials under N.J.S.A. 39:4-50(a). The vast majority of statutory revisions in this area have been directed towards minimizing, if not eliminating, the necessity for this kind of evidence. (at 514)

Accordingly, we hold that the statute prescribes an offense that is demonstrated solely by a reliable breathalyzer test administered within a reasonable period of time after the defendant is stopped for drunk driving, which test results in the proscribed blood-alcohol level. Prosecution for this particular offense neither requires nor allows extrapolation evidence to demonstrate the defendant's blood-alcohol level while actually driving. (at 522)

Note dissent by Justice Clifford

State vs. Oriole, 243 N.J.Super 688, 695-696(LawDiv.1990)

This court holds that extrapolation evidence of the defendant's blood alcohol level at the time of operation is both relevant to, and probative of, whether defendant Oriole acted recklessly, in violation of N.J.S.A. 2C:12-1b(1) and -1c. The State therefore will be permitted to adduce evidence of the extrapolation analysis based on defendant's blood-alcohol readings taken at the hospital, in order to show the level of defendant's blood-alcohol concentration when the collision occurred. At trial, the State may introduce extrapolation evidence on the issue of whether defendant acted recklessly (under circumstances manifesting extreme indifference to human life), as charged in the indictment[.]

2) Involuntary Intoxication - No criminal code defenses allowed

State vs. Hammond, 118 N.J. 306(1990)

We hold that the provisions of the Code governing principles of liability are not applicable to the motor vehicle violation of driving while intoxicated under N.J.S.A. 39:4-50. The Code defense of involuntary intoxication, N.J.S.A. 2C:2-8 is not a defense to this violation. (at 318)

Our holdings in Downie and Tischio confirm a clear legislative intent and a strong legislative policy to discourage long trials complicated by pretextual defenses. Yet that is what defendant seeks to accomplish in this case. Defendant does not contend that what he ingested did not create objectively all of the well-known symptoms of intoxication or did not result in a breathalyzer reading that *per se* constitutes intoxication. Defendant's expert testimony was proffered only to confirm his *318 contention that he drank liquor unwittingly. Indeed, defendant does not even argue that he had nothing intoxicating to drink the night he was arrested, but only that *some* of his consumption of alcohol was unknowing and "involuntary." This kind of defense has every potential for being pretextual and is the kind of tendentious defense the Legislature sought to discourage by its enactment of a statute based on objective measurements of intoxication. (at 317-318)

Common law defenses are available. Example: Common law necessity

State vs. Romano, 355 N.J.Super 21(App.Div.2002)
State vs. Fogarty, 128 N.J. 59(1992)

3) Defenses based upon pretext - Entrapment and quasi-entrapment

State vs. Fogarty, 128 N.J. 59(1992)

A clear legislative intent and a strong legislative policy exist to discourage long trials complicated by pretextual defenses. Defendant seeks to avail himself of a subjective pretextual defense in this case. He does not contend that the police officer ordered him to drive drunk; he asserts only that he believed that some unidentified police officer told him to leave. That kind of defense has every potential for being pretextual and would "impede the efficient and successful prosecution of those who drink and drive."

In our DWI decisions we attempt to eliminate every possibility of pretextual defenses. We have done so not only because of any doubts about the veracity of the factual defense offered, but also because of the potential for pretext.

In this case the risk of pretext is [great]. The scene is all too common: a brawl in a parking lot outside a bar, a restaurant, or a sports stadium, or indeed at any gathering where a number of people are present. The police arrive and decide that public safety requires that they immediately disperse the crowd. The police do not have time to assess the risk that some ordered to leave may be drunk. Moreover, if the police had to administer sobriety tests to everyone at those events before dispersing them, their law-enforcement efforts would suffer.

After a police order to disperse, those who had intended to leave anyway, those without fear of arrest or of physical assault, those without any reason to fail to tell the police that they are drunk, drive away intoxicated. Obviously, if the law were to permit those people to offer as a defense that they drove only because they reasonably feared that telling the police that they were drunk might lead to arrest, the invitation to offer a pretext would be clear. (at 68-69)

Note dissent by Justice Stein.

4) Common law and statutory Insanity

State vs. Inglis, 304 N.J.Super 207(LawDiv.1997)

As with involuntary intoxication, entrapment, and duress, the insanity defense has a high potential for serving as an instrument of pretext. When evaluating whether a particular defense has a high potential for pretext, the focus should be on the ease with which a defendant can allege a frivolous defense. In this respect, there is little difference between Mr. Inglis' insanity defense and the involuntary intoxication defense rejected in Hammond. (at 212)

5) No plea-bargaining

State vs. Hessen, 145 N.J. 441(LawDiv.1996)
State vs. Marsh, 290 N.J.Super 663(App.Div.1996)

Amendments to N.J.S.A. 39:4-50 - effective 2/19/24

The Court's intention in upholding this ban can be seen as an effectuation of the strong legislative and public policy to eliminate drunk driving, by refusing to allow drunk drivers to escape responsibility for their actions, by ensuring accountability of those who cause drunk driving, and by penalizing drinking-and-driving offenses to the fullest extent of the law. The ban is an essential element of a strongly-endorsed and well-articulated policy to eliminate drunk driving by affording offenders "zero tolerance" in the prosecution of their offenses. (Hessen at 458)

GUIDELINE 4. LIMITATION

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50)

R.P.C. 3.8 - Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

GUIDELINE 3. PROSECUTOR'S RESPONSIBILITIES

Nothing in these Guidelines should be construed to affect in any way the prosecutor's discretion in any case to move unilaterally for an amendment to the original charge or a dismissal of the charges pending against a defendant if the prosecutor determines and personally represents on the record the reasons in support of the motion.

Supreme Court Comment (6/29/90)

Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter. It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases. In discharging the diverse

responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well-established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.

6) Other Prohibited Defenses

a) No Jury Trial - State vs. Stanton, 176 N.J. 75(2003); State vs. Hamm, 121 N.J. 109(1990); State vs. Denelsbeck, 225 NJ 103(2016).

b) Glovebox Defense - State vs. Snyder, 337 N.J.Super 59(App.Div.2001); State vs. Lizotte, 272 N.J.Super 568(LawDiv.1993); Contrast State vs. Thompson, 462 N.J.Super 370(App.Div.2020) (Asleep in the car).

c) Use of Video to Rebut Per Se Violation - State vs. Allex, 257 N.J.Super 16(App.Div.1992); State vs. Manfredi, 242 N.J.Super 708(LawDiv.1990).

d) Involuntary Workplace Exposure to Alcohol - State vs. Carey, 263 N.J.Super 377(App.Div.1993).

e) Chronic Alcoholism - State vs. Housman, 131 N.J.Super 478(App.Div.1974).

f) Hyper-Sensitivity to Effects of Alcohol - State vs. Cryan, 363 N.J.Super 442, 457(App.Div.2003).

g) Too Intoxicated to Understand Paragraph 36 - State vs. Marquez, 202 N.J. 485, 513(2010).

h) No Automatic Dismissal When Complainant Officer Fails to Appear For Trial - Bulletin Letter #9/10-85 - See State vs. Paris, 214 N.J.Super 220(LawDiv.1986) overruled by State vs. Prickett, 240 N.J.Super 139(App.Div.1990)

i) Judicial Review of Dismissal Applications by the Prosecutor - Memorandum 12/2/04.