

Garden State CLE Presents:



INTENSIVE ZINGIS Training



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Lesson Plan

INTRODUCTION

The instruction in this CLE will focus on two topics:

First, the instructors will provide a comprehensive check-list of the new duties required of municipal prosecutors, defense attorneys and judges in certain drunk-driving cases based upon the revised (as of November 7th) Supreme Court decision in State vs. Zingis, ___ N.J. ___ (2024), 2024 WL 4730578

This training is also relevant in the Superior Court for prosecutors and defense counsel in cases where the defendant has been charged with a violation of N.J.S.A. 2C:40-26(b) and occasionally in DWI matters that are companion to indictable offenses.

Secondly, in order to provide a measure of context, the instructors will present a comprehensive overview of the ZINGIS decision, starting with the Court's decision in State vs. Cassidy, 235 N.J. 482 (2019), and the Special Adjudicator's Report by Judge Robert Fall, P.J.A.D. (ret). This information will detail the history and logic behind the decisions as expressed by the Supreme Court. This information will prove to be critical in the supporting briefs and oral advocacy related to ZINGIS PCR motions.

PART I

Role of the Municipal Prosecutor

1) The obligations imposed upon municipal prosecutors by the Supreme Court assume that part-time municipal prosecutors have the time, inclination and resources to research and assemble the required ZINGIS discovery data. As a practical matter, this task is almost always accomplished by the local (or State) police.

2) The Supreme Court's decision also assumes that the defendant will have secured defense counsel at an early stage in the proceedings.

Ten-step Checklist of Prosecutor's ZINGIS Discovery Tasks

1) Initial review of defendant's abstract: Does the defendant have any prior convictions for DWI or refusal within the ZINGIS window of November 5, 2008 through April 9, 2016? (See prosecutor's obligation to check on prior DWI convictions under N.J.S.A. 2B:25-5.1). The State must inform the court, defendant, and defense counsel whether defendant's prior DWI conviction involved a Dennis-calibrated Alcotest. In general, the relevant Dennis-counties can be remembered under the acronym USMOM (Union, Somerset, Middlesex, Ocean and Monmouth).

If no prior offenses within the ZINGIS window exist, the prosecutor has no further obligations on the ZINGIS issues.

2) If there are one or more convictions within the window, prosecutor is to notify the judge of the relevant ZINGIS priors.

3) Prosecutor should next search the PCSAM of the suspected ZINGIS convictions and get the dispositions with relevant summons number.

4) Prosecutor should get the dispositions using the summons numbers.

5) Prosecutor must next search S-152 using the summons number to capture test data.

6) Prosecutor should next cut and paste the data related to the summons as shown on the S-152 on a separate document and preserve it.

7) Next, using the Alcotest serial number, prosecutor should go to the Dennis Calibration Repository (a database that does not yet exist) to get a PDF of the machine's calibration temporally relevant to the defendant's ZINGIS arrest;

Comment - The Dennis Calibration Repository will be assembled in a summary, which will be created as follows: the State will compile a document—in as few pages as possible, preferably in multiple columns, and in a readable

font—that contains a sequential, alphanumeric list of the 1,046 file names, including the instrument serial number (for example, “ARWA-0188”), machine location, and dates of calibration. This Dennis Calibration Repository Summary is to be certified as accurate and certified copies will be distributed to each municipality for use by the municipal prosecutor.

According to the Supreme Court, the Dennis Calibration Repository, in conjunction with Exhibit S-152, will be the best available method of determining whether an individual was requested to provide breath samples on an Alcotest instrument calibrated by Trooper Dennis and whether an evidential BAC was obtained....

8) Obtain information from Dennis Calibration Repository Summary, another database that does not yet exist.

9) Discovery - The prosecutor must assemble the Dennis Repository Summary, the S-152 data, the disposition and a certified abstract (Rule 7:7-7(b)(5)) and serve it upon defense counsel (or the pro se defendant) and the court; and

10) Consistent with Rule 7:7-7(b), the discovery should be sent to counsel (or the pro se defendant) prior to the first case management conference under Rule 7:7-5(a).

Comment – According to the Supreme Court, ZINGIS procedures by the prosecutor will both (1) allow the prosecutors to prove beyond a reasonable doubt whether a defendant is [a ZINGIS-affected] defendant, permitting them to confidently discharge their duty in seeking sentencing enhancements when permitted by law, and (2) enable defendants to defend against such claims.

Part II

Role of Defense Counsel

Six-Step Checklist of Defense Counsel's ZINGIS Tasks

1) Discovery Demand - Make demand for discovery under Rule 7:7-7(b) contemporaneously with letter of representation. Best practices militate in favor of making a specific ZINGIS request in the discovery demand when relevant.

Comment - Defense counsel should independently search out prior convictions in every case and put little credence in his client's recollections. This search can be done by ordering a full MVC certified abstract or by examining the municipal court portal at <https://portal.njcourts.gov/webe41/MPAWeb/>.
OR

Defense counsel can await the discovery related to the record of prior convictions, as mandated under Rule 7:7-7(b)(5) from the prosecutor.

2) Case Management/Discovery Conferences - At the first case management conference, defense counsel should demand any and all ZINGIS data if they have not been received. If ZINGIS discovery has not been received by the second case management conference, defense should file a Holup motion. State vs. Holup, 253 N.J.Super 320(App.Div.1992).

3) If there are relevant ZINGIS prior convictions, defense counsel and his client should decide upon a PCR motion under Rule 7:10-2. As per the Supreme Court's decision, there is no time limitation on PCR applications that implicate ZINGIS convictions.

Comment: The ZINGIS holding assumes that the same attorney handling the DWI defense will also pursue the ZINGIS PCR, an assumption that may not always be true.

If the defendant has no funds for the PCR application, counsel should help the defendant prepare the standard Form 5A and aid the defendant in filing it in the appropriate court.

In this regard, Rule 7:10-2(e) provides:

(e) Assignment of Counsel. A defendant may annex to the petition a sworn statement asserting indigency in the Form 5A prescribed by the Administrative Director of the Courts, which form shall be furnished by the municipal court administrator. If the court finds that the defendant is indigent as herein provided, and that the original conviction involved a consequence of magnitude, it shall order counsel assigned to represent defendant and shall further order a transcript of testimony of any proceeding shown to be necessary in establishing the grounds of relief asserted.

Absent a showing of good cause, which shall not include lack of merit of the petition, the court shall not substitute new assigned counsel. If counsel is assigned, the court shall not thereafter substitute new assigned counsel absent a showing of good cause, which shall not, however, include lack of merit of the petition.

4) Defense counsel should also file a copy of the PCR petition with the DWI court and the municipal prosecutor.

5) While the PCR application is pending, defense counsel should work with the prosecutor and the trial court to prepare the case for trial so that the can be ready for disposition as soon as the PCR component has been decided.

6) Defense appeals from a denial of PCR should be combined with any appeal from the current DWI case under Rule 7:10-2(g)(5).

Part III

Role of Municipal Court Judges

The responsibilities of the judges differ between the trial-level court and the PCR court.

A) Trial-Level Judge

1) Pretrial conferences - According to the Court, if the record reflects that the defendant has a prior conviction for DWI, the prosecutor must inform the court, defendant, and defense counsel whether it occurred between the critical dates of November 5, 2008 and April 9, 2016, information readily available to the State in the defendant's abstract. If so, the trial court must then schedule a discovery conference for the State to fulfill its obligation and provide to the defendant and counsel, as well as the court, discovery indicating whether the defendant is a Dennis-affected defendant.

The opinion assumes that the judge will be aware if there is a ZINGIS issue with the case based upon the prosecutor's prior notification to the Court. As a result, the trial Court should make inquiries of defense counsel as to possible PCR by the defendant at the first (or second) case management conference.

2) The Supreme Court ruled that judges should afford the defendant a reasonable amount of time to decide whether to challenge the prior conviction. If the defendant wishes to challenge that earlier conviction, the defendant must do so by filing for PCR in the jurisdiction of the previous conviction. If a PCR application has been filed under ZINGIS, the trial-level judge should complete all the administrative steps to assure that the case will be ready for disposition once the PCR process has been completed.

3) Upon the filing of the PCR, the current DWI case is to be stayed unless the defendant elects to enter a guilty or both parties consent to a trial, irrespective of the filing of the PCR. All pretrial procedures in the subsequent DWI matter should continue. This includes timely

production of discovery and participation in case management conferences as directed by the court.

4) If the defendant represents to the Court that he does not wish to pursue a ZINGIS PCR application, the judge should personally address the defendant and make a clear record reflecting a knowing and voluntary waiver.

B) PCR Motion Judge

1) In the interests of public safety, the PCR motion judge has been instructed by the Supreme Court to prioritize ZINGIS applications so as to not unduly delay the disposition of the pending DWI. There is no assignment of responsibility for the task of alerting the DWI trial judge about the disposition of the PCR motion.

Comment – Speedy disposition of a ZINGIS PCR application will also require the cooperation of the municipal prosecutor, defense counsel, police records and the Court administrator. There is no analogous speedy disposition for other DWI PCR applications that will impact on sentencing, such as Laurick motions (Rule 7:10-2(g) (State vs. Laurick, 120 N.J. 1(1990); see also State vs. Patel, 239 N.J. 424 (2019)) or motions under Rule 7:6-2(b) to vacate a guilty plea based upon an inadequate factual basis for the plea (see State vs. Campfield, 213 N.J. 218(2013)).

2) Appeals - An appeal by the defendant from an adverse ruling must be bundled with Defendant's active DWI case. Although the Rules are not clear on this issue, it appears that the State may take an appeal from the PCR judge's grant of the ZINGIS PCR motion by way of Rule 3:23-2.

The defendant, a defendant's legal representative, or other person aggrieved by a judgment of conviction, or the defendant or State, if aggrieved by a final post judgment order entered by a court of limited jurisdiction shall appeal by filing a notice of appeal with the clerk of the court below within 20 days after the entry of judgment.

Municipal Prosecutor

- ❑ Review defendant's abstract.
- ❑ If prior DWI or refusal convictions occurred between November 5, 2008 and April 9, 2016, inform the court, defendant, and defense counsel.
- ❑ If no prior offenses within the ZINGIS window exist, the prosecutor has no further obligations on the ZINGIS issues.
- ❑ Notify judge if there are prior convictions within the window.
- ❑ Search PCSAM.
- ❑ Get prior dispositions with relevant summons numbers.
- ❑ Search S-152 using summons number to capture test data.
- ❑ Cut and paste the S-152 data into a separate document and preserve it.
- ❑ Use Alcotest serial number to get PDF of the Alcotest instruments calibration documents relevant to the defendant's ZINGIS arrest from Dennis Calibration Repository, a database that does not yet exist.
- ❑ Obtain information from Dennis Calibration Repository Summary, another database that does not yet exist.
- ❑ Assemble discovery—*i.e.*, abstract, disposition, S-152 data, and Dennis Calibration Repository Summary.
- ❑ Provide this discovery to defense counsel (or *pro se* defendant) and the court before the first case management conference.

Defense Counsel

- Discovery demand under Rule 7:7-7(b), including a specific ZINGIS request.
- Examine municipal court portal and order an MVC abstract - <https://portal.njcourts.gov/webe41/MPAWeb/>, OR
- Await discovery related prior convictions from the prosecutor under Rule 7:7-7(b)(5).
- Demand ZINGIS discovery at initial case management conference if not already received.
- Search PCSAM.
- Move for a discovery order requiring production of ZINGIS discovery pursuant to State vs. Holup, 253 N.J.Super 320(App.Div.1992), at second case management conference if not already received.
- Decide whether to pursue PCR from prior ZINGIS convictions under Rule 7:10-2.
- If defendant is indigent and has no funds for the PCR application, help the defendant prepare a Form 5A and aid the defendant in filing it in the appropriate court.
- File PCR petition where prior conviction occurred with a copy to the court where the subsequent DWI is pending and to the municipal prosecutor assigned to that court.
- Prepare the case where the subsequent DWI is pending for trial so that it will be ready for disposition as soon as PCR is decided.
- Appeals from PCR denials are combined with appeals from the disposition of the subsequent DWI under Rule 7:10-2(g)(5).

Municipal Court Judges

Trial-Level Judge

- Receive information from the prosecutor whether a defendant has prior convictions between November 2008 and April 2016.
- Schedule a discovery conference for the State to fulfill its discovery obligation as to whether the defendant is a Dennis-affected defendant.
- Inquire of defense counsel about PCR.
- If defendant pursues PCR, complete all administrative steps to assure that the case will be ready for disposition when PCR process is completed.
- If defendant does not pursue PCR, personally address the defendant and make a clear record reflecting a knowing and voluntary waiver and proceed to disposition.

PCR Motion Judge

- Prioritize ZINGIS applications so as to not unduly delay the disposition of the pending DWI.
- There is no assignment of responsibility for alerting the court where the subsequent DWI is pending about the PCR disposition.