

Garden State CLE Presents:

**Is My Guy on the
Revoked List for DWI?**



Instructor



Robert Ramsey, Ed.D.

Lesson Plan

©2024
Garden State CLE
All Rights Reserved

Part I

Introduction

1) There are both criminal and motor vehicle offenses which punish people who operate a motor vehicle while suspended for a DWI conviction. The analytical starting point for both offenses deals with the element of personally operating a motor vehicle, “during the period of suspension.”

N.J.S.A. 39:3-40 provides:

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

N.J.S.A. 2C:40-26 relies upon N.J.S.A. 39:3-40 for this element and provides:

a. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of R.S.39:3-40, if the actor's license was suspended or revoked for a first violation of R.S.39:4-50 or 39:4-50.4a and the actor had previously been convicted of violating R.S.39:3-40 while under suspension for that first offense. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

b. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of R.S.39:3-40, if the actor's license was suspended or revoked for a second or subsequent violation of R.S.39:4-50 or 39:4-50.4a. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

2) When it comes to suspensions based upon a conviction for drunk-driving or a refusal, the challenge for prosecutors and defense counsel is reconciling the concept of “during the period of suspension” with the defendant’s driving history. There are a number of possible permutations:

a) An Easy Call & A Cascading Mess - The defendant was personally operating during the determinate term of the DWI/Refusal license suspension ordered by the Court; or

b) Still Suspended - DWI Suspension is over but the defendant’s driving privileges remained revoked following the expiration of the determinate term of dwi/refusal suspension; or

c) Stacked Suspensions - The defendant was operating a motor vehicle while revoked for an unrelated administrative or non-DWI/Refusal suspension and the determinate term of the Court’s DWI suspension had not yet begun; or

d) PCR Relief - One or more of the defendant’s prior DWI convictions has been vacated as a result of post-conviction relief.

The published case law addresses each of these possibilities.

Part II

Statutory and Case Law Analysis

1) An Easy Call & A Cascading Mess - The defendant was personally operating during the determinate term of the DWI/Refusal license suspension ordered by the Court. The judgment of conviction will have the precise date that the suspension began and its length in terms of months, days or years. The beginning date can be easily determined by the “O” code on the defendant’s certified driving abstract. The ending date of the determinate term of suspension is not included on the abstract.

A first offense during this window for driving on the revoked list during this window triggers the cumulative enhancements of N.J.S.A. 39:3-40(a) thru (e) and N.J.S.A. 39:3-40(f)(2) and (3).

A first 39:3-40 conviction for a DWI suspension will also trigger a potential prosecution for N.J.S.A. 2C:40-26(a) if the defendant gets caught again for driving on the revoked list during the window of the determinate suspension term. This crime requires an unspecified jail term.

Finally, two or more prior convictions at any time for DWI or refusal, coupled with operation during the window of the DWI suspension will trigger N.J.S.A. 2C:40-26(b).

Comment: The defense to this situation will usually involve post-conviction relief or a motion to withdraw the N.J.S.A. 39:3-40 guilty plea under Rule 7:6-2(b)

2) DWI suspension is over: The defendant is on the revoked list for administrative reasons (no restoration fee, IDRC, Surcharges, fine payments, community service, etc) but the determinate term of the DWI/Refusal suspension is over.

State vs. Perry, 439 N.J.Super 514(App.Div.2015).

N.J.S.A. 2C:40-26 criminalizes the operation of a motor vehicle only while the operator is serving the court-imposed term of suspension, and not thereafter.

Comment: This holding is also of critical importance when defending a charge of N.J.S.A. 39:3-40(f)(2) and (3). The argument is that the Perry decision implicates N.J.S.A. 39:3-40 because it is a lesser included offense.

3) Stacked suspensions - The defendant was operating a motor vehicle while revoked for an unrelated administrative or non-DWI/Refusal suspension and the determinate term of the DWI suspension had not yet begun.

The confusion begins with N.J.S.A. 39:4-50(a)(3) which provides that if the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title or Title 2C of the New Jersey Statutes at the time of any conviction for a violation of this section, the revocation or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period.

State vs. Italiano, ___ N.J.Super ___ (App.Div.2024)

Because the effective date of defendant's most recent DWI-related sentence was delayed only due to other consecutively imposed accumulated sentences, defendant violated N.J.S.A. 2C:40-26(b) when he operated his vehicle prior to the conclusion of the suspension for his DWI offense. N.J.S.A. 2C:40-26 includes driving after an imposed suspension of driving privileges for a second or subsequent DWI, which has not commenced because of stacked or yet-to-be-served prior suspensions. The language of the statute does not require defendant to be serving a suspension associated with a particular DWI offense at the time he was operating his vehicle. Rather, the statute makes it a crime to operate during the period of license suspension ... if the actor's license was suspended ... for a second or subsequent DWI offense.

The same stacked suspensions logic and outcome apply for enhanced penalties for driving on the revoked list as a result of a DWI suspension. N.J.S.A. 39:3-40(f)(2). State vs. Cuccurullo, 228 N.J.Super 517(App.Div.1988).

4) PCR Relief - One or more of the defendant's prior DWI convictions was vacated as a result of post-conviction relief.

This possibility is highly fact sensitive. The central issue appears to be, how many prior DWI/Refusal convictions does the defendant currently have on the date of the trial for N.J.S.A. 2C:40-26(b)? The statute requires at least two (2).

This issue has been the subject of two (2) published Appellate Division case.

State vs. Faison, 452 N.J.Super 390(App.Div.2017)

Defendant entered pleas of guilty to 2 DWI offenses and was caught driving on the revoked list during the suspension term. The defendant filed a petition for PCR which resulted in both DWI convictions being vacated. He subsequently pled to one DWI charge and the second remained dismissed. As a result, at the time of his trial for N.J.S.A. 2C:40-26(b), the defendant had only one prior conviction for DWI.

State vs. Sylvester, 437 N.J.Super 1(App.Div.2014)

The defendant had three prior DWI. Upon her third DWI conviction in 2011, the court suspended the defendant's license for two years. In 2012, while the defendant's license remained suspended, she operated a motor vehicle and was indicted for violating N.J.S.A. 2C:40-26(b). The defendant then successfully filed for PCR regarding her 2011 DWI conviction, and the court vacated that conviction. However, before the defendant went to trial on the N.J.S.A. 2C:40-26(b) charge, she again plead guilty to the 2011 DWI charge, and the court once again suspended her license for two years.

At her trial, the defendant argued she was not guilty of violating N.J.S.A. 2C:40–26(b), asserting her license was not validly suspended at the time of the alleged offense because the conviction was subsequently vacated. The trial court rejected this argument and reasoned that on the date the defendant drove, her license was suspended and she was aware of the suspension. Moreover, since the defendant had pled guilty once again to the vacated DWI conviction, she had the same number of prior DWI convictions at the time the court found her guilty of violating N.J.S.A. 2C:40–26(b) as she had on the date of her offense. The court therefore denied the defendant's motion to dismiss the indictment and found her guilty of violating N.J.S.A. 2C:40–26(b).

Comment: When a prior conviction is dead, it should stay dead!

Part III

Collateral Issues

1) Dicta in State vs. Faison suggest that the conviction for N.J.S.A. 39:3-40(f) should merge as a lesser included offense into N.J.S.A. 2C:40-26.

2) Despite prior Appellate Division case law to the contrary, the current state of the law hold that an un-counseled prior DWI conviction may not be used to impose a jail term for a violation of N.J.S.A. 2C:40-26.

See State vs. Konecny, 250 N.J. 321(2022). See State vs. Patel, 239 N.J. 424(2019).

3) The two predicate violations may consist of one prior DWI and one prior refusal conviction or any other combination of the two offenses. State vs. Dougherty, 455 N.J.Super 336(App.Div.2018).

4) An out-of-state conviction for DWI will count as an element of N.J.S.A. 2C:40-26(b). State vs. Luzhak, 445 N.J.Super 241(App.Div.2016).

5) The defendant may not serve any portion of the mandatory 180-day jail term in an impatient program as otherwise permitted for intoxicated drivers. State vs. French, 437 N.J.Super 333(App.Div.2014).