

Garden State CLE Presents:

**The Effect of Zingis on
DWI Defense and Prosecution**



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Lesson Plan

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Part I

Preliminary Legal Issues

1) Issue: Burden of Proof at Sentencing - N.J.R.E. 101(a)(3)(C)

(a) Applicability; Exceptions.

(3) Relaxation. Except as provided by subparagraph (a)(2) of this rule, these rules may be relaxed in the following instances to admit relevant and trustworthy evidence in the interest of justice:

(C) proceedings in a criminal or juvenile delinquency action in which information is presented for the court's use in exercising a sentencing or other dispositional discretion, including bail and pretrial intervention and other diversionary proceedings;

Both the Appellate Division ruling in State vs. Zingis, 471 N.J.Super 590(App.Div.2022) and the Supreme Court's Zingis, ___ N.J. ___(2024) (2024 WL 3715910) holding note that the State must prove the existence of a prior DWI conviction to be used for sentencing enhancement beyond a reasonable doubt. Neither Court cites any authority for this proposition. Moreover, this rule appears to be inconsistent with Apprendi vs. New Jersey, 530 U.S. 466(2000) where the Court held that any fact that enhances a sentence, other than a prior conviction, must be proved beyond a reasonable doubt.

2) Issue: The relevant date range for Zingis convictions is November 5, 2008 through April 9, 2016.

3) Issue: Understanding the Court's ruling in Zingis requires knowledge of new, technical vocabulary that will soon become widely used among the professional DWI gemeinschaft. These include the following:

i. Exhibit S-152 - Refers to an Excel Spreadsheet that sets forth solution changes and calibrations on all Alcotest Instruments in New Jersey from November 5, 2008 through June 30, 2016. It contains 236,664 subject test records and comprises 25,180 pages. The prosecutor must now provide the prior disposition, along with the complete row of data from Exhibit S-152, and the Dennis AIR

Summary sheet in discovery, which together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter.

ii) PCSAM - Person Case Search and Manage - Every municipal court is equipped with access to a defendant's prior court history, including the ability to obtain the summons number for a prior disposition. Upon appointment, municipal prosecutors receive access to the (PCSAM) system, permitting them to search a defendant's prior court history, which would allow them to access the summons number for use in conjunction with Exhibit S-152.

iii) MCCS - Municipal Court Case Search - Defense counsel will also have an independent means of obtaining the same information through the (MCCS), should they find an independent evaluation of the evidence necessary.

iv) Dennis Calibration Repository - The Dennis Calibration Repository is currently a virtual folder containing a portable document format (PDF) file of every AIR in which Dennis was the calibrating officer. There are 1,046 files contained in this virtual folder, each representing one AIR and labeled accordingly. The repository will be made publicly available by placing it on a State website. Additionally, for ease of reference and use in exchanging discovery, the Dennis Calibration Repository shall be summarized in a Dennis AIR Summary sheet, which shall be created as follows: the State shall 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 only the instrument number (for example, "ARWA-0188"). This Dennis AIR Summary document is to be certified as accurate and certified copies will be distributed to each municipality for use by the municipal prosecutor. The prosecutor must now provide the prior disposition, along with the complete row of data from Exhibit S-152, and the Dennis AIR Summary sheet in discovery, which together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter.

Part II
Historical Background
State vs. Cassidy, 235 N.J. 482(2018)

1) What was the misconduct alleged to have been committed by Trooper Marc Dennis?

2) What is a NIST (National Institute of Standards and Technology) traceable thermometer and how is it relevant to this case?

3) How did the Court address this issue?

i) We order the State to notify all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action. We further recommend to the State that it require the manual recording of the NIST-traceable readings going forward as a check against negligent performances of this integral human test.

ii) Further, we lift the stay on all pending cases so that deliberations may commence on whether and how those cases should proceed. For those cases already decided, affected defendants may now seek appropriate relief. Because the State waited approximately a year to notify the affected defendants, we relax the five-year time bar, Rule 7:10-2(b)(2), in the interests of justice. We ask the Director of the Administrative Office of the Courts to monitor these cases and recommend how best to administer them in the event any special measures are needed. Finally, as to defendant Cassidy, we exercise our original jurisdiction and vacate her conviction.

Part III

Zingis Background

1) Appellate Division's holding - The State failed to prove beyond a reasonable doubt that Zingis's 2012 DWI conviction was not based on an inadmissible Alcohol Influence Report (AIR). In doing so, the court found that the record did not contain evidence with respect to how the Attorney General's list was compiled and whether it definitively includes all DWI convictions tainted by Dennis's malfeasance. Moreover, the court noted that the record lacked support for the prosecutor's assertions and in some instances undermined the State's proffer that all Dennis-affected defendants had been notified. The Appellate Division reasoned that in future cases the State may meet its burden to prove beyond a reasonable doubt that a DWI defendant was not convicted in the first instance based on a faulty AIR with a more robust record. Accordingly, the appellate court remanded it back to the municipal court to resentence Zingis as a first-time offender. On reconsideration, the State argued that Cassidy imposes an obligation on defendants to seek post-conviction relief (PCR) for any DWI conviction defendants believed to be tainted by an inadmissible AIR, while relieving the State from any burden to prove that a prior DWI conviction was not tainted when seeking a sentencing enhancement.

The Appellate Division considered and rejected both arguments. In its order and statement of reasons, the appellate court found that a defendant's failure to seek PCR should not insulate a prior conviction from scrutiny if the State later aims to rely on it. The court found that the State's position had no support under Cassidy, particularly its argument that it had no obligation to prove whether a prior DWI conviction was premised upon tainted evidence. The court also held that the State's argument that defendants could easily search the publicly available Alcotest Inquiry System (AIS) contradicted its representation to the Law Division court that proving a prior conviction was not tainted by Dennis would be almost impossible.

2) Questions posed to the Special Adjudicator by the Supreme Court:

(1) Which counties were affected by Dennis's conduct?

(2) What notification was provided to defendants affected by Dennis's conduct?

3) Findings by the Zingis Special Adjudicator

(1) The State did not identify all individuals who were requested to provide breath samples on Alcotest instruments calibrated by Dennis during the relevant time period;

(2) The classification of those defendants entitled to notification of the Court's decision in Cassidy is limited to those who were requested to provide breath samples on an Alcotest instrument calibrated by Dennis that resulted in the reporting of an evidential blood alcohol content (BAC) reading;

(3) The State did not fully provide the ordered notification to all defendants affected by the Court's decision in Cassidy;

(4) There are solutions available that should be implemented to better assure the proper identification of those individuals who have provided breath samples on Alcotest instruments calibrated by Dennis and to provide those individuals with additional notification:

(a) The use of the proposed "Dennis Calibration Repository," in conjunction with Exhibit S-152, is the best available method of determining whether an individual was requested to provide breath samples on an Alcotest instrument calibrated by Dennis and an evidential BAC was obtained;

(b) Where an enhanced sentence is sought for a DWI conviction on the basis of a prior DWI conviction, the State should be required to provide discovery to defendant and counsel regarding the applicability of a Dennis-affected matter;

(c) Where a defendant files an application seeking PCR based on the Court's ruling in Cassidy contending he is a Dennis-affected defendant, discovery should be provided from Exhibit-152 and Exhibit-28, under a protective order, regarding that original conviction;

(d) The State's recommendations regarding additional notification to those individuals identified as Dennis-affected defendants, who have been omitted from several of the spreadsheets produced, are persuasive and should be accomplished.

4) Remaining two areas of disagreement among the Zingis parties

(1) What will be the proper procedure for challenging a prior Dennis-affected DWI conviction when facing enhanced sentencing on a subsequent DWI?

(2) What would be the appropriate availability of Exhibit S-152?

5) Court's Zingis holding:

We order that in any case in which the State seeks an enhanced sentence based on a prior DWI conviction with an arrest date between November 5, 2008 and April 9, 2016, the State must inform the court, defendant, and defense counsel whether defendant's prior DWI conviction involved a Dennis-calibrated Alcotest. The State shall rely upon a combination of the publicly accessible Exhibit S-152 and the Dennis Calibration Repository. As discussed more thoroughly below, the State must provide all defendants with a prior DWI during the effective dates the row of Exhibit S-152 that corresponds to that defendant's prior arrest. Given the fallibility of the notification procedures post-Cassidy, the parties will now be entitled to discovery, which is already readily available and capable of unearthing the procedural irregularities caused by Dennis's misfeasance. Such transparency and safeguards will both (1) allow the State to prove beyond a reasonable doubt whether a defendant is an 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.

6) New municipal court DWI pretrial procedures -

i. During the initial conference for a DWI matter, the court shall inquire whether the pending matter represents the first or subsequent DWI for a defendant. 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 2016, information readily available to the State in the defendant's abstract. If so, we now order that the 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.

ii. The prosecutor will accomplish this by using the summons number from the earlier offense to search Exhibit S-152. As described below, that document will be redacted to include only non-personal identifying information. Once the corresponding entry is located within Exhibit S-152, the prosecutor is to “copy and paste” that row of data into a new document. The AIR number from that entry must then be compared against the Dennis Calibration Repository. The Dennis Calibration Repository is currently a virtual folder containing a portable document format (PDF) file of every AIR in which Dennis was the calibrating officer. There are 1,046 files contained in this virtual folder, each representing one AIR and labeled accordingly. The repository shall be made publicly available by placing it on a State website.

iii. Additionally, for ease of reference and use in exchanging discovery, the Dennis Calibration Repository shall be summarized in a Dennis AIR Summary sheet, which shall be created as follows: the State shall 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 only the instrument number (for example, “ARWA-0188”). This Dennis AIR Summary document is to be certified as accurate and certified copies will be distributed to each municipality for use by the municipal prosecutor.

iv. Once the cross-reference has been completed, the State can identify whether an AIR from Exhibit S-152 is a match with an AIR from the Dennis AIR Summary sheet or not. The State must also provide a copy of the Dennis AIR Summary sheet for the defendant and defense counsel to verify whether the number is or is not listed. If it is determined that the defendant's prior DWI conviction did not involve a Dennis-calibrated Alcotest, the defendant and defense counsel are still provided their copy of the one row of complete data from Exhibit S-152, along with the Dennis AIR Summary sheets, and the confirming prior disposition revealing the summons number for the defendant's prior DWI conviction. The matter then proceeds in the normal course and the defendant may face enhanced sentencing based on the prior DWI.

v. If the State determines that the defendant's prior offense involved a Dennis-affected Alcotest Instrument that produced an evidential BAC reading, corroborated by Exhibit S-152 and the Dennis AIR Summary sheet, 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 shall do so by filing for PCR in the jurisdiction of the previous conviction. A copy of the motion must be provided to the court for the subsequent DWI. Upon receiving the copy of the motion for PCR, the court for the subsequent DWI matter shall stay the disposition of the matter, 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, including timely production of discovery and participation in case management conferences as directed by the court shall continue during the pendency of the PCR. The goal is to have the subsequent case trial ready when the PCR is resolved.

vi. If the defendant, after being made aware of the existence of a Dennis-affected matter, chooses to proceed without challenging the earlier conviction, the court will inquire on the record that the defendant's decision is knowing and voluntary, and the matter may proceed in the usual course.

vii. Because of the serious public safety concerns that DWI charges present, we call on judges to resolve PCRs and related new matters as expeditiously as possible.

7) Protecting the privacy of previously convicted DWI defendants -

i. Exhibit S-152 contains the following columns of information: arrest date, time, and location, Alcotest serial number and calibration date, as well as the Alcotest test result, case number, and summons. The document as presently constituted also contains the following unredacted personal identifying information: the subject's first name, middle initial, age, gender, weight, height, and driver's license issuing state. The State seeks a protective order and access granted only to certain stakeholders, including all municipal courts and superior courts, municipal liaisons, and an assistant prosecutor in each county who will coordinate with municipalities in order to provide defendants and counsel with the relevant discovery. The following process

balances the State's concerns for privacy with defendants' due process need for notification.

ii. Municipal prosecutors must review a defendant's driving abstract in every case. Armed with the date of the offense and the defendant's name, the prosecutor -- with the assistance of the municipal court -- can then locate the summons number for any prior DWI.

iii. Once a summons number is identified, the disposition for that offense must be preserved; once it is cross-referenced in Exhibit S-152, it shall be provided to the defendant and defense counsel in discovery. Through that process, the defendant and counsel can see the date and location of offense, summons number, and the defendant's name. The prosecutor must then use the summons number to search Exhibit S-152.

iv. Exhibit S-152 in its newly redacted form, excluding all personal identifiers, must be publicly released on the State's website. By itself, without personal identifying information, the data in Exhibit S-152 is ineffective; in combination with other pieces of information possessed by the municipal prosecutor and defense counsel, however, the document becomes serviceable. Using Exhibit S-152 in this way retains the subjects' privacy while serving as a valuable tool.

v. The prosecutor must now provide the prior disposition, along with the complete row of data from Exhibit S-152, and the Dennis AIR Summary sheet in discovery, which together will be deemed proof beyond a reasonable doubt of whether a defendant's prior DWI conviction is a Dennis-affected matter.