Garden State CLE
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Video Course Evaluation Form

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I Certify that I watched, in its entirety, the above-listed CLE Course

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Garden State CLE Presents:

TEN New Jersey Drunk Driving Defenses You Must Know

…and use Frequently

Lesson Plan

Table of Contents

1. Intent to Operate a Motor Vehicle

a. Elements of Operation

Operator—**An operator of a motor vehicle is defined as a person who is in actual physical control of the vehicle. One can be an operator without driving. State v. Wright, 107 N.J. 488, 527 A.2d 379 (1987).**

When one, in an intoxicated state, places himself behind the wheel of a motor vehicle and not only intends to operate it in a public place, but actually attempts to do so and there is a possibility of motion, he has operated the vehicle within the meaning of N.J.S.A. 39:4-50(a). State v. Mulcahy, 107 N.J. 467, 479, 527 A.2d 368 (1987).

Elements of operation—**A person operates a motor vehicle under the influence of intoxicating liquor, within the meaning of N.J.S.A. 39:4-50 when, in that condition, he or she "enters a stationary vehicle, on a public highway or in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle." State v. Sweeney, 40 N.J. 359, 360, 192 A.2d 573 (1963).**

Attempted operation—**Defendant's attempt to start the engine of his car, which was thwarted when a police officer grabbed the keys from his hand, demonstrated an intent to operate a vehicle. The possibility of vehicle being put in motion, coupled with the defendant's intent to start the engine was sufficient evidence to constitute operation within the meaning of N.J.S.A. 39:4-50(a). State v. Morris, 262 N.J. Super. 413, 621 A.2d 74 (App. Div. 1993).**

b. Cops Find Your Guy Found Behind the Wheel

Behind the wheel-engine running—**"Operation may be proved by any direct or circumstantial evidence—as long as it is competent and meets the requisite standards of proof. [Citations omitted.] The vehicle's operating condition combined with defendant's presence behind the steering wheel permits the logical conclusion of an intent to drive."** **State v. George, 257 N.J. Super. 493, 497, 608 A.2d 957 (App. Div. 1992).**

Out of gas/behind the wheel—**"It was reasonable for the trier of fact to conclude that defendant had actually operated the vehicle. Defendant himself stated that he had been in Philadelphia in the early evening and that his vehicle remained parked on the roadway because he had run out of gas. There were no other persons in the area; defendant was in the driver's seat, and there was no evidence that any other person was involved with the use of the automobile at the time in question."** **State v. Dannemiller, 229 N.J. Super. 187, 190, 550 A.2d 1303 (App. Div. 1988).**

Parked vehicle—**Intoxication, control over the vehicle, and its unusual place of rest taken together, are of sufficient magnitude to sustain a conviction under N.J.S.A. 39:4-50, since the evidence raises a fair inference that defendant drove the vehicle to the location while intoxicated. State v. Grant, 196 N.J. Super. 470, 483 A.2d 411 (App. Div. 1984).**

Asleep with engine running—**Defendant was found in his automobile on the shoulder of a superhighway, which could have only been reached by operation of the automobile to the point where it was found. Defendant admitted that he had been drinking in a bar in Rahway, and admitted that he was driving his car to take someone home to Piscataway when he did not feel well and stopped by the side of the road. Defendant was not in a place which was normal for parking. Furthermore, when defendant was finally aroused from his "deep sleep," according to the state trooper he asked, "what did he hit?" "The inference is inescapable that defendant was in fact operating his motor vehicle while under the influence of intoxicating liquor."** **State v. Dickens, 130 N.J. Super. 73, 78, 325 A.2d 353 (App. Div. 1974).**

The "defendant's acts, while intoxicated, in entering the automobile, turning on the ignition, starting and maintaining the motor in operation, and remaining in the driver's seat behind the steering wheel, where he was found by the police, justify his conviction as the operator of the automobile. In an intoxicated condition, he was, for all practical purposes, then in control of a dangerous instrumentality." State v. Sweeney, 77 N.J. Super. 512, 521, 187 A.2d 39 (App. Div. 1962).

Evidence adduced at trial showed "that the defendant's car had its parking lights on, that when the trooper opened the door of the same the engine was running, and that the radio of the car was playing." From these undisputed facts the inference is inescapable that the defendant operated the motor vehicle he was found in on the grass portion of the shoulder of the northbound lane of the New Jersey Turnpike. State v. Damoorgian, 53 N.J. Super. 108, 114, 146 A.2d 550 (County Ct. 1958).

Asleep with engine off—**Defendant was found by the police with his head over the steering wheel, his right arm hanging through the spokes and left arm hanging to one side. "There was the smell of alcohol. The defendant's vehicle had apparently stalled; the headlights and ignition were on, but the motor was not running." The officer found the truck some six feet from the curb, standing near an intersection that had no traffic light. These facts constituted sufficient evidence to show operation while under the influence of alcohol. State v. Baumgartner, 21 N.J. Super. 348, 349-50, 91 A.2d 222 (App. Div. 1952).**

c. Defense - State v. Daly, 64 NJ 122, 124-125 (1973)

Defendant testified that he had been drinking in the tavern and left between twelve and twelve-thirty in the early morning. He said he realized he had too much to drink and decided to 'sleep it off.' To this end he got into his car, reclined the driver's seat and fell asleep. He was awakened a few times by the cold and started the engine to get some heat in the car. He was sound asleep when the officer rapped on the car window and shined a light into the car. He said that he told the officer he had no intention of driving, but he was arrested anyway and taken to the police barracks.

We agree with the Appellate Division holding that defendant was not shown to be 'operating' his motor vehicle within the meaning of the statute. In State v. Sweeney, 40 N.J. 359, 192 A.2d 573 (1963), defendant, in a state of intoxication, was found sitting in the driver's seat of his car which was parked at the curb with the motor running. There we held defendant could be convicted of 'operating' his car if there was evidence in the case from which the trial court could clearly infer that defendant intended to move the vehicle.

In the instant case, defendant denied any intent to move or drive his car until he had sobered up and, contrary to the State's contention, there was no evidence from which any such intent could be inferred beyond a reasonable doubt. The tavern, concededly, was required to close at 2:00 A.M. and there was no proof that it did not. Defendant had, thus, been in his car for at least one hour and twenty minutes without driving when come upon by the police.

We recognize that there is a risk involved. However, the statutory sanction is against 'operating' a motor vehicle while intoxicated. We conclude, as we did in Sweeney, that in addition to starting the engine, evidence of intent to drive or move the vehicle at the time must appear.

2. The Glove-box Defense

a. Last consumption and breath-testing

"**In our view the statute focuses on the operation of a motor vehicle when there is sufficient alcohol in the driver's system to produce the proscribed reading so long as there has been no further ingestion of alcohol between the time of operation and the time of testing. The law was not intended to encourage a perilous race to reach one's destination, whether it be home or the next bar, before the blood alcohol concentration reaches the prohibited level." State v. Tischio, 208 NJ Super. 343, 348 (App. Div. 1986)**

b. Defense – State v. Snyder, 337 NJ Super. 59, 66-67 (App. Div. 2001)

Our Supreme Court has not directly addressed the question of further ingestion of alcohol after operation, but the precedents cited suggest it would be unlikely to do so in a case where such ingestion was purely voluntary and in circumstances so closely intertwined with the events immediately surrounding operation of a vehicle and an accident.

The Court has made very clear the legislative policy to discourage the kind of frivolous defenses which have the potential for being pretextual [sic] by enacting a statute based on objective measurements of intoxication. That policy would surely be disserved were we to require the State to address the effect of voluntary post-operation drinking for which there exists, as in this case, not one shred of corroborative objective or circumstantial evidence, and which the existing undisputed proofs render unlikely.

We have, nonetheless, reviewed independently defendant's factual contentions by evaluating the record which was considered by the Law Division judge. *See R.* 2:10-5. Defendant produced no bottle of V-O, no eyewitness, no telephone log, nor even his wife to confirm that he made the call. If in fact he did phone his wife to come over and drive him home, there was no evidence that she ever came to the scene. Defendant had already caused an accident and was unsteady in the sobriety test after three hours of tavern drinking. As noted earlier, there would have been no reason for him to ask to be driven home, presumably leaving his truck parked in front of the tavern, if he was not under the influence of alcohol. If his wife did not show up and the police did not come, defendant would likely have continued on home independently.

The trial judge gave no indication that he believed defendant's story. Reading the same record as the trial judge had before him, defendant's assertions appear to us far less than credible and far short of a showing sufficient to mandate resolution of the question whether *Tischio's* holding would permit a credible "glove box" defense.

[See also State v. Lizotte, 272 NJ Super. 568 (Law Div. 1993).]

3. New Jersey Common Law Defenses

a. Criminal Code Defenses

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. State v. Hammond, 118 NJ 306, 318 (1990).

b. Defenses Available at Common Law – In General

Nonetheless, a defendant charged with a motor vehicle offense does not forfeit all constitutional and common-law defenses. State v. Fogarty, 128 NJ 59, 64 (1992).

Common Law Entrapment – subjective (Subjective entrapment arises when police implant a criminal plan in the mind of an innocent person who otherwise would not have committed the crime so that they may prosecute that person.)

Common Law Entrapment – objective (Objective entrapment focuses on the conduct of the police. It exists when the police conduct causes an average law-abiding citizen to commit the crime, or when the conduct is so egregious as to impugn the integrity of the court that permits a conviction.)

Duress - The defense that a person acted under threat of bodily harm to themselves or a family member. It may not be used to justify killing. The crime committed must be less serious than the harm threatened.

c. The Common Law Defense of Necessity [State v. Romano, 355 NJ Super. 21 (App. Div. 2002)]

The elements of the common-law defense of necessity are:

(1) There must be a situation of emergency arising without fault on the part of the actor concerned;

(2) This emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;

(3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and

(4) The injury impending from the emergency must be of sufficient seriousness to out-measure the criminal wrong.

The "necessity" defense is based on public policy. Essentially, "it reflects a determination that if, in defining the offense, the legislature had foreseen the circumstances faced by the defendant, it would have created an exception." Thus, the defense is available at common law only when the legislature has not foreseen the circumstances encountered by a defendant." If the legislature "has in fact anticipated the choice of evils and determined the balance to be struck between the competing values, defendants and courts alike are precluded from reassessing those values to determine whether certain conduct is justified.

d. The Defense – (*Fogarty – Inglis & Hammond* Distinguished)

Those cases are easily distinguishable from the case here. In each of those cases, the defendants were partially responsible for creating the situation which gave rise to the harm to be avoided. Here, defendant was attacked by three unknown men. Thus, he did not create or participate in the circumstances bringing about the harm he sought to avoid. Furthermore, this case is distinguishable on its facts, because defendant had no other reasonable alternatives available to him, whereas, in the cases cited above, the defendants had several other alternatives available to them. In addition, the gravity of the harm defendant faced in this case was significantly higher than the harm faced by the defendants in the above referenced cases.

We are satisfied that this case is one in a category discussed by Justice Stein in his dissent in *Fogarty.* Here, the "facts [are] so bizarre and remote from the public policy underlying the law that even a[c]ourt as committed as this one to the strict enforcement of the drunk-driving statutes can pause to make certain that no injustice has been done." To not apply the defense of necessity in these circumstances is to allow an injustice. *Romano* at 32-33

4. Twenty Minute Issues

a. In General

Operators must wait twenty minutes before collecting a sample to avoid overestimated readings due to residual effects of mouth alcohol. The software is programmed to prohibit operation of the device before the passage of twenty minutes from the time entered as the time of the arrest. Moreover, the operator must observe the test subject for the required twenty-minute period of time to ensure that no alcohol has entered the person's mouth while he or she is awaiting the start of the testing sequence. In addition, if the arrestee swallows anything or regurgitates, or if the operator notices chewing gum or tobacco in the person's mouth, the operator is required to begin counting the twenty-minute period anew. State v. Chun, 194 NJ 54, 79 (2008)

b. The Defense

One police officer was physically present with defendant during the traffic stop, the ride back to the station house, the booking process and the Alcotest administration. However, the officer left the room to stow defendant's cell phone. Because of discrepancies in the time-recording of various events, there was also insufficient evidence to establish clearly and convincingly that, even absent the departure to stow the cell phone, the officer observed defendant continuously for over twenty minutes before administering the Alcotest. Therefore, the State failed to satisfy a precondition to admitting the Alcotest results in evidence. In so concluding, this court relies on the *Chun* decision's plain language, the purpose of the twenty-minute observational requirement, and persuasive out-of-state authority construing comparable requirements. State v. Filson, 409 NJ Super. 246, 249 (Law Div. 2009)

5. Sample Taken within a Reasonable Period of Time

a. In General

[T]he 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. State v. Tischio, 107 NJ 504, 522 (1987).

b. The Defense

The Court added emphasis to the reasonable time requirement in responding to a defense argument that the Court's construction of the statute would encourage police officers to hold an accused in prolonged detention in the hope that higher breathalyzer readings could be obtained. After noting the doubtful authority for such extended detention, it said: "Moreover, we now hold that breathalyzer tests must be taken 'within a reasonable time' after the arrest." State v. DiFrancisco, 232 NJ Super. 317, 320 (Law Div. 1988).

One required proof as to "the proper administration of the test" is that it was performed "within a reasonable time after the defendant is stopped for drunk driving." The State must supply this proof by clear and convincing evidence. In this case the test was given as much as 3 hours and 50 minutes after the drunk driving occurred, unless DiFrancisco was "driving" at the time of his arrest at 3:10 a.m. In either case the State was obliged to prove that the test was given within a reasonable time. This court, absent such proof, has no way of knowing what time is reasonable, a conclusion that must depend upon a variety of facts, such as time and amount of alcohol consumption. The State presented no testimony on that issue and therefore failed to carry the burden of proof, making the breathalyzer test results inadmissible. State v. DiFrancisco, 232 NJ Super. 317, 321 (Law Div. 1988).

Compare: State v. Dannemiller, 229 NJ Super. 187 (App. Div. 1988)

6. Holup Motions

a. In General – Rule 7:7-7(j)

Continuing Duty to Disclose: Failure to Comply. There shall be a continuing duty to provide discovery pursuant to this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order that party to provide the discovery of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed or enter such other order as it deems appropriate.

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b. The Defense

By way of clarification of the situation where discovery has not been provided, we would also recommend that defense counsel serve a motion, on the papers, with certification similar to *R.* 1:6–2, upon the municipal prosecutor, filing the original with the municipal court seeking an order limiting time for the production of discovery and upon the municipal prosecutor's failure to do so, dismissal of the action. Such an application and the ensuing order would alert the municipal prosecutor and enforcement authorities to their discovery responsibilities and avoid the inconvenience to litigants and witnesses that occurs with such frequency when all parties appear in court for trial. Another salutary affect of such a practice is to expedite the processing of cases by assuring both sides of the certainty of the trial date and eliminating the unnecessary work, expense and delay resulting from the continuance of a case because the discovery process has not been completed. State v. Holup, 253 NJ Super. 320 (App. Div. 1992).

DONINI & RAMSEY

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TRENTON, NEW JERSEY 08609
(609) 396-7979
ATTORNEY FOR DEFENDANT

STATE OF NEW JERSEY	:	**HAMILTON TWP. MUNICIPAL COURT MERCER COUNTY**
Plaintiff	:	
vs.	:	**SUMMONS NO.**
SCOTT A. BROWN	:	**CERTIFICATION OF ROBERT RAMSEY**
Defendant	:	

I, Robert Ramsey, of full age do certify the following to be true:

1) I am an attorney at law of the State of New Jersey.

2) On or about January 18, 2001, I entered my appearance in the above captioned matter pursuant to Rule 7:7-9. At the time I entered my appearance with the Court, I simultaneously served a copy of my letter of appearance with the prosecutor and included a demand for discovery consistent with Rule 7:7-7(b).

3) Within thirty days of the entry of my appearance, I had not received any discovery from the municipal prosecutor. As a result, I wrote a separate letter to the prosecutor and once again made a demand for discovery upon him.

4) To date, I have had no response from the municipal prosecutor and have been unable to prepare the defense in this case.

5) My client has been charged with a violation of N.J.S.A. 39:4-50(a), driving under the influence of alcohol. The police alleged from the motor summons that this offense took place on January 10, 2001.

6) I have reason to suspect that there is significant evidence in possession of the state, which will help me prepare my case and put forth an appropriate for my client. Without this information, my client and I are not able to prepare the matter for trial or other disposition.

I certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_____

Robert Ramsey

Dated: January 12, 2008

DONINI & RAMSEY

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TRENTON, NEW JERSEY 08609
(609) 396-7979
ATTORNEY FOR DEFENDANT

STATE OF NEW JERSEY	:	**HAMILTON TWP. MUNICIPAL COURT MERCER COUNTY**
Plaintiff	:	
vs.	:	**SUMMONS NO.**
SCOTT A. BROWN	:	
		NOTICE OF MOTION
Defendant	:	**PURSUANT TO RULE 1:6-2**

TO: John Doe, Municipal Prosecutor
Hamilton Township Municipal Court
222 Slabtown Road
Matthewville, New Jersey 08648

PLEASE TAKE NOTICE that on a date to be set by the Court, the undersigned counsel will move for an Order limiting the time for the production of discovery upon the State of New Jersey. In the event the municipal prosecutor fails to comply with the ensuing Order of the Court a dismissal of the within action and sanctions to be paid by the municipal prosecutor pursuant to Rule 1:10-3.

In support of the within application, the undersigned counsel will rely upon the annexed certification, oral argument and the rule of law established

by the Appellate Division in State vs. Holup, 253 N.J.Super 320 (App.Div.1992).

DONINI & RAMSEY

ROBERT RAMSEY

Dated: January 12, 2008

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STATE OF NEW JERSEY	:	HAMILTON TWP. MUNICIPAL COURT MERCER COUNTY
Plaintiff	:	
		COMPLAINT NOS.
vs.	:	
SCOTT A. BROWN	:	
		ORDER
Defendant	:	

THIS MATTER having been opened to the Court upon a Motion of Donini & Ramsey, Esquires, Robert Ramsey, Esquire, representing the defendant, Scott A. Brown, and good cause having been shown;

IT IS ON THIS _____ DAY OF _____, 2008;

ORDERED that discovery in the above captioned matter be provided by the municipal prosecutor to the defense within ten days; and

IT IS FURTHER ORDERED that in the absence of the production of discovery within this time period, the Court will entertain a motion to dismiss the within complaint and to grant sanctions pursuant to Rule 1:10-3.

J.M.C.

7. Conditions of Admissibility

a. In General

There we demanded that, as a precondition for admissibility of the results of a breathalyzer, the State was required to establish that: (1) the device was in working order and had been inspected according to procedure; (2) the operator was certified; and (3) the test was administered according to official procedure.
State v. Chun, 194 NJ 54, 134 (2008)

b. Testimony by Operator for Each Test

Assuming that the results of the control test are within the established parameters, the instrument prompts the operator through a message on the LED screen to collect a breath sample. The operator then attaches a new, disposable mouthpiece and removes cell phones and portable electronic devices from the testing area. The operator is required to read the following instruction to the test subject: "I want you to take a deep breath and blow into the mouthpiece with one long, continuous breath. Continue to blow until I tell you to stop. Do you understand these instructions?" The arrestee then provides the first breath sample, which is measured in the IR and EC chambers. State v. Chun, 194 NJ 54, 80-81 (2008)

c. Core Foundational Documents

1. **Operator's Qualification Card (*Chun* at 134) [Good for the year granted + 2 calendar years];**
2. **Most recent calibration report from NJSP - (*Chun* at 145);**
3. **Most recent standard solution change report prior to defendant's test (*Chun* at 145) (Note – this document may sometimes be included as part of #2 above);**
4. **Certificate of analysis used in defendant's control tests - (*Chun* 145);**
5. **The Alcohol Influence Report; (*Chun* at 134)**
6. **Worksheet A Tolerance Calculations (*Chun* 150-151).**

8. Speedy Trial

a. In General

Barker v. Wingo, 407 US 514 (1972)

1. Length of delay;
2. Reason for delay;
3. Assertion of right to a speedy trial;
4. Prejudice to defendant from delay.

See also Article I, paragraph 10 of NJ Constitution of 1947

b. The Defense

Although we have embraced a case-by-case consideration of any speedy trial denial claim and have rejected adoption of a bright-line try-or-dismiss rule for quasi-criminal charges, such as driving while intoxicated, we consider the length of the delay in light of the nature of the charges and the complexity, or lack thereof, of the proofs required to establish each element of the offense.

Applying those principles to the speedy trial claim raised by defendant, we conclude that the sixteen-month delay between remand to the municipal court and notice of trial is too long and due entirely to neglect by the State. Defendant's failure to assert his right to a speedy trial during the delay cannot be considered a waiver of this right because the State, not defendant, has the obligation to prosecute the charges it has leveled against him. Defendant also asserted the right as soon as he received the trial notice. In addition, the generalized prejudice experienced by defendant, including anxiety about the unresolved charges and the impact of the contemplated license suspension on his ability to obtain and retain employment, cannot be disregarded. On balance, the factors fall in favor of defendant's claim that, in this case, the delay deprived him of his constitutionally-guaranteed right to a speedy trial.

State v. Cahill, 213 N.J. 253, 61 A.3d 1278 (2013)

9. Use of Force in Blood Cases

a. In General – Requirement of Reasonableness

With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person. "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether, [under the totality of the circumstances,] the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."

See Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

b. The Defense

State v. Ravotto, 169 NJ 227, 241-243 (2001)

In applying those tenets, we conclude that the force used by the police to extract defendant's blood was unreasonable under the totality of the circumstances. Defendant was terrified of needles and voiced his strong objection to the procedures used on him. He shouted and flailed as the nurse drew his blood. Several persons, including the police, and mechanical restraints were needed to hold defendant down. Defendant's fear is relevant to our analysis. A suspect's reaction to law enforcement officials is part of the fact pattern considered by a reviewing court when it determines whether police behavior was objectively reasonable.

We also consider the offense that was under investigation as part of the totality of the circumstances. Although the Court does not diminish defendant's suspected offense or in any way condone driving while intoxicated, we note that the charge against defendant is quasi-criminal rather than criminal in nature. Moreover, defendant had been in a one-car accident and was not under suspicion for causing the death of or injury to any other person.

Further, we are guided by the fact that courts do not require proof of blood alcohol levels to convict drunk drivers, and that even without the blood test the police had a strong case against defendant. Defendant had flipped his car, and the police had witnessed his erratic behavior, slurred speech, and glassy eyes, and had smelled alcohol on his breath. In addition, defendant's misleading call for help from the car had evidenced his impaired state.

We reiterate that the test of reasonableness is an objective one. Therefore, the fact that the police may have acted with good motives in transporting defendant to the hospital does not "make an objectively unreasonable use of force constitutional." Under *Graham,* we employ a balancing test to evaluate whether the police conduct impermissibly infringed on defendant's rights, considering all relevant facts and circumstances. Specifically, we consider defendant's manifest fear of needles, his violent reaction to the bodily intrusion engendered by the search, and his willingness to take a Breathalyzer test. We then weigh those factors against the State's interest in prosecuting defendant on a quasi-criminal charge in respect of which there existed considerable proofs apart from the blood evidence. In striking that balance, we are satisfied that the forced extraction of blood in this instance offended the federal and State Constitutions.

10. Double Jeopardy

a. In General

In New Jersey, drunk driving is considered to be a continuing offense. State v. Potts, 186 NJ Super. 616, 620 (Law Div. 1982). Passing from one municipality to another while driving intoxicated does not create a new offense. State v. Willhite, 40 NJ Super. 405 (Law Div. 1956).

Article I, paragraph 11 of State Constitution of 1947 is co-extensive with Fifth Amendment.

The double jeopardy clause affords protection in three contexts:
(1) protection against a second prosecution for the same offense after acquittal
(2) protection against a second prosecution for the same offense after conviction
(3) protection against multiple punishments for the same offense.

The double jeopardy analysis involves consideration of two prongs:

(1) the "same offense" test, which focuses upon the statutory elements of a crime rather than proofs proffered for conviction; or

(2), alternatively, the "same evidence" test, which focuses upon whether the same evidence used to prove the first offense is necessary to prove the second offense.

b. The Defense

Same evidence: **Defendant's operation of his motor vehicle under the influence was expressly included as part of the underlying facts constituting the offense as set forth in the indictment. Further, the State required, as part of defendant's plea to the indictment, that he acknowledge operation of his motor vehicle under the influence. [Thus,] defendant's subsequent prosecution for DWI would be barred because proof that defendant operated his motor vehicle under the influence required the same proofs that the State relied upon to establish the greater offense. State v. Hand, 416 NJ Super. 622, 629-630 (App. Div. 2010).**

Same elements: **The inquiry is whether each offense requires proof of an additional fact not necessary for the other offense. If so, the two offenses are not the same for double jeopardy purposes, and the second prosecution is not barred. [Example – DWI School-zone.] Death by auto requires proof of a death, a fact not required for the proof of drunk driving, *N.J.S.A.* 39:4-50. Drunk driving, on the other hand, requires proof of defendant's intoxication (or blood alcohol concentration), a fact not required for the proof of death by auto, *N.J.S.A.* 2C:11-5. Thus, under the traditional analysis, drunk driving and death by auto are not the "same" offense, and a conviction or acquittal for one should not bar a subsequent prosecution for another. State v. DeLuca, 108 NJ 98, 108 (1987).**