

Garden State CLE Presents:

Municipal Prosecutor Training



Guidelines for Complex Plea Agreements

Lesson Plan

Instructor:



Joseph P. Rem, Jr.
Certified Criminal Trial Attorney
&
Robert Ramsey, Author

Introduction – General Concepts

There are certain criteria that should be taken into consideration in every plea agreement, complex or simple. Foremost among them is whether the agreement can withstand subsequent scrutiny by the county prosecutor, the attorney general, or a court of appellate authority. Some of the other criteria include the following:

- 1) Does the agreement call for a legal sentence?
- 2) Does the matter have to be referred to the county prosecutor (e.g., N.J.S.A. 39:3-40 with suspension for DWI, accident involving serious bodily injury (N.J.S.A. 2B:12:17(a)))
- 3) Are all the requirements of law to be imposed under the agreement's terms and conditions? (e.g., forfeiture of public office. See State vs. Hupka, 203 N.J. 222, 242(2010) (“Prosecutors should include discussions of forfeiture and disqualification in plea negotiations with public employees.”))
- 4) Have you consulted with victims and afforded them their opportunity to speak in court?
- 5) Does the agreement meet the needs of the State of New Jersey and the amorphous standard of “the interests of justice” (victims, complainants, witnesses, investigating police, defendant's prior criminal history or driving record)?
- 6) Has the agreement been influenced by extraneous sources? (See State vs. Marsh, 290 N.J.Super 663(App.Div.1996))
- 7) Does the plea agreement comport with Rules of Professional Conduct and the ethical obligation of a prosecutor to seek to do justice?

Supreme Court Commentary – June 1990

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.

Part I **Plea Bargains on Drunk-Driving Cases**

a) Guideline 4A

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are: A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50). (See State vs. Hessen, 145 N.J. 441(1996)).

Permissible agreements under the Guidelines allow for:

A recommendation as to concurrent license suspensions for a first offense DWI and refusal;

Second or subsequent refusal may be dismissed in exchange for a plea to the companion DWI. (Note the DWI may sometimes be treated as a first offense)

All collateral charges (except certain drug offenses) may be dismissed as part of a DWI plea agreement.

b) Don't enter into a plea agreement calling for a downgrade of a BAC from .15% (or greater) to a BAC under .15%.

See Guideline 4B on the restrictions related to plea bargaining in DWI cases:

No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).

c) The dismissal of a DWI (or any other offense) is permitted based upon a lack of critical evidence. Guideline 3 provides in relevant part:

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.

Note that this Guideline precedes Guideline 4 and is necessary to preserve the ethical obligation of a prosecutor to do justice and refrain from prosecuting a case where probable cause does not exist. See R.P.C. 3.8 The prosecutor in a criminal case shall:(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

d) Don't move for a dismissal of a DWI ticket under Guideline 3 unless you can satisfy the requirements of this procedure:

TO: MUNICIPAL COURT JUDGES
FROM: PHILIP S. CARCHMAN, J.A.D.
SUBJECT: SAMPLE QUESTIONS FOR USE IN DRUNK
DRIVING
DATE: DECEMBER 2, 2004

Attached is a series of sample questions that a judge should ask on the record when a prosecutor has moved to dismiss or amend a drunk driving charge (N.J.S.A. 39:4-50, driving while intoxicated). The Conference of Presiding Judges-Municipal Courts developed these questions, which are designed to establish a record and thereby prevent an improper dismissal or amendment of a N.J.S.A. 39:4-50 charge. These questions are intended as a guide, so you need not ask the prosecutor the questions exactly as written. You are expected, however, to ask these or similar questions and any additional questions necessary to establish, on the record, the prosecutor's detailed reasons for requesting a dismissal or amendment.

If you have any questions about this memorandum, please contact your Vicinage Municipal Court Presiding Judge of Municipal Division Manager.

SAMPLE QUESTIONS ON MOTIONS BY PROSECUTOR TO DISMISS OR AMEND A DRUNK-DRIVING CASE

The following are sample questions that Municipal Court Judges should consider in questioning the municipal prosecutor when the prosecutor seeks to dismiss or amend a drunk-driving offense.

1) Why do you wish to dismiss or amend the charges?

A general statement by the prosecutor that asserts only a conclusion that the State cannot prove the charge beyond a reasonable doubt is insufficient. The prosecutor must state on the record the specific reasons why the case cannot be proven beyond a reasonable doubt. The prosecutor should provide the Court with a detailed explanation of the reasons the case cannot be proven. For example, the prosecutor saying, "I cannot prove operation," is insufficient. The prosecutor needs to set

forth, on the record, specific reasons why operation cannot be proven. The Court should be prepared to question the prosecutor in detail on any assertion made by the prosecutor.

2) Did you review the police reports and any videotape and discuss the case with the arresting police officer?

If the prosecutor indicates that the police reports were not reviewed or that the police officer had not been consulted, the Court should refuse to entertain the motion to dismiss or amend, until the prosecutor has indicated, on the record, that the police report was reviewed, and the arresting officer was consulted.

3) The Court should be provided with specific facts to support the prosecutor's position that the charges cannot be established beyond a reasonable doubt. In exploring these facts, the Court should consider asking the following questions:

a) If the operation cannot be proven, why not? Did the officer observe operation? Are there any witnesses who observed operation? Did the defendant make any admissions as to operation? Can the State seek to prove operation through any circumstantial evidence?

b) Is there a blood alcohol reading? If yes, why does the prosecutor believe it cannot be introduced in evidence? The prosecutor should place on the record the specific facts as to why the reading cannot be introduced into evidence. For example, a conclusion by the prosecutor that the machine is defective or there was a problem with the before or after test is insufficient. The prosecutor must state specific facts as to why the test is defective.

c) If the prosecutor indicates that the reading is defective, then the Court should closely examine the prosecutor as to whether the charges can be proven without a blood alcohol reading. In examining the prosecutor in this regard, the Court should ask about the facts of the stop (i.e., the observations of operation observed by the officer, the defendant's conduct on the stop, [i.e., physical appearance and demeanor], the defendant's ability to perform psychophysical tests at the scene and at the police department, the defendant's admissions as to consumption of alcohol).

4) If the prosecutor seeks to dismiss or amend based on a defense expert's report, the Court should closely question the prosecutor as to whether the State will be able to produce an expert to counter the defense expert. The Court should also be informed of the conclusions reached in the defense expert's report.

5) Is the application to dismiss or amend the case the result of a plea bargain where the defendant has agreed to plea to some other charge in return for the prosecutor dismissing or amending the charges?

Part II

Some Plea Bargaining “Do’s” and “Don’ts”

a) Don’t stipulate to probable cause as a part of the dismissal of a charge in a plea agreement. See Opinion 661 from Advisory Committee on Professional Ethics (1992)

RPC 3.8 states that the prosecutor in a criminal case shall:

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

Requiring a defendant to acknowledge the existence of probable cause in no way vitiates the obligation of the prosecutor not to prosecute when probable cause does not exist. That duty is absolute and unconditional. A defendant's uninformed - or informed - view on probable cause cannot relieve the prosecutor of the duty to assure that probable cause is present.

Even if there exists probable cause in the subjective opinion of the prosecutor, it is improper for the prosecutor to insist upon a defendant's acknowledgment of the existence of probable cause. A defendant's acknowledgment of the existence of probable cause is irrelevant to both the purpose and the propriety of a plea bargain. The true purpose for such a question can only be to enhance law enforcement's position unfairly or to relieve the prosecutor improperly of the obligation to ascertain the existence of probable cause. Requiring an affirmative answer to this first question is thus improper.

The issues of whether it is proper for a prosecutor to demand an acknowledgment that excessive force was not used and to require waiver or release of civil rights claims are separate and distinct from the issue of waiving probable cause. We start with the well- established obligation of the prosecutor:

The primary duty of a prosecutor is not to obtain convictions but to see that justice is done. State vs. Farrell, 61 N.J. 99, 104(1972). Thus, "[I]t is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* at 105 (quoting Beyer vs. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321(1935)). See State vs. Marshall, 123 N.J. 1, 152-153(1991).

b) Don't amend motor vehicle or Title 2C offenses to an ordinance violation.

When the legislature has defined a course of conduct as a violation of the law, local governments are preempted from enacting identical ordinance violations. In addition, existing ordinances, such as for "improper behavior" should not be used for plea bargaining purposes due to the doctrine of preemption.

N.J.S.A. 2C:1-5(d) - Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.

See also State vs. Felder, 329 N.J.Super 471(App.Div.2000); State vs. Paserchia, 356 N.J.Super 461(App.Div.2003).

c) Don't allow the use of pre-paid restitution in a plea agreement until you have had a Friedland hearing on the record.

In a Friedland hearing, the defense attorney and victim should represent on the record the amount of restitution to be paid, a justification for its reasonableness and what consideration will be granted by the State as part of the plea agreement in exchange for voluntary restitution paid in advance. The use of this procedure also insulates the parties from later charges of compounding under N.J.S.A. 2C:29-4.

In re Friedland, 59 N.J. 209, 220(1971):

In the future, should an attorney wish to have complaints dismissed by his client he must first go before the prosecutor and a judge and make a full and open disclosure of the nature of the charges and the terms, if any, under which the dismissal is sought. The dismissal should not be consented to unless both the judge and the prosecutor are satisfied that the public interest as well as the private interests of the complainant will be protected.

N.J.S.A. 2C:29-4 - A person commits a crime if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense or from seeking prosecution of an offense. A person commits a crime if he confers or agrees to confer any pecuniary benefit in consideration of the other person agreeing to refrain from any such reporting or seeking prosecution. It is an affirmative defense to prosecution under this section that the pecuniary benefit did not exceed an amount which the actor reasonably believed to be due as restitution or indemnification for harm caused by the offense. An offense proscribed by this section is a crime of the second degree. If the thing of value accepted, agreed to be accepted, conferred, or agreed to be conferred is any benefit of \$200.00 or less, an offense proscribed by this section is a crime of the third degree.

d) Don't dismiss companion "moving violation" tickets by way of merger.

The concept of merger requires an underlying conviction for a greater offense and a lesser-included offense (e.g., reckless driving and careless driving). A traffic complaint that has been marked as dismissed by merger will trigger motor vehicle points by the MVC.

Following the release of the unpublished Appellate Division decision in State vs. Price, 207 WL 3287844(App.Div.2007), the New Jersey Motor Vehicle Commission adopted a procedure whereby penalty points would be imposed following dismissal of traffic offense charges by way of merger. Thus, by way of example, the dismissal through merger of a reckless driving charge into a drunk-driving conviction will result in the imposition of five penalty points. As a result of the foregoing, in order to avoid the imposition of penalty points, traffic offenses should be dismissed outright as opposed by the doctrine of merger.

The Court's reasoning in Price was as follows:

This merger, however, does not obviate the imposition of mandatory penalties under Title 39. State vs. Baumann, 340 N.J.Super 553, 556-57(App.Div.2001). "Those penalties ... must survive the merger, particularly since they represent not only punishment for the offender but also protection for the driving public." Id. at 557. Our reasoning and ultimate holding in *Baumann* was upheld by the Supreme Court in State vs. Wade, 169 N.J. 302, 303(2001). Here, although none of the merged Title 39, Chapter 4 offenses carry specific mandatory statutory penalties, the court is nevertheless required to assess motor vehicle points. N.J.S.A. 39:5-30.6; and N.J.S.A. 39:5-30.5a.

e) Don't ask for a license suspension where none is required by statute unless you comply with the requirements of State vs. Moran, 202 N.J. 311, 328-29(2010). (See N.J.S.A. 39:5-31.)

[W]e direct municipal court and Law Division judges to consider the following factors in determining whether to impose a license suspension under N.J.S.A. 39:5-31, and, if so, the length of the suspension: the nature and circumstances of the defendant's conduct, including whether the conduct posed a high risk of danger to the public or caused physical harm or property damage; the defendant's driving record, including the defendant's age and length of time as a licensed driver, and the number, seriousness, and frequency of prior infractions; whether the defendant was infraction-free for a substantial period before the most recent violation or whether the nature and extent of the defendant's driving record indicates that there is a substantial risk that he or she will commit another violation; whether the character and attitude of the defendant indicate that he or she is likely or unlikely to commit another violation; whether the defendant's conduct was the result of circumstances unlikely to recur; whether a license suspension would cause excessive hardship to the defendant and/or defendants; and the need for personal deterrence. *Cf.* N.J.S.A. 39:5-30c (enumerating factors to be considered by MVC in determining appropriateness of imposing maximum suspension of three years). Any other relevant factor

clearly identified by the court may be considered as well. It is not necessarily the number of factors that apply but the weight to be attributed to a factor or factors.

Comparisons to motor vehicle statutes that impose mandatory license suspensions may also be a useful guide in some cases.

f) DO: Make sure that you demonstrate sensitivity appear on the record with victims and facilitate their right to address the municipal court judge prior to sentence. Also, make sure you consult with the victim on the proposed plea agreement and place that fact on the record.

1) NJ Constitution Article I, paragraph 22

A victim of a crime shall be treated with fairness, compassion, and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime **or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol**, and b) the spouse, parent, legal guardian, grandparent, child, or sibling of the decedent in the case of a criminal homicide.

2) Motor Vehicle offenses – non-DWI

N.J.S.A. 39:5-52. Information available to victim; request; "victim" defined; consultation with prosecutor.

a. A victim of a motor vehicle accident as defined in this section shall, upon his request, be provided in writing by the court adjudicating any offense committed during that motor vehicle accident with the following information:

- (1) Information about the victim's role in the court process;
- (2) Timely advance notice of the date, time, and place of the defendant's initial appearance before a judicial officer, submission to the court of any plea agreement, the trial and sentencing;
- (3) Timely notification of the case disposition, including the trial and sentencing;
- (4) Prompt notification of any decision or action in the case which results in the defendant's provisional or final release from custody; and
- (5) Information about the status of the case at any time from the commission of the offense to final disposition or release of the defendant.

As used in this section, “victim” means, unless otherwise indicated, a person who suffers death, or any personal, physical, or psychological injury as a result of a motor vehicle accident. In the case of death, “victim” means a surviving spouse, child, or the next of kin.

When a need is demonstrated, the information in this section shall be provided in the Spanish as well as the English language.

- b. A victim shall be provided with an opportunity to consult with the prosecutor prior to a dismissal of a case or the filing of a proposed plea negotiation with the court if a victim suffered death or sustained bodily injury or serious bodily injury as defined in [N.J.S. 2C:11-1](#).
- c. This section shall not be construed to alter or limit the authority or discretion of the Supreme Court to regulate the practice of plea agreements in municipal court or alter or limit the authority or discretion of a prosecutor.

3) DWI and related tickets

N.J.S.A. 39:4-50.10. Victim defined:

As used in this act, “victim” means, unless otherwise indicated, a person who suffers personal physical or psychological injury or death or incurs loss of or injury to personal or real property as a result of a motor vehicle accident involving another person's driving while under the influence of drugs or alcohol. In the event of a death, “victim” means the surviving spouse, a child or the next of kin.

N.J.S.A. 39:4-50.11. Victims' rights

Victims shall have the right to:

- a) Make statements to law enforcement officers regarding the facts of the motor vehicle accident and to reasonable use of a telephone;
- b) Receive medical assistance for injuries resulting from the accident;
- c) Contact the investigating officer and see copies of the accident reports and, in the case of a surviving spouse, child or next of kin, the autopsy reports;
- d) Be provided by the court adjudicating the offense, upon the request of the victim in writing, with:
 - (1) Information about their role in the court process;
 - (2) Timely advance notice of the date, time, and place of the defendant's initial appearance before a judicial officer, submission to the court of any plea agreement, the trial and sentencing;
 - (3) Timely notification of the case disposition, including the trial and sentencing;

(4) Prompt notification of any decision or action in the case which results in the defendant's provisional or final release from custody; and

(5) Information about the status of the case at any time from the commission of the offense to final disposition or release of the defendant;

e) Receive, when requested from any law enforcement agency involved with the offense, assistance in obtaining employer cooperation in minimizing loss of pay and other benefits resulting from their participation in the court process;

f) A secure waiting area, after the motor vehicle accident, during investigations, and prior to a court appearance;

g) Submit to the court adjudicating the offense a written or oral statement to be considered in deciding upon sentencing and probation terms. This statement may include the nature and extent of any physical harm or psychological or emotional harm or trauma suffered by the victim, the extent of any loss of earnings or ability to work suffered by the victim and the effect of the offense upon the victim's family.

When a need is demonstrated, the information in this section shall be provided in the Spanish as well as the English language.

g) DO: Make creative use of court supervised probation in plea agreements to include terms and conditions that will benefit the defendant and the public:

N.J.S.A. 39:5-7 - In any proceeding instituted pursuant to the provisions of this subtitle [N.J.S.A. 39:1-1 thru 39:5(h)-27], except where a mandatory penalty is fixed herein, the magistrate may suspend the imposition or execution of sentence and may also place the defendant on probation under the supervision of the chief probation officer of the county for a period of not less than six months nor more than one year. The probation shall be effected and administered pursuant to the provisions of [N.J.S.A. 2C:44-1, 2C:44-6, 2C:45-1 to 2C:45-4, 2C:46-1].

Examples:

Community service

Installation of interlock device (especially in N.J.S.A. 39:4-96 cases)

Payment of restitution in motor vehicle accident cases (but not for N.J.S.A. 39:6B-2 cases – subtitle 2 offenses).

Jail term of as much as 90-days (N.J.S.A. 2C:43-2(b)(2))