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The New Jersey DWI & Criminal Law Review – 2010

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1. Statutes

a. Ignition Interlock Demonstration

– NJSA 39:4-50.16 *et seq*.

a. (1) Except as provided in paragraph (2) of this subsection, in sentencing a first offender under R.S.39:4-50, the court may order, in addition to any other penalty imposed by that section, the installation of an ignition interlock device in the motor vehicle principally operated by the offender following the expiration of the period of license suspension imposed under that section. In sentencing a first offender under section 2 of P.L.1981, c. 512 (C.39:4-50.4a), the court shall order, in addition to any other penalty imposed by that section, the installation of an ignition interlock device in the motor vehicle principally operated by the offender during and following the expiration of the period of license suspension imposed under that section. The device shall remain installed for not less than six months or more than one year, commencing immediately upon the return of the offender's driver's license after the required period of suspension has been served.

(2) If the first offender's blood alcohol concentration is 0.15 % or higher, the court shall order, in addition to any other penalty imposed under R.S.39:4-50, the installation of an ignition interlock device in the motor vehicle principally operated by the offender during and following the expiration of the period of license suspension imposed under that section. In addition to installation during the period of license suspension, the device shall remain installed for not less than six months or more than one year, commencing immediately upon the return of the offender's driver's license after the required period of suspension has been served.

b. In sentencing a second or subsequent offender under R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C.39:4-50.4a), the court shall order, in addition to any other penalty imposed by that section, the installation of an ignition interlock device in the motor vehicle principally operated by the offender during and following the expiration of the period of license suspension imposed under R.S.39:4-50 or section 2 of P.L.1981, c. 512 (C.39:4-50.4a). In addition to installation during the period of license suspension, the device shall remain installed for not less than one year or more than three years, commencing immediately upon the return of the offender's driver's license after the required period of suspension has been served.

c. The court shall require that, for the duration of its order, an offender shall drive no vehicle other than one in which an interlock device has been installed pursuant to the order.

d. As used in this act, "ignition interlock device" or "device" means a blood alcohol equivalence measuring device which will prevent a motor vehicle from starting if the operator's blood alcohol content exceeds a predetermined level when the operator blows into the device.

b. NJSA 2B:12-23.1 (Financial Obligations Owed to the Municipal Court)

Companion AOC Directive #02-10

a. Notwithstanding any other provision of law to the contrary, if a municipal court finds that a person does not have the ability to pay a penalty in full on the date of the hearing or has failed to pay a previously imposed penalty, the court may order the payment of the penalty in installments for a period of time determined by the court. If a person defaults on any payment and a municipal court finds that the defendant does not have the ability to pay, the court may:

(1) reduce the penalty, suspend the penalty, or modify the installment plan;

(2) order that credit be given against the amount owed for each day of confinement, if the court finds that the person has served jail time for the default;

(3) revoke any unpaid portion of the penalty, if the court finds that the circumstances that warranted the imposition have changed or that it would be unjust to require payment;

(4) order the person to perform community service in lieu of payment of the penalty; or

(5) impose any other alternative permitted by law in lieu of payment of the penalty.

b. For the purposes of this section, "penalty" means any fine, statutorily-mandated assessment, surcharge or other financial penalty imposed by a municipal court, except restitution or a surcharge assessed pursuant to subsection f. of section 1 of P.L.2000, c. 75 (C.39:4-97.2).

c. 39:3-76.2n. Offense level for violation of seat belt laws; fines for back seat violations

Enforcement of the provisions of subsection c. of section 2 of P.L.1984, c. 179 (C.39:3-76.2f) by State or local law enforcement officials shall be accomplished by treating a violation thereof only as a secondary offense when a driver of a passenger automobile has been detained for some other suspected violation of Title 39 of the Revised Statutes or other law. Each rear seat passenger 18 years of age or older of a passenger automobile shall be responsible for any fine imposed pursuant to section 6 of P.L.1984, c. 179 (C.39:3-76.2j) for failure to wear a seat belt pursuant to subsection c. of section 2 of P.L.1984, c. 179 (C.39:3-76.2f).

2. Refusals

State v. Ciancaglini, ____ N.J. ____ (2011)

***N.J.S.A.* 39:4-50** contains no reference whatsoever to the refusal statute. When listing the penalties for driving while intoxicated, it categorizes them based on being "[f]or the first offense," "[f]or a second violation," and "[f]or a third or subsequent violation." ***N.J.S.A.* 39:4-50**(a)(1), (2), (3). Nothing suggests that those references to prior "violations" are meant to refer to anything beyond DWI convictions in violation of ***N.J.S.A.* 39:4-50**, and the Legislature made no relevant amendment to the DWI or refusal statute while otherwise strengthening the latter. Indeed, without any statutory cross-reference, or similar expression, the most natural reading of the statute would suggest that the "prior" violations described in the three subsections of ***N.J.S.A.* 39:4-50** are meant to refer only to the section of Title 39, Chapter 4, in which they are contained, that is ***N.J.S.A.* 39:4-50**. Such a reading is consistent with the well-established principle that penal statutes must be strictly construed.

Moreover, while the record was not fully developed as to whether defendant's 2006 refusal conviction was incident to an acquittal of DWI, it cannot be reasonably suggested that someone convicted of refusal when found not guilty of DWI can be treated as if he or she were convicted of the DWI offense. If the Legislature wanted to treat a refusal conviction as an enhancer for DWI, even after an acquittal of DWI, it would have had to do so in clearer language.

State v. Schmidt, 414 NJ Super. 194 (App. Div. 2010)

In the present matter, defendant unambiguously consented to undergo an Alcotest after being read the first part of the Standard Statement. Nonetheless, he failed on three consecutive occasions to give an adequate breath sample. The officer administering the test regarded defendant's conduct as a refusal, and he was justified in reaching that conclusion. Although the second part of the Standard Statement need not be read if the defendant unequivocally refuses to take the test, we do not view defendant's apparently inadequate efforts after his prior unequivocal consent to be an unequivocal declaration of intent, but rather, an ambiguous indication of purpose. Nonetheless, faced with a conditional or ambiguous response, the officer administering the Alcotest did not read to defendant the second part of the Standard Statement, but instead merely threatened defendant with prosecution for refusal.

We regard *Widmaier's* instruction that the second part of the Standard Statement be given if the defendant's response "is conditional in any respect whatsoever," coupled with our holding in *Duffy* requiring the instruction under even more ambiguous circumstances, to provide the necessary foundation for a similar conclusion that the instruction was required under the factually different but equally conditional or ambiguous circumstances of this case. Turning to the second issue raised by defendant, we find that if the second part of the Standard Statement had been read to defendant after his second Alcotest, defendant's failure to provide an adequate breath sample on his third attempt would have provided a sufficient foundation for a refusal charge, assuming that the officer concluded that there was an unwillingness, as opposed to an inability, to give an adequate sample. In this regard, we note that there is no requirement in *Chun* that a defendant be afforded all eleven possible attempts to produce an adequate breath sample. Moreover, the Court in that case held that "[c]harging an arrestee with refusal remains largely within the officer's discretion." So long as the second part of the Standard Statement is read and the defendant, without reasonable excuse, continues to produce inadequate breath samples, we find it to be within a police officer's discretion to terminate the Alcotest and charge the defendant with refusal.

State v. Marquez, 202 NJ 485 (2010)

A careful reading of the two statutes reveals four essential elements to sustain a refusal conviction: (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test.

We add the following. It is no defense to a refusal charge for drivers to claim that they were too drunk to understand the standard statement. In other words, it is not necessary for the State to prove that a driver actually understood the warnings on a subjective level. If properly informed in a language they speak or understand while sober, drivers can be convicted under the implied consent and refusal statutes. Voluntary, excessive drinking cannot and does not void the statutes. Indeed, that type of voluntary behavior is fundamentally distinct from a person's utter lack of ability to understand a foreign language.

State v. Kim, 412 NJ Super. 260 (App. Div. 2010).

There is also a procedural bar to defendant's argument. Defendants who seek to exclude evidence on constitutional grounds are required to file a motion to suppress the evidence in accordance with *Rule* 3:5-7, governing motions to suppress in the Law Division, and *Rule* 7:5-2, for motions to suppress filed in the municipal court. We [have] held that a defendant who "seeks to bar admission of breathalyzer test results because of a police officer's failure to comply with the statute ... is obligated to move to suppress the breathalyzer test results and present evidence of the police officer's non-compliance." In addition to filing a motion, a defendant must show that there are material facts in dispute to be entitled to an evidentiary hearing. *R.* 3:5-7. We conclude that the same obligations apply to this defendant.

3. Drunk Driving

State v. Hand, 416 N.J. Super. 622 (App. Div 2010)

The State argues that the "same evidence" test should not be applied to guilty pleas. The State contends the prohibition against double jeopardy "was not created to enable a defendant to, by entering a guilty plea to one offense, avoid punishment for the remainder of his misdeeds." Rather, it maintains that the "same evidence" test focuses upon "the actual evidence to be presented at trial." The State asserts that had defendant proceeded to trial, in addition to evidence that defendant operated his motor vehicle under the influence, it would have introduced additional facts to establish that defendant created a risk of widespread injury or death. Specifically, it would have introduced evidence that (1) defendant operated his vehicle on an athletic field while adults and children were present; and (2) defendant's vehicle nearly struck several people on the baseball field, hockey rink, and near the concession stands. The State urges this evidence would have been sufficient to prove that defendant recklessly created a risk of widespread injury or death, irrespective of whether he operated his motor vehicle while under the influence of alcohol.

We agree that if presented, such proofs could sustain a conviction for the offense, but what could have occurred is not the test. Rather, it is only what in fact occurred that informs our analysis and decision here. As the Law Division noted, in both the indictment and at the time defendant pled guilty to the indictment, it was defendant's operation of the motor vehicle under the influence that formed the "essential facts constituting the crime charged" in the indictment and defendant's subsequent guilty plea. *R.* 3:7-3(a). ("The indictment ... shall be a written statement of the essential facts constituting the crime charged."). His guilty plea "leading to a judgment of conviction has the force of an admission of guilt on the charge based on [his] sworn factual statement[.]""It is unthinkable that the Legislature would intend that judgments of conviction should be treated differently depending on whether they resulted from guilty pleas or trials." *Ibid.* We therefore reject the narrow interpretation advanced by the State that the "same evidence" test should only apply to trials.

State v. Federico, 414 NJ Super. 321 (App. Div. 2010)

We affirm the convictions substantially for the reasons expressed by Judge Donald Volkert in his written opinion of September 16, 2008. DWI is an absolute liability offense, and intoxication on chemicals or otherwise is not a defense. Much as involuntary alcohol intoxication is not a defense to a DWI charge, involuntary intoxication by chemicals cannot be. To hold otherwise would contravene the "clear legislative intent and a strong legislative policy to discourage long trials complicated by pretextual defenses." *N.J.S.A.* 39:4-50 prohibits operating a motor vehicle "while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit forming drug," which, by definition, "includes an inhalant or other substance containing a chemical *capable* of releasing any toxic vapors or fumes for the purpose of inducing a condition of intoxication." *N.J.S.A.* 39:4-50(a)(3). But even if involuntary chemical intoxication were a defense for DWI, the trial judge did not have to accept defendant's version of events. Credibility is for the trial judge to decide, and the judge need not state reasons for the credibility determination or provide detailed, as opposed to general, findings. Moreover, if it were possible that the defendant's disoriented state flowed from his use of Paxil, exposure to chemical compounds and sleep deprivation, the judge could accept the observations of the police regarding defendant's disheveled appearance, slurred language, watery eyes, and smell of alcohol, and make credibility determinations to conclude defendant was operating the vehicle while intoxicated from drinking alcohol.

State v. Maricic, ____ NJ Super ____ (App. Div. 2011)

Defendant also requested downloaded Alcotest results from the date of the machine's last calibration.

[According to the Attorney General:]

> **"Each local police department currently has approximately 3 discs of Alcotest data. The department could open the data stored on each disk, make the appropriate column adjustments, print a hard copy, redact all names, dates of birth and driver's license information, then use this data as a master copy. By arrangement with the municipal prosecutor, the police agency could either give defense counsel the opportunity to view the hard copy record at the agency's location or supply counsel with a separate hard copy (with associated costs of reproduction). Alternatively, the local agency can store the redacted files in an electronic medium on a new compact disc, and provide defense counsel with the opportunity to view, or receive a copy of, the compact disc."**

Thus, the Court has acknowledged the discoverability of this data and Paw has developed and promulgated a mechanism for providing it on an interim local basis while a statewide database is established. Moreover, in the present case, defense counsel has acknowledged his responsibility to pay any costs incurred in the production of the data. In these circumstances, we likewise find the denial of discovery in response to defendant's first request to have been mistaken.

State v. Enright, 416 NJ Super. 391 (App. Div. 2010)

Because defendant's Gloucester Township plea and conviction were not un-counseled, there was no basis under *Laurick* and *Hrycak* to order that the conviction could not be considered for purposes of an increased sentence on a subsequent conviction. We conclude that the municipal court's partial grant of PCR was contrary to law and was not binding on the Law Division in its assessment of the appropriate penalty to be imposed under the DWI statute.

State v. Rivera, 411 NJ Super. 492 (App. Div. 2010)

When a limit on a numeric calculation is required, the Court included express instructions in that regard. For example, in the two illustrations to determine the validity of the readings as within the tolerance limits, the relative and absolute tolerance limits are carried to four decimal places. Even though the actual mathematical result of the examples is to four decimal places, Worksheet A includes a direction requiring this result. Worksheet A specifically states the upper tolerance limit is to be calculated by multiplying the mean by 1.05 or adding .005 BAC and selecting the greater result calculated "to four digits after [the] decimal point." Similarly, the lower tolerance limit is computed by multiplying the mean by .95 or subtracting .005 BAC *500 and selecting the lower result taken "to four digits after [the] decimal point."

No similar instruction limiting the mean to three decimal places is found. There is no evidence supporting a further need to truncate the mean or other interim calculations to achieve an accurate final BAC. Moreover, the unnecessary truncation of the arithmetic mean to three decimal places artificially narrows the tolerance range below that accepted by the Court. The concomitant result would falsely increase the number of invalid Alcotest results and thus preclude justifiable prosecutions for per se violations.

4. Criminal

a. Immigration/Post-Conviction Relief

Padilla v. Kentucky, 130 S. Ct. 1473 (2010)

Strickland v. Washington, **applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required under The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.**

State v. Nunez-Valdez, 200 NJ 129 (2009)

This case essentially presents a claim of ineffective assistance of counsel based on defendant's assertions that counsel provided **138* misleading information on the consequences of a guilty plea. Defendant contends that his attorneys told him to accept the plea offer in exchange for a probationary sentence and that the plea would not affect his immigration status.

Preliminarily, we note our agreement with amici that the traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here. We have approved of Chief Justice Wilentz's observation that whether a defendant should be advised of " 'certain consequences of a guilty plea should not depend on ill-defined and irrelevant characterizations of those consequences.' That observation applies here.

When a guilty plea is part of the equation, we have explained that "[t]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases'; and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'

We turn next to assess whether defendant met his burden of proving that he was deprived of his state constitutional right to effective assistance of counsel. We elect to decide this case under our state constitution because we recognize that a federal remedy may depend on whether deportation is a penal or collateral consequence. As noted above, our analysis does not depend on whether deportation is a penal consequence. Rather, the issue is whether it is ineffective assistance of counsel for counsel to provide misleading, material information that results in an uninformed plea, and whether that occurred here.

b. Criminal Procedure

State v. Lacey, 416 NJ Super. 123 (App. Div. 2010) (Civil Reservations)

Rule **3:9-2 provides in part that "[f]or good cause shown, the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding." That provision has been in **126* the Rules since the 1969 revision, but there is no commentary as to its intended scope. *See R.* 3:5-2 (1953); *Proposed Revision of the Rules Governing the Courts of the State of New Jersey, R.* 3:9-2, 211-13 (1966). The *Rule* governs guilty pleas entered in the Superior Court and on indictable offenses in the municipal court.**

Defendant is concerned that DYFS may endeavor to use the plea against him, as a statement of a party in DYFS proceedings, or by the affirmative use of collateral estoppel, in some Title 9, *N.J.S.A.* 9:6-8.21 to -8.73, or Title 30, *N.J.S.A.* 30:4C-1 to -40, action, and perhaps by others in actions before the Family Part.

As we have said, under *Rule* 3:9-2, the defendant has the burden to show a "reason sufficient to warrant the granting of his application." Here, no reason was given or adequately explained to justify the relief. Moreover, we do not deem a Title 9 or Title 30 action commenced by DYFS to be a "civil proceeding" for which the rule of preclusion was intended to apply. An action commenced by DYFS is an action by the State against a parent or guardian designed to protect the best interests of the child; it is not an action for money damages or other traditional relief in a "civil proceeding." The "best interests" of a child, and the State's *parens patriae* obligation to protect children, simply cannot be compromised by the exclusion of the plea colloquy entered as a matter of public record in open court. Of course, the admission of the plea, when not subject to the "non-evidential" preclusion, is subject to the New Jersey Rules of Evidence.

State v. McCabe, 201 NJ 34 (2010) (Recusal Motions)

Motions for recusal ordinarily require a case-by-case analysis of the particular facts presented. That said, it is difficult to conceive of a situation like this one in which disqualification would not be necessary. A bright-line rule in this area will offer guidance to municipal judges and litigants alike; it will also help ensure the confidence of the public in the judicial system. Accordingly, we hold that part-time municipal court judges must recuse themselves whenever the judge and a lawyer for a party are adversaries in some other open, unresolved matter.

Cases will be considered open through the 45-day period in which to file an appeal, *R.* 2:4-1, and while any appeal is pending. If the matter is reopened for good cause afterward, *R.* 1:13-7, a motion for recusal can be entertained at that time.

When recusal is necessary, the municipal court case can be transferred to another judge in the same or a nearby municipal court

A more nuanced situation arises when the lawyer and the municipal court judge were former adversaries in a closed case. That fact alone does not compel recusal. In deciding whether disqualification is appropriate, judges should evaluate the factors in *Rule* 1:12-1. Other relevant considerations include any history of animosity between counsel, and how recently the judge and opposing counsel were adversaries. The timing of a motion for recusal may also be telling in certain instances. However, we reiterate that "it is improper for a court to recuse itself unless the factual bases for its disqualification are shown by the movant to be true or are already known by the court."

State v. Murphy, 412 NJ Super. 553 (App. Div. 2010) (Pros Misconduct)

The prosecutor argued that the police officer had nothing to gain by being untruthful. However, a conviction will not be reversed solely because the prosecutor's remarks in summation were improper. Instead, we must evaluate the prosecutor's comments in the context of the overall " 'tenor of the trial' " and " 'degree of responsiveness of both counsel and the court to improprieties when they occurred' " in determining whether an improper comment denied defendant a fair trial and warrants reversal. The Supreme Court has devised a three-part test:

Specifically, an appellate court must consider (1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them. Generally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were made. The failure to object also deprives the court of an opportunity to take curative action.

Here, defense counsel did object, but the judge overruled the objection by saying in open court, in full hearing of the jury, that the prosecutor's remark was a "fair comment" on the evidence. Thus, not only did the judge err by failing to strike the offending remark, he compounded the harmful effect of the remark by essentially signaling to the jury his agreement with the prosecutor's argument. The judge's comment had the effect of encouraging the jury to utilize the prosecutor's remark in its overall evaluation of whether it was defendant or [the police officer] who was telling the truth.

c. Search & Seizure

State v. Minitee, 415 NJ Super. 475 (App. Div. 2010) (Tow & Search)

The Pena-Flores Court thus established three basic requirements to uphold the warrantless search of a motor vehicle: (1) the stop must be unexpected; (2) the police must have probable cause to believe that the vehicle contains contraband or evidence of a crime; and (3) there must exist exigent circumstances under which it is impracticable to obtain a warrant. As to the exigency requirement, the Court emphasized that it "encompasses far broader considerations than the mere mobility of the vehicle."

Applying these principles here, we hold that the police clearly had sufficient time to seek a warrant before searching the SUV the day after seizing it. After the car was taken into custody, there was no justification to search it without a warrant. Once the vehicle was removed from the scene, impounded, and taken to the Fort Lee police station, the State had sufficient time to obtain either a telephonic warrant or a traditional one. The warrantless search of the vehicle once it was in the custody of the State was clearly unjustified and unconstitutional.

Applying this mandate to these facts, the exigency that existed at the scene dissipated once the SUV was removed and placed in the custody of the Fort Lee Police Department. Thereafter, the police clearly had sufficient time to obtain, at a minimum, a telephonic warrant before searching the vehicle. Stated differently, the exigent circumstances that permitted the police to seize the SUV from the scene do not justify its subsequent warrantless search at the Fort Lee police station.

We harmonize the seemingly inconsistent holdings in *Martin* and *Pena-Flores* by finding that the exigent circumstances that existed at the scene only permitted the police to seize the vehicle and transport it to a secure location. Thereafter, the police were constitutionally required to obtain a warrant before searching the vehicle. This approach distinguishes between, and guards against, unreasonable *searches* and unreasonable *seizures,* the two fundamental protections embodied in Article I, Paragraph 7 of our State Constitution.

State v. Pompa, 414 NJ Super. 219 (App. Div. 2010) (Truck Search)

> **The State had the burden of demonstrating exigent circumstances and its failure in this regard is revealed by the Trooper's testimony. During cross-examination at the suppression hearing, Trooper Budrewicz admitted defendant's vehicle was incapable of being moved because he was in possession of defendant's keys; common sense strongly suggested it was not likely another person with another set of keys was in the vicinity. In addition, the Trooper admitted he could have had the vehicle towed to a safe location while he applied for a warrant prior to conducting a search beyond the scope of the administrative inspection:**
>
> **Q: But you could have towed [the truck] to Perryville station, secured it there, and gotten a warrant, or you could have left it there, or called a detective, or called the [prosecutor's] office and said I've got probable cause to search this thing, get me a warrant....**
>
> **A: I could have done that but I had plain smell.**

And, when asked why he decided to search instead of first obtaining a warrant, the officer insisted: "I don't need a warrant with probable cause." Again, *Pena-Flores* requires more than probable cause; exigent circumstances are also required.

State v. Davila, 203 NJ 97 (2010) (Protective Sweeps)

We hold that a protective sweep of a home may only occur when (1) law enforcement officers are lawfully within the private premises for a legitimate purpose, which may include consent to enter; and (2) the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger. Where those substantive conditions are met, as a matter of procedure, the sweep will be upheld only if (1) it is cursory, and (2) it is limited in scope to locations in which an individual could be concealed. As additional guidance we add the following. The search should be strictly limited in duration to the time frame during which police are lawfully within the premises. Moreover, when a protective sweep is performed in a non-arrest setting, as when police presence in the home is not due to the execution of an arrest warrant, the legitimacy of the police presence must be probed. And, a careful examination must be undertaken of the basis for the asserted reasonable articulable suspicion of dangerous persons on the premises. The law enforcement officers cannot have created the danger to which they became exposed by entering the premises, and thereby bootstrap into an entitlement to perform a protective sweep. Thus the inquiry should examine whether the request for entry was legitimate or a ruse and whether the officers can identify articulable reasons for suspecting potential harm from a dangerous person that arose once the officers arrived at the scene.

In summary, the review of a protective sweep search and seizure shall require the State to bear the burden of proving, in these warrantless search contexts, the reasonableness of the protective sweep. That requires a demonstration that the police presence at the property that was swept was both lawful and legitimate.

State v. Carvajal, 202 NJ 214 (2010) (Standing/Abandonment)

For standing purposes, property is abandoned when a person, who has control or dominion over property, knowingly and voluntarily relinquishes any possessory or ownership interest in the property and when there are no other apparent or known owners of the property. We determined that this definition of abandonment "provides the strongest guarantee that the police will not unconstitutionally search or seize property, which has multiple apparent owners, merely because one person has disclaimed a possessory or ownership interest in that property. The State bears the burden of proving "by a preponderance of the evidence that the defendant abandoned the property and therefore has no standing to object to the search.

d. Forfeiture & Expungement

State v. Hupka, 203 NJ 222 (2010) (Official Misconduct)

Prosecutors should include discussions of forfeiture and disqualification in plea negotiations with public employees. Where a defendant is charged with a crime of dishonesty or a crime of the third degree or above and the State is considering accepting a plea to a lesser-included offense, if forfeiture is desired the State should raise voluntary forfeiture as a condition of the plea. And, when a defendant is charged with a crime that might be regarded as involving or touching his or her public position, the State should, likewise, require an allocution that either establishes the connection between the crime and the position to enable the court to sustain a subsequent forfeiture and disqualification order, or, alternatively, should negotiate a voluntary disqualification from a future position.

In the present case, the prosecutor acted with circumspection, negotiating a plea that was conditioned on defendant voluntarily and permanently relinquishing his right to present and future employment as a law enforcement officer. At the same time, no such agreement was reached requiring defendant's disqualification from all future public positions or offices. *See* *N.J.S.A.* 2C:51-2(d). Furthermore, defendant's factual circumstances do not support an "involving or touching" conclusion in respect of his offense. Defendant did not use his office or its trappings in any way in the commission of his offense. We reject application of some ill-defined incompatibility-with-duties analysis that an expansive reading of *Moore,* when untethered to its specific facts, is said to support. To the extent that our courts, in the past, have applied the touching and involving language broadly to police officers, the reasoning of *McCann* as it has been applied to this matter should control going forward.

In re D.H., 204 NJ 7 (2010) (Expungement)

A public official pled guilty to a disorderly persons offense that directly involved or touched the official's public office. As part of her plea agreement, the public official consented to the entry of a statutorily mandated order of forfeiture of public employment, that is, an order whereby the public official forfeited her public employment and was "forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions." Several years later, the former public official sought relief under New Jersey's expungement statute, , seeking an order that "such conviction and all records and information pertaining thereto be expunged.". As part of that application, the former public official also sought to avoid the effect of the mandatory order of forfeiture of public employment, asserting that, along with her disorderly persons offense conviction, the order of forfeiture of public employment likewise should be expunged. Both the trial court and the Appellate Division concluded that, in the context of a disorderly persons offense, the expungement statute must be read broadly enough to include and also expunge the order of forfeiture of public employment. As a result, the trial court ordered that both the public official's conviction for a disorderly person offense and the concomitant order of forfeiture of public employment be expunged. The Appellate Division affirmed that judgment.

We disagree. Our primary task is to harmonize the provisions of the forfeiture of public employment statute, , with those of the expungement statute. In so doing, we conclude that the provisions of the expungement statute are not intended to override-that is, expunge-a properly entered order of forfeiture of public employment. Stated differently, we conclude that, in the context of an expungement application and in order to give full expression to the Legislature's will, a mandatory order of permanent forfeiture of public employment must be severed from-and preserved from the expungement of-the conviction that originally triggered the order of forfeiture.

State v. Kueny, 411 NJ Super. 392 (App. Div. 2010) (Official Misconduct)

The defendant's oath as a police officer to defend and obey the laws of New Jersey, in of itself, does not make him strictly liable for official misconduct for all crimes he may commit. The Supreme Court has stated that, although the oath of office "is a necessary condition to assumption of office, of itself it creates no particular duty, transgression of which" would be indictable. Nor was there introduced into evidence any statute, Mount Laurel Police Department standard operating procedure, order, rule or regulation which prescribed that a police officer had a duty to return lost money that is discovered while the officer is off-duty, on vacation or outside of Mount Laurel. In New Jersey " 'the fundamental duty of a policeman ... is to be on the lookout for infractions of the law and to use due diligence in discovering and reporting them. However, as a rule "a governing body can directly exercise its police power only within its jurisdictional boundaries, absent a statute broadening those powers."

The proposition that it is an inherent duty of every police officer to obey the law, and therefore police officers are strictly liable under *N.J.S.A.* 2C:30-2 for the commission of any crime, is forestalled by precedent. "[N]ot every offense committed by a public official involves official misconduct To be guilty of a violation of *N.J.S.A.* 2C:30-2, the defendant must be shown to have committed misconduct that is "sufficiently related to the officer's official status." . A public servant's private misconduct cannot be punished as official misconduct; the private misconduct can only be punished to the extent that the same conduct by a private citizen can be punished

Stated differently, the misconduct must somehow relate to the wrongdoer's public office. There must be a relationship between the misconduct and public office of the wrongdoer, and the wrongdoer must rely upon his or her status as a public official to gain a benefit or deprive another.

e. Crawford Issues

State v. Basil, 202 NJ 570 (2010) (Testimonial Statements)

It is understandable why the young woman (who was courageous enough to step forward) might not want to become a State's witness in a criminal prosecution-fear being one reason. It is not understandable why police officers would not take the most elemental steps to preserve evidence for a future trial. One of the great challenges facing the law enforcement community is to persuade reluctant or frightened witnesses to testify. For the most part, the police and prosecutors do all within their means to bring their witnesses to court. That did not happen here.

A police officer is not helpless when a person, who claims to have witnessed a crime, refuses to provide her identification. Under such circumstances, the officer is empowered to take that person into custody as a material witness. In most instances, the mere threat of possible arrest as a material witness should produce the necessary identification. Unfortunately, the Confrontation Clause issue here comes to us for no reason other than that the police chose not to determine the witness's identity.

Condoning the practice would give a perverse incentive to the police not to obtain basic identifying information from its star witness. We cannot overlook the cost to the system of justice by the State's failure to take reasonable steps to produce the one witness whose testimony was critical to defendant's fate. Not securing the name and address of the State's key witness-but using the statement of that witness to convict the accused-makes hollow defendant's right of confrontation.

f. Sentencing

State v. Blackmon, 202 NJ 283 (2010) (Speaking at Sentencing)

By constitutional amendment, statute, and our Court Rules, a class of people who have a right to be heard in person in connection with a sentencing has been established, and it is a universe that does not include family, friends or supporters of defendants. We cannot, however, end our analysis of this matter with that observation because juxtaposed against that framework of unquestioned rights are practices that sentencing courts routinely follow. For example, although a strict reading of the statute would allow only a single person to speak for the victim, by custom and practice, many sentencing judges exercise their discretion to permit multiple members of a victim's family to address the court. Similarly, sentencing courts commonly permit defendants' family members and others, including spiritual advisors, to address the court in an effort to call attention to facts about the defendant that bear upon the sentence to be imposed but are not otherwise plain from the record

We have recognized implicitly that sentencing courts can and do exercise discretion permissibly in allowing members of a defendant's family or others who appear on defendant's behalf to be heard. The question presented in this appeal is whether refusing to hear from defendant's family member or doing so without giving an explanation for that choice is an abuse of discretion that warrants relief.

In exercising discretion, courts should be guided by this Court's recognition that they need not entertain mere pleas for mercy and need not permit presentations that are cumulative or that merely repeat previously-submitted written comments. Nor are they required to permit presentations that are scurrilous, vengeful, or inflammatory. Moreover, courts should consider whether the individual seeking to be heard on defendant's behalf has information that bears upon an aggravating or mitigating factor, and may require a proffer consistent with one of those factors from defendant's counsel, electing to limit the grant of permission accordingly.

State v. Bienick, 200 NJ 601 (2010) (Aggravating/Mitigating Factors)

Under the Code, a sentencing court first must determine whether aggravating and mitigating factors apply. After balancing the factors, the trial court may impose a term within the permissible range for the offense. The Court Rules require that the sentencing court explain the reasoning behind its findings. *R.* 3:21-4(g).

That explanation is important for meaningful appellate review of any criminal sentence challenged for excessiveness. The reviewing court is expected to assess the aggravating and mitigating factors to determine whether they "were based upon competent credible evidence in the record." An appellate court is not to substitute its assessment of aggravating and mitigating factors for that of the trial court. However, when an appellate court determines that the trial court has found aggravating and mitigating factors unsupported by the record, the appellate court can intervene and disturb such a sentence with a remand for resentencing. We also have held that a remand may be required when a reviewing court determines that a sentencing court failed to find mitigating factors that clearly were supported by the record. Our decisions do not require, however, that the trial court explicitly reject each and every mitigating factor argued by a defendant. It is sufficient that the trial court provides reasons for imposing its sentence that reveal the court's consideration of all applicable mitigating factors in reaching its sentencing decision.

Although our case law does not require that trial courts explicitly reject every mitigating factor argued to the court, we encourage judges to address each factor raised, even if only briefly. That practice not only ensures consideration of every factor but also demonstrates to defendants and the public that all arguments have been evaluated fairly. A plain statement of the trial court's reasoning also assists reviewing courts in the performance of their duties.

State v. Moran, 202 NJ 311 (2010) (NJSA 39:5-31)

For ease of reference, we 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 dependants; and the need for personal deterrence. 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

A municipal court or Superior Court judge must articulate the reasons for imposing a period of license suspension.

g. Domestic Violence

Crespo v. Crespo, 201 NJ 207 (2010) (DV & Gun Searches)

To the extent defendant raised whether the Second Amendment's right to bear arms, *U.S. Const.* amend. II, applies to the states, we note that the issue of "[w]hether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses" presently is pending before the Supreme Court of the United States. *National Rifle Assoc. v. City of Chicago,* 567 *F.*3d 856 (7th Cir.2009), *cert. granted,* --- U.S. ----, 130 *S.Ct.* 48, 174 *L.Ed.*2d 632 (2009). We need not reach that point because the right to possess firearms clearly may be subject to reasonable limitations. *See District of Columbia v. Heller, ---U.S.* ----, ----, 128 *S.Ct.* 2783, 2816-17, 171 *L.Ed.*2d 637, 678 (2008) (holding that "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and endorsing "longstanding prohibitions on the possession of firearms").

State v. Lee, 411 NJ Super. 349 (App. Div. 2010) (DV Surcharge)

Defendant correctly states that neither attempts, generally, nor attempted murder, specifically, are included in ***N.J.S.A.*** **2C**:25-19a which lists the offenses which can constitute domestic violence. We agree, and vacate the assessment.

State v. Gandhi, 201 NJ 161 (2010) (Stalking)

The anti-stalking statute that criminalized defendant's actions provided that a person is guilty of stalking "if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family." *N.J.S.A.* 2C:12-10(b). Based on that language and the history of this statutory offense, we do not discern a legislative intent to limit the reach of the anti-stalking statute to a stalker-defendant who purposefully intended or knew that his behavior would cause a reasonable person to fear bodily injury or death. Rather, we read the offense to proscribe a defendant from engaging in a course of repeated stalking conduct that would cause such fear in an objectively reasonable person. We view the statute's course-of-conduct focus to be on the accused's conduct and what that conduct would cause a reasonable victim to feel, not on what the accused intended. Indeed, a person accused of stalking conduct very well may have intended to be amorous, but if he or she purposefully or knowingly engages in course of conduct and the effect of that conduct is terrorizing to a reasonable victim, then the anti-stalking statute criminalizes the conduct.

We hold that the statutory offense reaches and punishes a person who engages in a course of stalking conduct even if the person is operating under the motivation of an obsessed and disturbed love that purportedly obscures appreciation of the terror that his or her conduct would reasonably cause to the victimized person.