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Garden State CLE presents:

NJ Drunk-Driving Case-Law Update for 2014

Lesson Plan

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Part I – Intoxication Based upon Blood Evidence

Background

Schmerber v. California, 384 US 757, 770 (1966)

The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

State v. Dyal, 97 NJ 229, 239-240 (1984)

As a practical matter, the encounter between a patrolman and a drunken driver often arises in the context of an emergency. The officer may be alone, an accident may have occurred, people may be injured, and the public safety may be imperiled. Although search warrants ordinarily might be required where no emergency exists, in emergencies police may search for and seize evidence without first obtaining a search warrant. The authorization to conduct a warrantless search on probable cause is particularly appropriate when a policeman arrests an apparently intoxicated automobile operator.

One crucial consideration is that the body eliminates alcohol at a rapid rate. The evidence is evanescent and may disappear in a few hours. Investigating police, while coping with an emergency, should not be obliged to obtain a search warrant before seeking an involuntary blood test of a suspected drunken driver.

Missouri v. McNeely, 133 S. Ct. 1552 (2013)

In [Schmerber], this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

Background: Telephonic Search Warrants

State v. Valencia, 93 N.J. 126, 459 A.2d 1149 (1983). (Rule 3:5-3(b))

a. Exigency. Probable cause and precise procedures;

b. Equivalent to a warrantless search (thus presumed unreasonable);

c. Burden on the State to prove exigency, probable cause and correct procedures followed.

Rule 3:5-3(b)

A Superior Court judge may issue a search warrant upon sworn oral testimony of an applicant who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate longhand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of his or her information. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a search warrant. A warrant may issue if the judge is satisfied that exigent circumstances exist sufficient to excuse the failure to obtain a written warrant, and that sufficient grounds for granting the application have been shown. Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for the purpose of R. 3:5. The judge shall direct the applicant to print the judge's name on the warrant. The judge shall also contemporaneously record factual determinations as to exigent circumstances. If a recording is made, the judge shall direct that the testimony be transcribed as soon as practicable. This transcribed record shall be certified by the judge. The judge shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant. In all other respects, the method of issuance and contents of the warrant shall be that required by subsection (a) of this rule.

State v. Pena-Flores, 198 NJ 6, 35-36 (2009):

"In furtherance of them, we will amend *R.* 3:5-3(b) to clarify the parity between the various methods for obtaining a warrant and to underscore that an officer may resort to electronic or telephonic means without the need to prove exigency.

SUPREME COURT OF NEW JERSEY (effective 12/1/13)

It is ORDERED, pursuant to N.J. Const. Art. VI, sec. 2, par.3, that effective December 1, 2013 and until further order, Part III (Criminal) and Part VII (Municipal Court) of the Rules Governing the Court of the State of New Jersey are supplemented and relaxed so as to permit Municipal Court judges, as designated by the Assignment Judge, to issue search warrants for nonconsensual blood testing in all driving-while-intoxicated cases where no indictable charge is anticipated; this authorization is not limited to evening or weekend hours and such search warrants may be issued in-person or by telephone, radio or other means of electronic communication on the sworn oral testimony of a law enforcement officer or prosecuting attorney communicated to the issuing judge, pursuant to the procedures outlined in R. 3:5-3(a) and (b).

It is FURTHER ORDERED that R. 3:5-3(b) is also specifically relaxed so as to remove the requirement that exigent circumstances must exist to issue a search warrant by telephone, radio or other means of electronic communication.

It is FURTHER ORDERED that the Court's Criminal Practice Committee and Municipal Court Practice Committee are asked to consider the scope of authority for Municipal Court judges to issue telephonic/electronic search warrants in all cases and to provide the Court with any proposed rule recommendations.
For the Court,

/s/ Stuart Rabner

Chief Justice
Dated: October 8, 2013

State v Adkins, 433 N.J. Super. 479 (App. Div. 2013)

While it could be argued that suppression would, in some abstract sense, vindicate defendant's state and federal constitutional right against illegal searches, it would do so at a cost our Court has not always found justifiable. Retroactivity analysis implicitly recognizes that, where retrospective application of a new rule of law will inflict major disruption on the criminal justice system, some defendants will not get the benefit of the new rule even if it implicates constitutional rights. Thus, in declining to give retroactive application to new search and seizure rulings—and to various other criminal law rulings, the Court necessarily deprives some defendants of an avenue to vindicate newly-recognized rights.

Consequently, application of the exclusionary rule here would not serve the rule's principal purposes articulated by our Court. It would not deter unlawful police conduct, and it would not meaningfully safeguard the integrity of our judicial process. It is one thing for our courts to eschew involvement in admitting evidence seized unlawfully. It is another thing entirely to exclude evidence seized in conformity with the law as it existed at the time of the seizure. Consequently, we reverse the trial court's order suppressing the blood evidence.

In reaching this conclusion, we emphasize the unusual circumstances of this case, where (a) the United States Supreme Court issued a new search and seizure rule that was more restrictive than existing precedent from our Supreme Court; (b) at the time the search was conducted, it was authorized by settled precedent from our Supreme Court; and (c) had the new rule been issued by our Supreme Court as an interpretation of the New Jersey Constitution.

Unresolved McNeely Search warrant issues

a. Territorial jurisdiction

b. Burden of production

Part II. Paragraph 36

Background: State v. Schmidt, 206 NJ 71 (2011)

State v. O'Driscoll, 215 N.J. 461, 73 A.3d 496 (2013)

Courts should consider whether an error in the reading of the standard statement is material in light of the statutory purpose to inform motorists and impel compliance. To do so, courts are to examine whether a defendant reasonably would have made a different choice and submitted to a breath test had the officer not made an error in reciting the statement. An immaterial variation from the standard form does not require reversal of a conviction for refusal.

Here, an officer read defendant the standard statement in a language he understood. The officer informed defendant that he was required to submit a sample of his breath and that, if he refused, his license could be revoked for up to twenty years. The officer also incorrectly told defendant that he faced a minimum six-month period of revocation instead of seven months. In addition, the officer erred when he said the minimum fine was $250, instead of $300, and the maximum fine was $1000, instead of $2000.

We find that the officer's mistakes were inconsequential. The officer read the standard statement and informed defendant both that the breath test was mandatory and that serious consequences—revocation of his license for a period from six months up to twenty years—would result if he did not submit to the test. In other words, as the Legislature intended, the officer used the standard statement to inform defendant of the consequences of refusal in a manner that should have impelled a reasonable person to comply. It is difficult to see how the minor discrepancies in this case could have influenced that decision. Like the Appellate Division, we are "highly doubtful" that the errors reasonably could have affected defendant's choice. Because the errors were not material, we find that the State satisfied the elements of the refusal statute.

III. Sunset of the Alcotest 7110

Background: State v. Chun, 194 NJ 54, 151-153 (2008)

2. ORDERED that the State shall arrange forthwith with Draeger for revisions to the New Jersey Firmware utilized in Alcotest 7110 MKIII–C, as needed to accomplish the directives set forth in the Court's opinion regarding the admissibility into evidence of results of Alcotest breath testing, currently New Jersey Firmware version 3.11, as follows:

A. The firmware shall be locked so that only the manufacturer of the device is able to change the firmware, with changes to be downloaded by State Police Coordinators as needed;

B. The firmware shall utilize minimum breath sample criteria as follows: (1) minimum volume of 1.5 liters for all test subjects except for women over sixty years of age, for whom the minimum volume shall be fixed at 1.2 liters; (2) for all subjects, regardless of age or gender, the minimum criteria shall also include (a) a minimum 4.5 second blowing time; (b) a minimum flow rate of 2.5 liters per minute; and (c) a plateau as established by the infrared (IR) measure which does not differ by more than one percent in 0.25 seconds;

C. The firmware shall be corrected to set the acceptable tolerance range for breath sample readings at the greater of plus or minus five percent of the mean, or plus or minus 0.005 percent BAC from the mean;

D. The firmware shall be corrected to eliminate the buffer overflow programming error;

E. The firmware shall be corrected to re-enable catastrophic error detection;

F. The firmware shall be corrected so that the AIR will report control test results for IR and EC readings prior to the application of the fuel cell drift algorithm;

G. The firmware shall be programmed to include the serial number of the Ertco–Hart digital temperature measuring system utilized as a part of each calibration, certification and linearity report;

H. The firmware shall be corrected to identify, on any AIR which reveals that the test subject has no reportable results, why there has been no reportable result derived or generated;

I. The firmware shall be reprogrammed to include, on all future AIR printouts, solution change reports, calibration documents, and a listing of the temperature probe serial number and value; and

J. The firmware shall be reprogrammed to include, on all future AIR printouts, a designation of the firmware version utilized by the device reporting breath results;

State v. Chun, 215 N.J. 489, 73 A.3d 1241 (2013)

ORDER

1. IT IS ORDERED that defendants' motions for Orders in Aid of Litigants' Rights, M–1538, M–1540, are denied; and

2. IT IS ORDERED that the State's motion, M–1539, for relief from further compliance with Paragraph 2 of this Court's March 17, 2008, Order is granted; and

3. IT IS ORDERED that the State's motion, M–1539, for authorization to continue to utilize the Alcotest 7110 with Firmware version 3.11, and to deem the results admissible in accordance with this Court's March 17, 2008, Order and associated worksheets, with the exception of the provisions of Paragraph 2 thereof, is granted; and

4. IT IS ORDERED that, in addition to the directive in Paragraph 1(A)(3) of this Court's March 17, 2008, Order, concerning admissibility of Alcotest results for women over the age of 60 in prosecutions for refusal, *see* *N.J.S.A.* 39:4–50.4a, if the only evidence of refusal is the inadmissible AIR, such women may not be charged with, prosecuted for, or convicted of that offense.

IV. Speedy Trial

Background:

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.

New Jersey speedy trial DWI cases:

State v. Misurella, 421 N.J.Super. 538, 25 A.3d 270 (App.Div.2011);

State v. Tsetsekas, 411 N.J.Super. 1, 983 A.2d 1155 (App.Div.2009);

State v. Berezansky, 386 N.J.Super. 84, 85–86, 99, 899 A.2d 306 (App.Div.2006),

State v. Fulford, 349 N.J.Super. 183, 793 A.2d 112 (App.Div.2002);

State v. Farrell, 320 N.J.Super. 425, 727 A.2d 501 (App.Div.1999);

State v. Prickett, 240 N.J.Super. 139, 572 A.2d 1166 (App.Div.1990);

State v. Merlino, 153 N.J.Super. 12, 378 A.2d 1152 (App.Div.1977).

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

[T]he sixty-day period for disposition of driving-while-intoxicated charges was simply a goal. Counsel has suggested that such charges should be able to be resolved within 90 to 120 days. We have determined, however, that we should not adopt an inflexible try-or-dismiss rule. We also hesitate to suggest even an aspirational goal, as goals have a tendency to evolve over time into rules. Nevertheless, we also have determined that the time to conclude any charge, particularly one pending in the municipal courts, should bear some relation to the nature of the offense and the nature of the evidence required to support a conviction. Therefore, a judge confronting a claim that a defendant has been denied his right to a speedy trial must account for the provisions of the order entered to implement the ruling in *State v. Chun,* which addressed the scientific reliability of the Alcotest.

In summary, we hold that the four-factor balancing analysis announced in *Barker* remains the governing standard to evaluate claims of denial of the federal and state right to a speedy trial. 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.

V. Motions to Suppress Evidence

Background: NJRE 104

(a) Questions of admissibility generally. When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In making that determination the judge shall not apply the rules of evidence except for Rule 403 or a valid claim of privilege. The judge may hear and determine such matters out of the presence or hearing of the jury.

d) Testimony by accused. By testifying upon a preliminary matter, the accused does not become subject to cross-examination as to other issues in the case.

State v. Gibson, 429 N.J.Super. 456, 60 A.3d 493 (App. Div. 2013)

[W]e conclude the court's reliance on the evidence at the pre-trial hearing in the trial on the merits violated defendant's rights to procedural due process and fundamental fairness. It was unfair to rely upon the suppression hearing evidence in the trial on the merits because the two proceedings are designed to determine discrete issues and are governed by different rules.

While the trial on the merits determines a defendant's guilt, the suppression hearing determines the admissibility of evidence, based on the lawfulness of police conduct. *See* *N.J.R.E.* 104(a) (stating judge shall determine the condition precedent to admissibility of evidence); *R.* 7:5–2(a) ("The municipal court shall entertain motions to suppress evidence seized without a warrant in matters within its trial jurisdiction...."). Specifically, in this case, the court determined there was a reasonable and articulable suspicion to justify the motor vehicle stop, and probable cause to arrest defendant for DUI.

The standards of proof differ. The State must prove guilt beyond a reasonable doubt, but must prove a reasonable and articulable suspicion to stop, and probable cause to arrest, by a preponderance of the evidence. A defense attorney may "save" evidence for trial if convinced it is not likely to defeat the State's lesser burden in the suppression hearing, but may engender reasonable doubt at trial.

Also, the suppression hearing may include evidence inadmissible in the trial on the merits. Evidence relevant to the lawfulness of police conduct may be irrelevant to the question of guilt. The Rules of Evidence do not apply in the suppression hearing, except as to *N.J.R.E.* 403 and claims of privilege. *N.J.R.E.* 104(a). Thus, unobjectionable evidence in the suppression hearing, such as hearsay, could be excluded in a subsequent trial.

Moreover, if a defendant chooses to testify at a suppression hearing, his statements may not be used at trial, unless he testifies at trial and gives conflicting testimony. Even then, his prior statements may only be used to impeach.

On the other hand, a defendant may choose not to testify at a suppression hearing for strategic reasons, yet testify in his own defense at trial. The right to testify is constitutionally protected, as is the right to remain silent.

A defense attorney's tactics, strategy, and proofs in a suppression hearing may differ markedly from those at trial. For example, in this case, evidence that defendant's poor performance on the field sobriety tests was due to a bad back, as opposed to intoxication, would have been relevant to the question of guilt, but irrelevant to whether the objective facts before the officer, who was unaware of defendant's back condition pre-arrest, constituted probable cause.

VI. Discovery

Backround: Rule 7:7-7(j)

(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.

State v. Holup, 253 NJ Super. 320 (App. Div. 1992)

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. Wolfe, 431 N.J.Super. 356, 69 A.3d 164 (App. Div. 2013)

Defendant unsuccessfully sought to block admission of his Alcohol Influence Report (AIR), a report generated by an Alcotest breathalyzer device, because the State did not timely provide complete discovery.

We perceive defendant's true grievance to be that the State was permitted to cure the deficiencies in its evidence establishing the foundation for admission of the AIR in the middle of trial after not providing the documents or witness to defendant in discovery. Defendant argues that such errors required his attorney to assist the State in its case against him by specifying the lack of foundational evidence. He asserts that this error was compounded when the municipal court allowed the prosecutor to provide the missing document required by *Chun,* the "Certificate of Analysis 0.10 Percent Solution used in New Solution Report," which had not been previously provided in discovery. The prosecutor indicated that she thought this document was available online, but apparently it was not. The State was also allowed to call a police officer not named in discovery to authenticate the AIR and foundational documents. Defendant candidly admits that his attorney would not have prepared any differently had he been aware of this information timely. Defendant thus objects to the leeway granted to the State by the municipal court to cure this discovery violation in the middle of trial because it tips the balance unfairly in favor of the State. He does not claim, however, that his ability to present his defense was impaired in any specified way.

It is evident here that the prosecutor did not intend to mislead defendant. She thought the document in question was on the website and apparently overlooked the need to have a witness to authenticate the documents. Defendant does not argue that the State intended to mislead him by not providing all of the discovery timely. He also makes no significant argument of prejudice. Accordingly, we determine that the Law Division judge did not abuse his discretion in allowing the officer to testify nor by admitting the late-supplied document into evidence. We do not intend by this discussion to imply that a decision to preclude this evidence would have been an abuse of discretion if there was an indication of prejudice to the defense.

VII - Periscope: New Jersey Supreme Court Pending DWI Cases:

A-41-13 State v. Julie Kuropchak (072718)
In this appeal challenging a conviction of driving while intoxicated, was it error to admit the documentary evidence and the Alcotest reults, and was the observational evidence sufficient to sustain the conviction?
Certification granted: 11/13/13
Posted: 11/19/13

A-31-13 State v. James J. Revie (072600)
Is a defendant who is convicted of a third offense of driving while intoxicated (DWI) more than ten years after his second DWI conviction entitled to a second step-down in sentencing under N.J.S.A. 39:4-50(a)(3) after having already received a step-down in sentencing on his second DWI conviction?
Certification granted: 10/24/13

[Reserved issue under State v. Ciancaglini, 204 NJ 597 (2011)]

A-11-13 State v. Bruno Gibson (072257)

Was defendant entitled to a judgment of acquittal on this DWI charge where the municipal court that convicted defendant relied, over defense counsel's objection, on evidence elicited in a pre-trial suppression hearing?

Certification granted: 9/11/13

Posted: 9/12/13

[State v. Gibson, 429 N.J.Super. 456, 60 A.3d 493 (App. Div. 2013); State v. Allan, 283 N.J.Super. 622, 662 A.2d 1038 (Law Div.1995).]

A-41-12 State v. Diana M. Palma (071228)

What is the standard for imposing a jail sentence for a careless driving offense?

Certification granted 1/30/13

Posted: 1/30/13

Argued: 9/23/13

A-30-12 State v. Roger Paul Frye (070975)

May defendant's two prior convictions for driving while intoxicated be counted to sentence him as a third-time offender for a conviction of refusal to submit to a chemical breath test under N.J.S.A. 39:4-50.4a; and should defendant have been permitted to withdraw his guilty plea to refusal under the circumstances of this case?

Certification granted 11/16/12

Posted: 11/16/12

A-38-12 State v. Kenneth W. Verpent (071272)

Did the trial court err in denying defendant's motion to suppress the results of the urine test; did the trial court abuse its discretion in admitting certain expert testimony that was allegedly beyond the scope of the expert's qualifications; and did the trial court impermissibly allow expert testimony on the ultimate issue of fact?

Certification granted 1/16/13
Posted: 1/23/13
Argued: 11/06/13