Garden State CLE
21 Winthrop Road • Lawrenceville, New Jersey 08648
(609) 895-0046 fax- 609-895-1899
Atty2starz@aol.com

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Laurick to the Rescue!

Lesson Plan

Introduction

Baldasar v. Ill., 446 US 222 (1980)
State v. Sweeney, 190 NJ Super. 516 (App. Div. 1983)
State v. Carey, 230 NJ Super. 402 (App. Div. 1989)

The *Laurick* Era Begins

State v. Laurick, 120 NJ 1 (1990)
State v. Latona, 307 N.J. Super. 387 (App. Div. 1998)
Nichols v. US, 511 US 738 (1994)
State v. Hrycak, 184 NJ 351 (2005)

Statute of Limitations

Rule 7:10-2(g)

State v. Schadewald, 400 NJ Super. 350 (App. Div. 2007)

State v. Bringhurst, 401 NJ Super. 421 (App. Div. 2008)

State v. Binkiewicz (2008 WL 1945094)

Motion Practice & Pleadings

Sentencing

State v. Conroy, 397 NJ Super. 324 (App. Div. 2008)

State v. Thomas, 401 NJ Super. 180 (Law Div. 2007)

State v. Sweeney, 190 NJ Super. 516 (App. Div. 1983)

None of the views expressed by the justices precludes using the present defendants' prior convictions to impose enhanced *noncustodial penalties* for a second driving under the influence conviction. The overriding concern in the several *Baldasar* opinions was the actual imposition of a custodial term without having had the benefit of counsel at the first conviction. We note also that second offenders cannot receive more than a 90-day prison sentence under *N.J.S.A.* 39:4-50. Therefore, under the views of the Justices in the *Baldasar* plurality, the present defendants had no constitutional right to counsel in the most recent proceedings below.

We find that *Baldasar* does not apply to the cases we are considering, and that there is no federal constitutional bar to using these defendants' prior convictions (which may or may not have been un-counseled) to impose enhanced noncustodial second offender penalties pursuant to *N.J.S.A.* 39:4-50.

Defendants ha[ve] the burden of establishing, for sentencing purposes, the lack of legal representation at the prior convictions.

State v. Carey, 230 NJ Super. 402 (App. Div. 1989)

[W]e conclude that, irrespective of federal constitutional compulsion, the policy announced in *Rodriguez v. Rosenblatt,* and adopted by *R.* 3:27-2, requires that a defendant may, so long as he sustains his burden of proof, successfully attack an enhanced penalty by showing (a) that he was indigent at the time of his prior New Jersey drunk driving conviction, if that conviction was entered after the date *Rodriguez v. Rosenblatt* was decided, and was not told of his right to counsel, or (b) that he was not indigent and was not advised, pursuant to *R.* 3:27-2, of his right to retain counsel. The policy embodied in *Rodriguez* and *R.* 3:27-2 would have no meaning or impact if our conclusion concerning prior New Jersey convictions were otherwise.

State v. Carey, 230 NJ Super. 402 (App. Div. 1989)

We are satisfied that the municipal court and Law Division both erred in imposing an enhanced sentence. It was improper to reject the defendant's testimony solely because *Rodriquez* required assignment of counsel at the 1979 proceedings. Our knowledge of the municipal court system precludes judicial notice that every municipal court scrupulously honored the dictates of *Rodriquez* in 1979. The efforts of the Supreme Court and Administrative Office of the Courts (AOC) led to personal visits by trial court administrators and AOC staff at least through 1981, in part to assure compliance. Moreover, educational programs were directed to judges and clerks on the subject. In any event, the record in this case does not justify the presumption used to overcome defendant's testimony that he was not advised of his right to counsel and did not waive it.

State v. Laurick, 120 NJ 1 (1990)

We agree in general with the approach set forth in *[Carey]* to the effect that compliance with the *Rodriguez* directive cannot be conclusively presumed just because we have a rule that says such notice will be given. A defendant in a second or subsequent DWI proceeding should have the right to establish that such notice was not given in his or her earlier case, and that if defendant is indigent, the DWI conviction was a product of an absence of notice of the right to assignment of counsel and non-assignment of such counsel without waiver. A non-indigent defendant should have the right to establish such lack of notice as well as the absence of knowledge of the right to be represented by counsel of one's choosing and to prove that the absence of such counsel had an impact on the guilt or innocence of the accused or otherwise "wrought a miscarriage of justice for the individual defendant."

State v. Laurick, 120 NJ 1 (1990)

In evaluating, in the case of non-indigents, whether a miscarriage of justice has occurred, "innocence or guilt is indeed relevant among the several considerations which should properly mold the discretion of a judge" in determining whether to relieve a party of a plea. On the issue of a demonstration of miscarriage of justice, as on others, the defendant has the burden of proving the right to post-conviction relief which, without such showing, applied the opinion below retroactively to allow collateral attack on a prior un-counseled DWI conviction.

The proceeding to challenge the collateral effect of such prior convictions should properly be in the municipal court in which the original conviction was entered. We realize the difficulty in reviewing such dispositions more than three years after the fact when transcripts or tapes of the proceedings are no longer available. Still, it will be much easier in the original court to arrange for a thorough and complete review of the dockets of the proceedings. Sometimes notation of an attorney's entry of an appearance may be in the case file. In addition, any available police records may confirm or dispel the absence of counsel in the proceedings, and in the case of non-indigence, the evidence bearing on guilt or innocence. That requirement of proceeding in the court of original jurisdiction should be equally applicable when the only issue is whether the un-counseled plea precluded imposition of an additional loss of liberty. Resolution of that issue will ordinarily be simpler and more straightforward, with the only consequence that the period of incarceration imposed may not exceed that available for the counseled conviction.

State v. Laurick, 120 NJ 1 (1990)

Although we have genuine doubt, then, about the conclusive effect of *Baldasar,* we prefer not to try to divine the further course of the Court in this area. We are satisfied that there is a core value to *Baldasar* that we should follow: that an un-counseled conviction without waiver of the right to counsel is invalid for the purpose of increasing a defendant's loss of liberty. In the context of repeat DWI offenses, this means that the enhanced administrative penalties and fines may constitutionally be imposed but that in the case of repeat DWI convictions based on un-counseled prior convictions, the actual period of incarceration imposed may not exceed that for any counseled DWI convictions. For example, a third offender with one prior un-counseled conviction could not be sentenced to more than ninety days' imprisonment.

State v. Laurick, 120 NJ 1 (1990)

To sum up:

(1) It is constitutionally permissible that a prior un-counseled DWI conviction may establish repeat-offender status for purposes of the enhanced penalty provisions of the DWI laws of the State of New Jersey. The only constitutional limit is that a defendant may not suffer an *increased* period of incarceration as a result of a *Rodriguez* violation that led to an un-counseled DWI conviction.

(2) No other relief necessarily flows from a *Rodriguez* violation that led to a prior un-counseled DWI conviction. The judicial policies expressed in *Rodriguez v. Rosenblatt,* of giving notice to accused of a right to be represented by counsel, do not create a constitutional entitlement to such notice. Nor does the absence of such notice demonstrate a fundamental injustice unless there be some showing in post-conviction relief proceedings that it prejudiced the defendant in that the defendant (a) was unaware of such rights, and (b) if indigent, would have derived benefit from the notice by seeking the assistance of counsel. A non-indigent defendant would have to show in addition that the lack of notice otherwise affected the outcome. No such showing was made in this case.

State v. Laurick, 120 NJ 1 (1990)

(3) Post-conviction relief from the effect of prior convictions should normally be sought in the court of original jurisdiction, which will be in the best position to evaluate whether there has been any denial of fundamental justice. Appeals from the disposition in that court shall be combined with any appeal from proceedings involving the repeat offense.

State v. Latona, 307 N.J. Super. 387 (App. Div. 1998)

On appeal, the State focuses upon the fact that, in deciding *Laurick,* the Court relied upon language in [*Baldasar*], to the effect that un-counseled convictions cannot be used to enhance punishment for subsequent offenses. However, the State points out that *Baldasar* was expressly overruled in *Nichols v. United States,* 511 *U.S.* 738 (1994). The State now urges that, given the opportunity, our Supreme Court would follow *Nichols* and modify its *Laurick* decision, so we should reject the reduction of defendant's sentence and require that he be sentenced as a third-time DWI offender, pursuant to *N.J.S.A.* 39:4-50(a)(3).

This court may not speculate on whether our Supreme Court would rethink its holding in *Laurick* because a subsequent United States Supreme Court decision overruled one of the cases upon which *Laurick* relied. A close reading of *Laurick* indicates much authority and reasoning apart from *Baldasar* to support the decision. As to *Baldasar,* the Court pointedly said:

We are satisfied that there is a core value to *Baldasar* that we should follow: that an un-counseled conviction without waiver of the right to counsel is invalid for the purpose of increasing a defendant's loss of liberty.

Nichols v. US, 511 US 738, 746-747 (1994)

We reasoned that the Court, in a number of decisions, had already expanded the language of the Sixth Amendment well beyond its obvious meaning, and that the line should be drawn between criminal proceedings that resulted in imprisonment, and those that did not.

We adhere to that holding today, but agree with the dissent in *Baldasar* that a logical consequence of the holding is that an un-counseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction.

State v. Hrycak, 184 NJ 351, 362-63 (2005)

With the above as the background, we take this opportunity to reaffirm our decision in *Laurick* that "[i]n the context of repeat DWI offenses, ... the enhanced administrative penalties and fines may constitutionally be imposed but that in the case of repeat DWI convictions based on uncounseled prior convictions, the actual period of incarceration imposed may not exceed that for any counseled DWI convictions." To be sure, the United States Supreme Court has made it clear that federal law does not prohibit the use of a prior uncounseled conviction for enhancement of a subsequent conviction. Despite the *Nichols* holding, we continue to adhere to our position set forth in *Rodriguez* that an uncounseled "indigent defend[a]nt should [not] be subjected to a conviction entailing imprisonment in fact or other consequence[s] of magnitude [.]" We are convinced that a prior uncounseled DWI conviction of an indigent is not sufficiently reliable to permit increased jail sanctions under the enhancement statute. A contrary conclusion would severely undermine the policy embodied in *Rodriguez,* and our Court Rules. We will not do that. In short, we affirm the continuing vitality of *Laurick* as it applies to our jurisprudence.

State v. Hrycak, 184 NJ 351, 362-63 (2005)

A defendant is faced with a three-step undertaking in proving that a prior un-counseled DWI conviction should not serve to enhance the jail component of a sentence imposed on a subsequent DWI conviction. As a threshold matter, the defendant has the burden of proving in a second or subsequent DWI proceeding that he or she did not receive notice of the right to counsel in the prior case. He or she must then meet the two-tiered. In that vein, if defendant proves that notice of the right to counsel was not provided, the inquiry is then bifurcated into whether the defendant was indigent or not indigent. "[I]f [the] defendant [was] indigent, [the defendant must prove that] the DWI conviction was a product of an absence of notice of the right to assignment of counsel and non-assignment of such counsel without waiver." On the other hand, if the defendant was not indigent at the time of the prior un-counseled conviction,

[the] defendant should have the right to establish such lack of notice as well as the absence of knowledge of the right to be represented by counsel of one's choosing and to prove that the absence of such counsel had an impact on the guilt or innocence of the accused or otherwise 'wrought a miscarriage of justice for the individual defendant.'

State v. Hrycak, 184 NJ 351, 362-63 (2005)

To fulfill the legislative intent, we read the DWI statute for a third-time offender with one prior uncounseled DWI conviction to allow for the imposition of incarceration no greater than that for a second-time offender, i.e. ninety days, and to allow for the imposition of the second-time offender requirement of thirty days of community service. To be sure, a third-time offender with one prior uncounseled DWI conviction is still subject to administrative penalties applicable to a third-time offender under *N.J.S.A.* 39:4-50(a)(3).

Rules of Court – R. 7:10-2(g)

g) Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Conviction

(1) Venue. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction shall be brought in the court where the prior conviction was entered.

(2) Time Limitations. The time limitations for filing petitions for post-conviction relief under this section shall be the same as those set forth in Rule R. 7:10-2(b)(2).

(3) Procedure. A petition for post-conviction relief sought under this section shall be in writing and shall conform to the requirements of Rule 7:10-2(f). In addition, the moving papers in support of such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(4) Appeal. Appeals from a denial of post-conviction relief from the effect of a prior conviction shall be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under R. 3:23-2(a).

State v. Schadewald, 400 NJ Super. 350, 354-355 (App. Div. 2007)

In other words, to establish entitlement to the step-down sentence for a second or subsequent DWI:

1. Indigent defendants must establish that they were not given notice of their right to counsel and advised that counsel would be provided for them if they could not afford one.

2. Non-indigent defendants must establish that they were not advised of their right to counsel and that they were unaware of such right at the time they entered the uncounseled pleas.

3. Defendants who establish that they were not adequately noticed of their right to counsel must then demonstrate that if they had been represented by counsel, they had a defense to the DWI charge and the outcome would, in all likelihood, have been different. Police reports, witness statements, insurance investigations and the like may be used to submit proofs that the outcome would have been different if the defendant had the benefit of counsel before pleading guilty.

State v. Bringhurst, 401 NJ Super. 421 (App. Div. 2008)

[W]e must conclude that the five-year time limit contained in *Rule* 3:22-12(a) should not automatically require dismissal of the application. The fact that a prior DWI conviction may have been un-counseled would, in and of itself, be of no moment unless and until there was a subsequent DWI conviction. By its very nature, a *Laurick* challenge simply cannot be raised until a second or subsequent conviction occurs because there is otherwise no basis for "[r]elief from an [e]nhanced [c]ustodial term [b]ased on a [p]rior [c]onviction." *R.* 7:10-2(g).

Since a second or subsequent conviction may occur at any time in the future, it would be illogical to apply the *Rule's* five-year time limit mechanistically to deny all such applications. Indeed, a defendant could never obtain the benefit of *Laurick's* holding if his second conviction occurred more than five years after the first uncounseled one because his petition would automatically be time-barred. The defendants in *Hrycak* and *Latona,* for example, would have been unable to raise their *Laurick* issues. We can discern no reason why the Supreme Court would have explicitly recognized the *Laurick*-styled PCR petition on the one hand, and at the same time deny its relief where "the extent and cause of the delay" was not occasioned by the defendant.

State v. Bringhurst, 401 NJ Super. 421 (App. Div. 2008)

To summarize, a defendant's *Laurick* PCR petition brought more than five years after the predicate DWI conviction he challenges as un-counseled must comply with the requirements of *Rule* 7:10-2. A defendant must first establish that he is entitled to relaxation of *Rule* 3:22-12(a)'s time limit. In general, given the nature of a *Laurick* PCR petition, a defendant may routinely establish that any delay in filing his claim was not the result of neglect or some other disqualifying reason. However, a defendant must also allege facts in the petition sufficient to establish a prima facie case for relief under the standards enunciated in *Laurick* before relaxation is appropriate. In this case, defendant failed to establish a prima facie case for the relief he sought.

3:22-10(a). Presence of Defendant at Hearing; Evidentiary Hearing

(a) A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.

State v. Conroy, 397 NJ Super. 324, 330-331 (App. Div. 2008)

This is defendant's fourth actual conviction, having been previously convicted on October 12, 1982; April 17, 1990; and August 1, 1995. Because defendant's 1982 conviction was entered following an uncounseled plea, that conviction may not be used to enhance the period of incarceration on a subsequent conviction. *Laurick, supra,* 120 *N.J.* at 16, 575 *A.*2d 1340. Accordingly, we agree with defendant that when he appeared before the Law Division he stood as a third offender, not a fourth offender, for the limited purpose of the trial court imposing a jail sentence under the enhanced sentencing provision of the DWI statute.

Moreover, because there was a hiatus of more than ten years between the present offense and his last offense in 1995 (the third and second offenses, respectively, for purpose of incarceration under *Laurick*), defendant was entitled to the benefit of the step-down provision: "where *the court shall treat* the third conviction as a second offense for sentencing purposes." *N.J.S.A.* 39:4-50(a)(3) (Emphasis added). Sentencing a qualified defendant under the step-down provision is mandatory, not discretionary. We are satisfied that to deny defendant the benefit of the step-down proviso, which the Legislature has provided to all third offenders, would violate the principle of fairness that underpins *Laurick*.

State v. Thomas, 401 NJ Super. 180, 184-185 (Law Div. 2007)

Although the defendants in both *Laurick* and *Hrycak* faced enhanced sentences under the DWI statute, there is nothing in the language or the reasoning of either case that would permit the conclusion urged by the State: that their holdings apply only to sentences imposed under the DWI statute. Rather, although neither required by the federal constitution nor articulated as a state constitutional principle, it remains the law in New Jersey that no defendant may be sentenced to an increased period of incarceration for any offense on the basis of an uncounseled conviction.

Here, defendant has pled guilty to the offense of driving while her license was suspended, in violation of *N.J.S.A.* 39:3-40. The State seeks to have her sentenced, as she was in the municipal court, in accordance with subsection (f)(2) of that statute, due to the fact that the license suspension had been imposed as the result of the Moorestown DWI conviction.

At the time of the instant charge of driving while her license was suspended, defendant had only one prior conviction for the same offense. Therefore, a jail sentence exceeding five days here would subject her to an increased loss of liberty predicated solely on the fact that the underlying suspension was imposed for a DWI conviction. However, because the conviction on which the State would have the court predicate an enhanced jail sentence was un-counseled, to impose a sentence in excess of five days would violate the mandate of *Laurick.*