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Garden State CLE Presents:



“The COVID Case for DWI Plea-Bargaining in Municipal Court”

Instructor:



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Lesson Plan

1.) Introduction

a.) Due to the ongoing COVID-19 crisis and the impact it has had on the ability of municipal courts to try drunk driving cases, the time has come to relax the prohibition of the plea bargaining of drunk-driving cases as set forth under Guidelines 4A and 4B to the plea bargaining guidelines in the Appendix to the Part VII Rules of Court.

2.) Current Governing Law:

a.) Rule 7:6-2(d) - d) Plea Agreements. Plea agreements may be entered into only pursuant to the Guidelines and accompanying Comment issued by the Supreme Court, both of which are annexed as an Appendix to Part VII, provided, however, that:

- (1) The complaint is prosecuted by the municipal prosecutor, the county prosecutor, or the Attorney General; and
- (2) The defendant is either represented by counsel or knowingly waives the right to counsel on the record; and
- (3) The prosecuting attorney represents to the court that the [complaining witness and the] victim, if the victim is present at the hearing, has been consulted about the agreement; and
- (4) The plea agreement involves a matter within the jurisdiction of the municipal court and does not result in the downgrade or disposition of indictable offenses without the consent of the county prosecutor, which consent shall be noted on the record; and
- (5) The sentence recommendations, if any, do not circumvent minimum sentences required by law for the offense.

Pursuant to paragraph (a)(1) of this rule, when a plea agreement is reached, its terms and the factual basis that supports the charge(s) shall be fully set forth on the record personally by the prosecutor, except as provided in Guideline 3 for Operation of Plea Agreements. If the judge determines that the interests of justice would not be served by accepting the agreement, the judge shall so state and the defendant shall be informed of the right to withdraw the plea if already entered.

b.) GUIDELINE 3. PROSECUTOR'S RESPONSIBILITIES

Nothing in these Guidelines should be construed to affect in any way the prosecutor's discretion in any case to move unilaterally for an amendment to the original charge or a dismissal of the charges pending against a defendant if the prosecutor determines and personally represents on the record the reasons in support of the motion. The prosecutor shall also appear in person to set forth any proposed plea agreement on the record.

However, with the approval of the municipal court judge, in lieu of appearing on the record, the prosecutor may submit to the court a Request to Approve Plea Agreement, on a form approved by the Administrative Director of the Courts, signed by the prosecutor and by the defendant. Nothing in this Guideline shall be construed to limit the court's ability to order the prosecutor to appear at any time during the proceedings.

c.) Supreme Court comment - Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter. It is recognized that it is not the municipal prosecutor's function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases. In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges. Further, the prosecutor should have the ability to amend the charges to conform to the proofs.

d.) See also RPC 3.8 detailing the ethical duties of prosecutors and the related case law. [“The primary duty of a prosecutor is not to obtain convictions but to see that justice [be] done.” State v. Farrell, 61 N.J. 99, 104, 293 A.2d 176 (1972).]

e.) GUIDELINE 4. LIMITATION.- No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and

B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).

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

If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge.

A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible a plea agreement as to the collateral charges arising out of the same factual transaction connected with any of the above enumerated offenses in Sections A and B of this Guideline.

3.) Plea bargaining case law review:

- a.) State v. Hessen, 145 N.J. 441 (1996).
- b.) State v. Marsh, 290 N.J.Super. 663 (App. Div. 1996)
- c.) State v. Rastogi, 403 N.J.Super. 581 (Law Div. 2008)

4.) Discussion and analysis:

a.) This prohibition is now thirty years old and was formulated in a time where the public policy of our State called for prompt and harsh punishment for people convicted in municipal court of driving while intoxicated. The prohibition was also necessary due to the lack of supervision, training and control that was exercised over local municipal prosecutors in that era by the county prosecutors and the Attorney General. The fear was that unsupervised municipal prosecutors would plea bargain away an otherwise meritorious case.

b.) Much has changed over the ensuing 30 years.

- i.) The position of municipal prosecutor has now been codified under N.J.S.A. 2B:25-1 et seq. Moreover, each local prosecutor in the state is supervised and given periodic training by a county assistant prosecutor liaison.
- ii.) The official public policy of New Jersey, as expressed by the Legislature on December 1, 2019 under N.J.S.A. 39:4-50.16a is to require the installation of ignition interlock devices for all convicted offenders. Moreover, first offenders with a blood alcohol level of less than 0.149% as well as first offender refusal defendants under N.J.S.A. 39:4-50.4a can completely avoid a license suspension by installing an ignition interlock device.
- iii.) Additionally, the Legislature has now reduced the mandatory license suspensions for second and subsequent offenders.

c.) In a sense, many of the aspects of the plea bargaining prohibition under Guidelines 4A and 4B have already been relaxed as a result of both the COVID-19 crisis and the developing case law. By way of example, limited plea bargaining is now permitted in cases that implicate questionable Alcotest 7110 calibrations under State v. Cassidy, 235 N.J. 482 (2018).

d.) The inability of the municipal courts to try DWI cases coupled with the reduced ability to resolve cases quickly by way of video link has had the net effect of relaxing Directive 1-84, mandating a 60-day disposition on all DWI matters.

e.) The mandatory jail component of second and third offender DWI sentences has also been relaxed on a *de facto* basis. Under Directive 13-20, the Administrative Director also authorized the release from custody of inmates serving municipal court sentences and has permitted judges to decide to put off sentencing hearings because of COVID-19 or to delay the start of a jail or prison sentence as a result of the COVID-19 crisis. This action essentially relaxes Acting Director Judge Carchman's memorandum to municipal court judges of October 25, 2006 which mandated that, except for compelling reasons, convicted third offender DWI defendants be taken from the municipal court directly to jail. (See *State v. Luthe*, 383 N.J.Super. 512 (App. Div. 2006)).

f.) The inability to try DWI matters during this time of crisis has resulted in an ongoing and relentless backlog of cases that may take years to resolve in a fair and orderly manner. Worse still, many of these defendants are still legally driving and are not subject to the use of an interlock device.

5.) Proposed solution:

a.) The solution to this problem can be achieved by permitted controlled and supervised plea bargaining of drunk-driving cases. Any proposed plea agreement on the local level should be subject to a review and approval process by the county prosecutor's liaison as well as the municipal court judge. A plea to a downgraded offense such as reckless driving under N.J.S.A. 39:4-96 should contain a requirement that the defendant install an ignition interlock device in one vehicle he either owns or principally operates. This component of sentence can be accomplished by imposing, as part of the plea agreement, a term of court-supervised probation as permitted under N.J.S.A. 39:5-7.

b.) The ability of municipal prosecutors to enter into plea agreements in appropriate drunk-driving cases will provide a powerful incentive for defendants to resolve their cases quickly and in conformity with the realities and limitations that have been placed upon the judiciary due to COVID-19. It will reduce a future backlog of DWI cases and get offenders to install interlock devices immediately as opposed to years from now. The argument that such plea agreements may allow third offenders to avoid a jail term is essentially moot since their cases are not being resolved and nobody is being sentenced to county jail sentences anyway due to COVID-19.

c.) As a starting point for discussion, the following could be promulgated in place of the current Guideline 4A with conforming amendments to Guideline 4B.

GUIDELINE 4. LIMITATION.

- A. Subject to approval by both the county prosecutor and the court, a municipal prosecutor may engage in plea discussions in cases involving alleged violations of N.J.S.A. 39:4-50 and N.J.S.A. 39:4-50.4a, provided that the sentence to be imposed for an offense for which a plea of guilty was entered in lieu of N.J.S.A. 39:4-50 or N.J.S.A. 39:4-50.4a include a requirement that the defendant install an ignition interlock device on one motor vehicle that he owns or principally operates.

6.) Conclusion:

Based upon the foregoing practical considerations as well as the implicit threat to the driving public, it is now time to reevaluate the strict prohibition on DWI cases and permit plea bargaining of these cases with appropriate supervision.