

Garden State CLE Presents:

DWI Collateral Consequences Check-list



Instructors



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Lesson Plan

Introduction

Drunk-driving and refusal convictions carry penal consequences that, for the average defendant, are enormous. The combination of fines, associated costs, penalties and the like, coupled with a long loss of driving privileges can devastate the personal and professional lives of defendants. However, even after the fines are all paid and the term of license loss has been served, the collateral consequences that are a part of every drunk driving and refusal to take a breath test conviction will continue to haunt the defendant for years. All too often, the impact of collateral consequences comes as a complete shock to the defendant.

With the exception immigration consequences (*State v. Gaitan*, 209 N.J. 339 (2012)), under the prevailing case law, *State v. Heitzman*, 107 N.J. 603 (1987), municipal court judges are not required to inform the defendant of collateral consequences. That responsibility rests with defense counsel, and occasionally, prosecutors.

The rationale in *Heitzman* has been subject to slow but steady erosion over the years as the Court has added more and more collateral consequences of which the defendant must be made aware as part of the plea process. This trend began with *State v. Bellamy*, 178 N.J. 127 (2003) (civil commitment following a plea to certain sex offenses.) Current law has extended the list to include the following:

Immigration consequences, *State v. Nunez-Valdez*, 200 N.J. 129 (2009)

Forfeiture of public office, *State v. Hupka*, 203 N.J. 222, 242 (2010)

Lifetime loss of firearms purchase permit, *State v. Agathis*, 424 N.J. Super. 16 (App. Div. 2012)

In general, the requirement in Rule 7:6-2(a)(1) that a defendant understand the nature of the charge and the consequences of the plea only extends to penal consequences. Simply put, the penal consequences of a plea are those aspects of punishment over which the court has a measure of control. Essentially, a penal consequence is the punishment that will be made part of the sentence by the court. Collateral consequences, by their nature, are outside of the court's ability to control or mitigate. In many instances, they are unpredictable as well. Indeed, in the context of a drunk driving case, the only collateral consequences that the court must explain to the defendant are the enhanced penalties the defendant will face if the defendant is convicted of driving on the revoked list or drunk driving in the future. (N.J.S.A. 39:4-50(c)).

On the other hand, the evolving law has permitted the withdrawal of a guilty plea by way of post-conviction relief when counsel does not inform his client as to important collateral consequences. As the Court explained in *Agathis*, in the immigration cases, the issue has been 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. Although the erroneous information provided by defense counsel in *Nunez-Valdez* concerned the defendant's deportation from this country, an arguably more significant consequence than the forfeiture of the right to a firearms identification card, the constitutional principle underpinning the Court's decision in *Nunez-Valdez* is likewise applicable in this case. Defendant had the right to receive correct legal advice from his attorney in matters material to him in deciding to accept or reject the State's plea offer.

As a matter of professionalism and competence (See R.P.C. 1:1), a defense attorney should thoroughly inform a client who is about to plead guilty to drunk driving of the enormous collateral consequences he will face.

a.) Plea withdrawal

A plea by a defendant who was unaware of a significant collateral consequences may be collaterally attacked on the grounds that it was not entered knowingly under Rule 7:6-2(a)(1). There are two procedures for seeking such an outcome:

Post-Conviction Relief under Rule 7:10-2 based upon ineffective assistance of counsel. This Rule has extensive filing requirements and a 5-year statute of limitations except for excusable neglect. In this context, see *State v. Chau*, 473 N.J. Super. 430 (App. Div. 2022).

Motion to withdraw a plea – Rule 7:6-2(b) – Not statute of limitations and only requires a post-sentencing showing the need to correct a manifest injustice.

Part I - Common DWI Collateral Consequences

In an effort to help fulfill defense counsel's responsibility, the following sections detail the collateral consequences associated with drunk-driving cases.

1.) Motor vehicle surcharges

Motor vehicle surcharges constitute a civil penalty. *Clark v. Clark*, 324 N.J. Super. 587, 592 (Chn. Div. 1999). They are imposed under the authority granted the Chief Administrator of the Motor Vehicle Commission (MVC) by N.J.S.A. 17:29A-35(b). This statute establishes a Motor Vehicle Violations Surcharge System under which the MVC levies surcharges on drivers who are assessed too many violation points. Surcharges are also imposed upon drivers who are convicted of drunk driving or refusal to take a breathalyzer test.

Motor vehicle surcharges can impose an intolerable burden on a driver. The continuing validity of the recipient's driving privileges becomes utterly dependent on the timely payment to the State of the surcharge amount. The yearly surcharge totals can be extremely expensive, sometimes totaling many thousands of dollars. A failure to make timely payments will result in an indefinite suspension of driving privileges and a judgment for the surcharge amount, plus costs and interest docketed in Superior Court.

From an attorney's perspective, the one good thing about the imposition of surcharges is that it is completely reliable and predictable. Attorneys who know and understand the system can properly advise their clients with certainty on how a given disposition in a drunk-driving case will affect the future imposition of MVC surcharges. Once an attorney understands how the surcharge system works, he or she can attempt to structure case dispositions in such a way that surcharges can be avoided.

A person who is convicted of a drunk driving offense under N.J.S.A. 39:4-50(a) or a refusal to take a breath test under N.J.S.A. 39:4-50.4a is subject to a surcharge. Generally speaking, the surcharge for these violations is \$3000, payable at a rate of \$1000 per year for three years. The payments will be billed on a monthly basis. A driver who is convicted three times of either of these offenses over a three year period would be subject to a \$4500 surcharge on the third offense, payable at \$1500 per year for three years.

2.) Prohibition on issuance of license plates

Surprisingly, this consequence is of enormous importance to certain clients.

a.) Vanity plates – NJSA 39:3-33.5a

No courtesy mark may be issued to any applicant who:

- a. has been convicted of a violation of either section 39:4-50, or section 39:4-96 of this Title or section 2 of P.L.1966, c. 142 (C.39:4-50.2) or has been convicted of a violation of a law of a substantially similar nature in another jurisdiction; or
- b. has been convicted of a violation of N.J.S.2C:11-5 or section 1 of P.L.2017, c. 165 (C.2C:11-5.3); or
- c. for the two-year period next preceding his application for a courtesy mark has had his driving privileges in this State or in another jurisdiction revoked or suspended for any reason whatsoever.

b.) ID Marks and special organization plates - 39:3-33.5. Restrictions upon issuance

Except as provided for courtesy marks in section 2 of P.L.2000, c. 15 (C.39:3-33.5a), no particular identifying mark or special organization license plate issued pursuant to P.L.1987, c. 374 (C.39:3-27.35) may be issued to any applicant who:

- (a) for the 10-year period next preceding the date of application for a particular identifying mark or special organization license plate has been convicted of a violation of either section 39:4-50, or section 39:4-96 of this Title or section 2 of P.L.1966, c. 142 (C.39:4-50.2) or has been convicted of a violation of a law of a substantially similar nature in another jurisdiction; or
- (b) has been convicted of a violation of N.J.S.2C:11-5 or section 1 of P.L.2017, c. 165 (C.2C:11-5.3); or
- (c) for the two-year period next preceding his application for a particular identifying mark or a special organization license plate has had his driving privileges in this State or in another jurisdiction revoked or suspended for any reason whatsoever.

3.) No cause of action for personal injury, property damage or pain/suffering

If a defendant sustains damages as a result of an accident during which he or she is intoxicated, a DUI or refusal conviction (See *Castano v. Augustine*, 475 N.J. Super. 71 (App. Div. 2023)) will subsequently prevent the defendant from using New Jersey courts in an attempt to recover economic and non-economic losses. N.J.S.A. 39:6A-4.5(b) provides that a drunk driver who is convicted under the laws of New Jersey or any other jurisdiction has no cause of action for the recovery of economic and non-economic losses sustained in an accident arising from the drunken driving conduct. In fact, a claim for property damages is also not be sustainable under this statute. The statute imposes this ban irrespective of fault in the accident. Thus, even in those instances where the intoxicated defendant's driving conduct did not cause the accident, such a defendant would still be barred from asserting a cause of action in New Jersey. Under the case law, the limited exceptions under the statute include suits for Personal Injury Protection (PIP) benefits, social host liability and a suit under the state's Dram Shop Act.

4.) Insurance eligibility points and liability insurance

Under New Jersey law, eligible persons may purchase insurance in the voluntary market. An “eligible person,” as defined under New Jersey law, must have, among other qualifications, a valid driver's license and fewer than 9 insurance eligibility points. (N.J.S.A. 17:33B-13 and N.J.A.C. 11:3-34.) Applicants who do not meet the definition of an “eligible person” may still purchase insurance through the New Jersey Personal Automobile Insurance Plan (PAIP). However, in order to be a “qualified applicant” to purchase liability insurance on an assigned risk basis through PAIP, an applicant must hold a valid New Jersey driver's license. Thus, a person who loses his or her driving privileges as a result of a drunk-driving conviction will be unable to purchase liability insurance during the term of suspension. Furthermore, once the drunk-driving defendant becomes re-licensed, he or she will be required to purchase insurance on an assigned risk basis through PAIP due to the 9 insurance eligibility points that are assessed for a drunk-driving conviction.

5.) No expungements

The record of a drunk-driving conviction may not be subject to expungement. (See N.J.S.A. 2C:52-28.) Despite the serious consequences associated with this offense, a drunk-driving violation does not constitute a disorderly persons offense or a crime and, as an offense under Title 39, it is ineligible for expungement consideration.

Often the most significant aspect of the need to expunge relates to video of the defendant at the scene. This can be expunged if there is a companion disorderly persons' offense associated with the DWI.

6.) Civil Consequences

In cases involving the infliction of personal injury or property damage, the defendant in a drunk-driving case may be subject to substantial civil liability. Any statement the defendant may make under oath while testifying at his or her drunk-driving trial can be used as evidence in a civil proceeding. However, if it is the defendant's intention to resolve the case by a plea of guilty, the plea may be sealed so that it may not be used as evidence in a subsequent civil matter arising from the drunk-driving case. (See *Maida v. Kuskin*, 221 N.J. 112 (2015).)

7.) Immigration, citizenship and removal

Deportation is a drastic measure and at times constitutes the equivalent of banishment or exile. It is the forfeiture for misconduct of residence in the United States. Given the gravity of this consequence, the Supreme Court has promulgated Directive 09-11 which requires municipal court judges to inform defendants that a guilty plea or a finding of guilt as to certain offenses may result in negative immigration consequences and (2) to inform defendants that they have a right to seek advice from an attorney regarding those potential consequences.

8.) Ignition Interlock Devices (IID)

There are significant costs and responsibilities associated with the IID. Clients will need exacting advice, especially in those instances where they must serve a determinate term of a license suspension but must still have the interlock installed on their vehicles. This circumstance also implicates certain ethical questions for attorneys.

- Ignition interlock devices (IID) apply only to one motor vehicle owned, leased, or principally operated by the defendant, whichever the person most often operates.
- IID provisions no longer apply to first offender defendants who drive under the influence of drugs or those who allow drugged operation. These offenders are subject to a first offender license forfeiture ranging from seven months to one year. (N.J.S.A. 39:4-50(a)(1)(ii)).
- During of the period of IID installation imposed by the sentencing judge, the defendant may not operate any vehicle that is not equipped with an IID. (N.J.S.A. 39:4-50.17(c)). A notation to this effect will be imprinted on the operator's license. (N.J.S.A. 39:4-50.18(b)).
- A defendant who claims under oath in open court to not owning or having access to a motor vehicle will receive a suspension of driving privileges in lieu of an IID commitment. If such a defendant later acquires a vehicle during the suspension term, he must report this fact to the sentencing court and install an IID.

Under Directive 25-19, the Administrative Office of the Courts has required municipal court judges to forfeit the driving privileges of all first offenders and collect their licenses. Such defendants can thereafter seek immediate restoration from the Motor Vehicle Commission by presenting proof of IID installation from an authorized provider.

Master collateral consequences check off list

Client Name: _____

Summons Number: _____

Municipal Court: _____

In addition to ALL DIRECT CONSEQUENCES TO BE IMPOSED AT THE TIME OF SENTENCE, this client has been informed as to the following collateral consequences of a drunk driving conviction under N.J.S.A. 39:4-50(a) and N.J.S.A. 39:4-50.4a.

1. Motor Vehicle Surcharges—\$1000 per Year for Three Years;
2. Motor Vehicle Points on Companion Moving Violations;
3. Insurance Eligibility Points—Nine Point Assessment;
4. Restriction on Vanity & Courtesy License Plates;
5. No Cause of Action of Economic & Non-Economic Damages;
6. Loss of Ability to Purchase Liability Insurance;
7. Reporting requirements to state agencies for professionals;
8. No Expungement of Motor Vehicle Record;
9. Sentence Enhancement for Future Violations
 - a. Drunk Driving
 - b. Driving on the Revoked List – NJSA 39:3-40(f)(2) and (3) and NJSA 2C:40-26
 - c. Driving a vehicle not equipped with an IID under NJSA 39:4-50-19(a)
10. Civil Consequences of Guilty Plea or Testimony under Oath;
11. Obligations and costs related to ignition interlock devices; and
12. Immigration consequences.

I have reviewed these consequences with my defense attorney.

Client signature: _____

Date: _____