



Garden State CLE
 2000 Hamilton Avenue
 Hamilton, New Jersey 08619
 (609) 584-1922 – Phone
 (609) 584-1920 - Fax
 GardenStateCLE2@gmail.com

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Garden State CLE Presents:

New Jersey Criminal Law Review -
2022



Instructors:



**Joseph P. Rem, Jr.,
Certified Criminal Trial Attorney**



Robert Ramsey

Lesson Plan

Effect of PCR or Laurick Relief on NJSA 2C:40-26

***Laurick* relief and the principles underlying the prohibition against the use of un-counseled DWI convictions extend to the enhanced sentencing scheme in Section 26(b), and prior un-counseled convictions cannot be used as predicates to increase a loss of liberty for DWS. Furthermore, if a defendant obtains traditional PCR on a prior DWI or Refusal conviction and the State does not pursue a second prosecution, that vacated conviction cannot be used as a predicate in a Section 26(b) prosecution. In the present case, however, defendant was not entitled to *Laurick* relief in the first instance because he had counsel during his prior proceedings. *Laurick* is available only to defendants who were without counsel and not advised of their right to counsel during their DWI-related prosecutions.**

Turning to the effect of vacating a conviction through PCR, the Court finds that if the State does not initiate a second prosecution or the matter is otherwise dismissed, the vacated conviction cannot then serve as a basis for charging a defendant with another offense. Thus, a conviction vacated through PCR cannot be used as a predicate for a Section 26(b) prosecution.

Video tape evidence at trial.

In our view, the [Supreme Court precedent] implicitly held those portions of video-recorded evidence displayed to the jury during trial are fair game in summation, while those segments contained in the same video recording that are not shown are not “in evidence” and must not be commented on. The reason for this is straightforward: video-recorded evidence stands apart from documentary evidence.. Unlike documentary evidence, video-recorded evidence often is unclear and needs narration to place the scene in context, while documentary evidence usually speaks for itself.

We therefore expressly hold the admission of video-recorded evidence is properly limited to only those segments played for the jury during trial, even when the entire video recording purportedly has been admitted in evidence. Accordingly, we conclude counsel are prohibited from commenting on the unshown segments in their closing remarks to the jury.

State v. Dorff, 468 N.J. Super. 633 (App. Div. 2021)

Police response to attorney request (Pre-Sims case)

In this appeal the court held that defendant's Fifth Amendment right to counsel was violated during a stationhouse interrogation, reversing the trial court order denying defendant's suppression motion. Detectives at the outset of the interrogation advised defendant of her rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). During the interrogation, defendant made several references to her need to speak with an attorney. The court held that defendant's statement, "[t]hat's why I feel I might need a lawyer," was sufficient to invoke her right to counsel. A detective then commented, "[w]ell, I mean that's a decision you need to make. . . . But if you didn't do anything [wrong], you certainly don't need to have [an attorney]." Defendant immediately responded that she felt she had not done anything wrong and elected to continue with the interrogation. She eventually made an inculpatory admission.

The court ruled the detective's brief, spontaneous comment undercut the *Miranda* warnings and impermissibly burdened the Fifth Amendment right to counsel. By suggesting in effect that innocent persons do not need an attorney, the detective implied that a request to terminate the interrogation to speak with counsel would evince a consciousness of guilt, thereby discouraging the assertion of the right to counsel. The court emphasized the State bears the burden to show scrupulous compliance with *Miranda*, adding that there is no "good faith" exception to the *Miranda* rule. Rather, the court held, a *Miranda* violation such as the one that occurred in this case triggers the exclusionary rule whether it was intentional or inadvertent.

Trickery in Interrogation by police (Pre-Sims case)

This interlocutory appeal arises from an ongoing prosecution for strict liability for drug-induced death, N.J.S.A. 2C:35-9, following a fatal heroin overdose. The State appeals from a trial court order suppressing incriminating statements defendant made during a stationhouse interrogation because the officers did not advise him that a death had occurred and that he was facing prosecution for a first-degree homicide offense. The trial court had initially held the statements were admissible but granted defendant's motion for reconsideration that cited to the majority opinion in State v. Sims, 466 N.J. Super. 346 (App. Div.), certif. granted, 246 N.J. 146 (2021). While the parties and the trial court knew that the Supreme Court had granted certification, they appeared to be unaware that the Supreme Court had stayed the Sims opinion.

In Sims, the majority announced a new per se rule that when police make an arrest following an investigation, they must at the outset of a custodial interrogation advise the interrogee of the offense(s) for which he or she was arrested regardless of whether a complaint-warrant or arrest-warrant has been issued. 466 N.J. Super. at 367. The question to be addressed by the Supreme Court is: "[w]ere the officers required to advise defendant, who was not charged with any offenses at the time, why he was arrested before proceeding with the custodial interrogation."

n the present case, the court follows an alternate analytical route that does not depend on the outcome in Sims. The court leaves to the Supreme Court to decide whether police may remain silent during a Miranda colloquy with respect to the essence of unfiled charges for which the interrogee was taken into custody. Rather, the court focuses on the impact of the police decision in this instance to advise defendant of the reason for his arrest in a manner that was misleading. Under this analytical approach, the failure to advise defendant of the overdose death was a relevant factor to be considered in determining whether defendant's waiver of Miranda rights was made knowingly.

The court concludes, considering the totality of the circumstances, the State failed to prove beyond a reasonable doubt that defendant's waiver of his right against self-incrimination was made knowingly because the detectives affirmatively misled defendant by providing a deliberately vague and incomplete answer to his question of why he was taken into custody. The court reasons that it is one thing for police to withhold information; it is another

thing entirely for them to provide an explanation that creates or reinforces a false impression.

The court recognizes that police are permitted, within limits, to use trickery or deception in the course of a custodial interrogation. The court draws a fundamental distinction, however, between police trickery with respect to the strength of the evidence against an interrogee on the one hand, and trickery with respect to the seriousness of the offense(s) for which he or she was arrested on the other hand. While police are allowed to use certain forms of trickery following a knowing and voluntary Miranda waiver, the court finds no New Jersey precedent that authorizes trickery as part of the waiver process. Indeed, the court notes that *Miranda v. Arizona* expressly held that "any evidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [or her] privilege." 384 U.S. 436, 476 (1966).

The court adds that affirmatively misleading an interrogee about the seriousness of the offense for which he or she was taken into custody strikes at the heart of the waiver decision. The court does not, however, propose a categorical, per se rule that any deception or trickery of this type automatically warrants suppression. Rather, the court holds that the use of such a stratagem is an important factor to be considered as part of the totality of the circumstances in determining whether the State has met its burden of proving, beyond a reasonable doubt, that defendant made a knowing waiver of his right against self-incrimination.

Finally, the court rejects the State's argument that the detectives did not have probable cause to charge defendant with the strict liability for drug-induced death offense pending the completion of autopsy and toxicology reports. Applying de novo review, the court concludes that the detectives were aware of facts constituting probable cause that defendant committed the strict liability homicide offense, viewed from the standpoint of an objectively reasonable police officer.

Basis for Miranda waiver

The Court declines to adopt the new rule prescribed by the Appellate Division and finds no plain error in the trial court's denial of defendant's motion to suppress his statement to police. The Court also concurs with the trial court that the victim's testimony at the pretrial hearing was admissible under N.J.R.E. 804(b)(1)(A)'s exception to the hearsay rule for the prior testimony of a witness unavailable at trial, and that the admission of that testimony did not violate defendant's confrontation rights.

1. The Court first considers the trial court's decision denying defendant's motion to suppress his statement to police. Under New Jersey law, the State bears the burden to prove beyond a reasonable doubt that a suspect's waiver of his privilege against self-incrimination prior to an inculpatory statement was knowing, intelligent, and voluntary in light of all the circumstances. In *State v. A.G.D.*, the Court departed from the totality-of-the-circumstances rule and required law enforcement officers to inform a suspect that a criminal complaint has been filed or arrest warrant has been issued before interrogating him. 178 N.J. 56, 68-69 (2003). The Court reasoned that the failure to inform a suspect that a criminal complaint or arrest warrant has been filed or issued deprives that person of information indispensable to a knowing and intelligent waiver of rights. The rule announced in *A.G.D.* is clear and circumscribed. If a complaint-warrant has been filed or an arrest warrant has been issued against a suspect whom law enforcement officers seek to interrogate, the officers must disclose that fact to the interrogatee and inform him in a simple declaratory statement of the charges filed against him before any interrogation. The officers need not speculate about additional charges that may later be brought or the potential amendment of pending charges.

2. The Appellate Division's expansion of the rule stated in *A.G.D.* is unwarranted and impractical. *A.G.D.* mandates disclosure of factual information about pending charges that the officer can readily confirm and clearly convey. The principle stated in *A.G.D.* stands in stark contrast to the Appellate Division's expanded definition of an arrestee's *Miranda* rights, which relies not on an objective statement of the charges pending against the arrestee, but on an officer's prediction, based on information learned to date in a developing investigation, of what charges may be filed. The Appellate Division's new rule would starkly depart from the Court's prior precedent and from the law of every other jurisdiction. The Court affirms the trial court's application of the totality-of-the-circumstances standard to deny

defendant's motion to suppress his statement. Defendant was read his Miranda rights and waived those rights verbally and in writing.

State v. Gonzalez, 249 N.J. 612(2022)

Basis for Miranda waiver

Defendant's question about the attorney was an ambiguous invocation of her right to counsel. Under settled New Jersey law, see, e.g., *State v. Reed*, 133 N.J. 237,253 (1993), the detective was required to cease questioning and clarify whether defendant was requesting counsel during the interview. Because the State played defendant's recorded statement at trial and read the apology note -- written at the detective's suggestion -- to the jury, the error in failing to suppress that evidence was harmful. The Court also finds plain error in the trial court's admission of certain challenged evidence, and it provides guidance for the proceedings on remand.

If a person subject to custodial interrogation "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). "The United States Supreme Court has drawn a strict line to identify what will qualify as a request for counsel." *State v. Alston*, 204 N.J. 614, 620 (2011). Under the federal bright-line rule, officers must stop questioning a suspect only when the suspect's request for counsel is "unambiguous or unequivocal." *Davis v. United States*, 512 U.S. 452, 461-62 (1994). If a suspect makes an ambiguous or equivocal statement regarding the right to counsel, officers are under no obligation to stop questioning him.

In *State v. Chew*, the New Jersey Supreme Court rejected the standard enunciated in *Davis* and continued to require, in accordance with state precedent, that interrogators conduct an appropriate inquiry into a suspect's ambiguous invocation of the right to counsel. 150 N.J. 30, 63 (1997). Under New Jersey's more flexible approach, a suspect need not be articulate, clear, or explicit in requesting counsel; any indication of a desire for counsel, however ambiguous, will trigger entitlement to counsel. The Court provided guidance in *Alston* and reaffirmed that, in situations where "a suspect's statement 'arguably' amount[s] to an assertion of Miranda rights," conducting a follow-up inquiry is the only way to ensure that a suspect's waiver of their right was knowing and voluntary. 204 N.J. at 621-23. The Court instructed that where the suspect's "statements are so ambiguous that they cannot be understood to be the assertion of a right, clarification is not only permitted but needed." The *Alston* Court noted, however, that officers are under no obligation to give a suspect advice about whether he should assert any of his rights.

Here, defendant's first mention of counsel, "[b]ut what do I do about an attorney and everything?" was an ambiguous invocation of her right to

counsel that required the detective to cease all questioning and seek clarification. Defendant did not seek an opinion about whether she should have a lawyer present, but rather inquired about the availability of counsel. Additionally, defendant's query made it unclear whether she wanted an attorney present at that time or in the future. Thus, defendant's statement was "arguably" a request for counsel. Although the detective was under no obligation to give defendant any advice about obtaining counsel, she was required to cease the interrogation and ask follow-up questions to clarify defendant's obstruse statement regarding counsel.

Because the detective made no further inquiry, all portions of defendant's statement made thereafter, as well as defendant's note of apology to the Borsucks, should have been excluded at trial; admitting the evidence was plain error.

Use of cell phone

Defendant, Michelangelo Troisi, appeals the Law Division order denying his de novo appeal of a guilty finding against him in Princeton Municipal Court for violating N.J.S.A. 39:4-97.3, use of hands-free and hand-held wireless communication devices while driving. At the municipal court trial, defendant argued that the manner in which he was using his cell phone while driving was not a violation of the plain meaning of the statute. Defendant testified and admitted that his conduct in the car required him to divert his attention from steering his vehicle on a public road for enough time to enter his six-digit pass code, open the Google Maps app, and place the cursor in the search window. The municipal court judge found defendant guilty of violating N.J.S.A. 39:4-97.3 and imposed a fine.

Defendant appealed de novo to the Law Division, which found defendant guilty of the traffic violation for substantially the same reasons as the municipal court: defendant's actions in his car exceeded the bounds of the statute.

Applying well-established principles of statutory construction, the court held that making multiple keystrokes on a cell phone to locate and use an app such as Google Maps while driving would constitute an offense under N.J.S.A. 39:4-97.3 and that the Law Division and municipal court did not abuse their discretion in finding that defendant's conduct was a violation. The court also held that the statute was not unconstitutionally vague because it fairly puts motorists on notice of what category of activity is impermissible.

State v. Herrera, 469 N.J. Super. 559 (App. Div. 2022)

Merger of offenses

This case examines whether and in what circumstances a jury trial conviction for leaving the scene of a fatal motor vehicle accident, N.J.S.A. 2C:11-5.1, merges with a conviction for endangering an injured victim, N.J.S.A. 2C:12-1.2. The State appealed from the trial court's decision to impose concurrent state prison terms, arguing that N.J.S.A. 2C:11-5.1 and N.J.S.A. 2C:12-1.2 both expressly require that the sentences be served consecutively. Defendant cross-appealed, arguing that the trial judge should have merged the two convictions. Because the decision whether to impose consecutive or concurrent prison terms necessarily presupposes that a defendant has been convicted of at least two separate crimes, the threshold question is whether defendant's two convictions merge.

The court applies the "flexible" multi-faceted test for merger that focuses on the elements of the crimes and the Legislature's intent in creating them, and on the specific facts of each case. See *State v. Miller*, 237 N.J. 15 (2019). The court compared the elements of the leaving-the-scene and endangering crimes and also construes the express non-merger provisions codified in both N.J.S.A. 11-5.1 and N.J.S.A. 12-1.2. Both crimes are designed to protect injured individuals by creating incentives for persons to remain at the scene of an injury, to report the incident, and to render or summon aid. The two offenses thus offer alternative bases for punishing the same criminal conduct.

With respect to the critical fact-sensitive portion of the multi-part merger test, the court concludes that there was no continuous transaction to split into stages; rather, the criminal conduct was initiated and completed in a brief instant. In this instance, the leaving-the-scene and endangering crimes involved a single voluntary act—defendant's split-second decision to abscond from the accident scene—and were committed in the same place at exactly the same time.

Considering all of the relevant circumstances, the court concludes that the convictions must be merged, rendering academic the State's contention that consecutive sentences should have been imposed.

State v. Caronna, 469 N.J. Super. 462 (App. Div. 2021)

Police procedure: No knock search warrant

This court held that the exclusionary rule applies where police violate Article I, Paragraph 7 of the New Jersey Constitution by unreasonably and unjustifiably ignoring a search warrant requirement that they knock and announce their presence before entering a dwelling. Doing so deters police from flagrantly violating knock-and-announce search warrant requirements; safeguards against unconstitutional, unreasonable, and illegal search and seizures under New Jersey law; and, importantly, upholds the rule of law and integrity of our administration of justice.

State v. Boston, 469 N.J. Super. 223 (App. Div. 2021)

Police request for ID

Defendant Dwayne D. Boston was convicted of third-degree possession of cocaine following a routine traffic stop on his way home from the movies with his wife and children. He contends the police unlawfully asked him, a front-seat passenger in his wife's car, to hand over his State identification card after he told them he did not have a driver's license. The court agrees, and concludes defendant's subsequent arrest on an open traffic warrant was unlawful, and the drugs seized in the ensuing search incident to his arrest should have been excluded at trial.

The court holds in a routine traffic stop where the driver has to be arrested on an open traffic warrant, the officer's asking whether a passenger is a licensed driver is reasonable; but when the passenger claims he does not possess a license, the officer's further demand for identification from the unlicensed passenger in the absence of particularized suspicion is not.

State v. Carrillo, 469 N.J. Super.318 (App. Div. 2021)

Frisk for weapons

The main issue in this appeal from the trial court's denial of defendant's suppression motion without a testimonial hearing is whether the officer violated defendant's rights when he patted him down a second time, just minutes after the officer patted him down the first time and uncovered no weapons. The court concludes that an officer may conduct a second pat-down when, giving weight to the unproductive first one, the circumstances preceding the second one still give the officer reason to believe the suspect is armed and dangerous. Because there exist issues of fact material to that question, the court reverses the trial court's order and remands for a testimonial hearing.

State v. Ehrman, 469 N.J. Super. 1 (App. Div. 2021)

Correct defendant on ordinance prosecution

In these back-to-back appeals, defendant challenged numerous complaint-summonses issued in municipal court by the Jersey City Department of Housing, Economic Development and Commerce for municipal violations involving rental properties owned by various limited liability companies (LLCs) of which defendant was a member. In one appeal, defendant challenged an interlocutory order denying his motion to dismiss twenty-five complaint-summonses issued to him individually and granting the State's cross-motion to amend the complaints to name the LLC that was the record owner instead of him. In the other appeal, defendant challenged the order finding the LLC that was the record owner of the property guilty of violating a municipal ordinance following a trial de novo in the Law Division notwithstanding the fact that the LLC made no appearance through counsel and neither the municipal court nor the trial court inquired on the record to ascertain whether there was a knowing and voluntary waiver before proceeding with the trial.

he court reversed and remanded for entry of an order of dismissal without prejudice of the twenty-five complaint-summonses because they were issued to the wrong defendant and therefore fatally defective and both the municipal court and trial court erroneously relied on a Part IV rule governing civil practice to grant the State's cross-motion to amend. The court also reversed the finding of guilt of the LLC and remanded for a new trial because the absence of an appearance through counsel or a clear waiver of such in a quasi-criminal municipal court prosecution constitutes a violation of constitutional dimension requiring reversal.

State v. Scuderi, 469 N.J Super. 507 (App. Div. 2021)

Effective date of refusal amendments

In this appeal, the court held that the Legislature intended prospective application of the amended refusal statute, N.J.S.A. 39:4-50.4a. That intent was manifested by the Legislature's express statement that the amended legislation—which imposed on all defendants convicted of refusal the less onerous penalty of installing an interlock device rather than forfeiting his or her license as mandated by the former statute—would become effective on December 1, 2019, over four months after it was signed into law, and apply only to those defendants who committed an offense on or after that date. That unequivocal legislation pronouncement militates against retroactive application even for defendants who were sentenced after December 1, 2019.

In such circumstances, courts need not consider the common law exceptions to the presumption of prospective application as discussed in *Gibbons v. Gibbons*, 86 N.J. 515 (1981) and *James v. New Jersey Manufacturers Ins. Co.*, 216 N.J. 552 (2014), nor the timing of the penalty incurred under the general savings statute, N.J.S.A. 1:1–15. The Legislature's determination that interlock devices serve as a greater deterrent than license forfeiture supports the conclusion that the amended legislation was neither ameliorative nor curative, in any event.