

Garden State CLE Presents:

Criminal Law Review - 2023



Instructors



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Lesson Plan

State vs. Higgs, ___ N.J. ___ (2023)
2023 WL 2699200

Defendant Andre Higgs was convicted of murder after a jury trial. Defendant and the decedent, Latrena May, had been involved in a romantic relationship and shared a child. On the evening of May's death, defendant and May were arguing on her front porch when East Orange Police Officer Kemon Lee approached them after hearing a woman's voice shout "police" several times while he patrolled the area.

Officer Lee testified that shortly after exiting his patrol car, he asked May to come down from the porch, but Defendant began shooting May. Officer Lee returned fire and shot Defendant several times. Defendant testified to a different version of events. Defendant stated that May pulled out a gun during their argument, and Defendant took the gun away from her. According to Defendant, he tried to surrender as Officer Lee approached, but the officer fired his weapon at Defendant which led to the involuntary discharge of the gun in Defendant's hand, causing May's death.

Prior to trial, Defendant sought access to Officer Lee's internal affairs file, which included prior incidents of the officer firing his weapon while on duty. Defendant argued that the prior incidents were relevant to his defense that Officer Lee fired first. The trial court denied access to the file. The State then sought to bar Defendant from cross-examining Officer Lee about any prior shootings and the trial court granted the State's motion. Lastly, the State sought to impeach Defendant on cross-examination with his five prior judgments of conviction. Four were over 20 years old at the time of trial and one was over 14 years old. The trial court granted the State's request, finding that a disorderly persons offense seven years prior to the trial was sufficient to "bridge the gap" between the old convictions and the present matter.

At trial, video from Officer Lee's dashcam was played for the jury during the testimony of Officer Lee, Defendant, and Detective Kevin Green, who was not present at the scene of the shooting. Detective Green testified, over objection, that he believed the dashcam footage depicted a gun in Defendant's back waistband as Officer Lee's patrol car approached.

Defendant was convicted of murder, among other offenses, and sentenced to life imprisonment. On appeal, the Appellate Division affirmed Defendant's convictions and sentence, finding no error with the trial court's rulings.

This appeal implicates three issues, each of which was decided in favor of the defendant:

1) Procedure For Review if Police Officer Internal Affairs Investigations - The Court prescribes a framework for trial courts to assess requests for access to internal affairs records and provides guidance for the application of that framework on remand in this case. Because the defense argues Officer Lee discharged his firearm first, defense counsel could potentially be allowed to explore Officer Lee's history of past shootings on cross-examination. On remand, Defendant will be entitled to access the internal affairs file as outlined in the Court's opinion, and that evidence may be used to cross-examine Officer Lee subject to any objections pursuant to N.J.R.E. 403 or 404(b).

2) Lay Opinion Testimony - Detective Green's testimony was based entirely on his lay opinion from watching the video, which was impermissible under N.J.R.E. 701. The video was already in evidence, so the jury was able to view the video and determine for themselves what the video showed.

3) Use of Remote Prior Convictions For Impeachment - Applying the factors in N.J.R.E. 609(b)(2), it was error for the trial court to admit defendant's remote convictions because the State did not meet its burden of establishing that the probative value outweighed the prejudicial effect of admitting the old convictions.

State vs. Gomes, 253 N.J. 6(2023)
The One Diversion Rule

Upon harmonizing the statutes, we conclude that persons who received pre-CREAMMA conditional discharges for specified marijuana offenses - just like persons who had pre-CREAMMA convictions for those marijuana offenses - are no longer categorically precluded from future admission into PTI. Instead, prosecutors and reviewing courts must consider the merits of their PTI applications, without regard to the existence or circumstances of the earlier marijuana-related conditional discharges. Our conclusion is consistent with the arguments of the Attorney General as the State's chief law enforcement officer, as well as all but one of the parties and amici before us.

We must make clear that our reversal of the Appellate Division's decision does not automatically entitle a PTI applicant with a previous marijuana conditional discharge to be admitted into the program. In Gomes's case, the Middlesex County Prosecutor opposed the PTI application, so the matter must be remanded to the trial court to consider whether the various factors under the PTI statute warrant his admission to the program. When assessing those factors, the prosecutor and the court must ignore the existence and circumstances that produced Gomes's earlier charges and conditional discharge.

We stress that this is an exceptional situation involving a sweeping new statute that we have endeavored to harmonize sensibly with pre-existing laws. Our decision harmonizing the provisions should not be interpreted as an invitation to disregard statutory language that has been unaltered by new laws. The result we reach in this distinctive case is amply supported by sound interpretive principles.

State vs. Burnham, 474 N.J.Super 226(App.Div.2023)
Sales Tax - Grading For Purposes of Shoplifting

This case addresses the issue of whether sales tax should be included when calculating the "full retail value" of merchandise under New Jersey's shoplifting gradation statute. N.J.S.A. 2C:20-11(c). Defendant pled guilty to shoplifting an Xbox One with an advertised price of \$499.99. Shoplifting constitutes a crime of the third degree "if the full retail value of the merchandise exceeds \$500 but is less than \$75,000" and a crime of the fourth degree "if the full retail value of the merchandise is at least \$200 but does not exceed \$500." N.J.S.A. 2C:20-11(c)(2) and (c)(3). The State utilized sales tax in grading defendant's offense, and he was therefore charged with a third-degree offense.

The court analyzed the theft statute, which specifically utilizes sales tax to calculate the "amount involved" in its statutory gradation scheme. However, the court observed the shoplifting statute contains no such provision. The court concluded because the Legislature did not determine sales tax should be included in the valuation of full retail value in enacting the shoplifting gradation statute, it was improper for sales tax to have been utilized to increase defendant's charge to a third-degree offense.

State vs. Chau, 473 N.J.Super 430(App.Div.2022)
PCR – Excusable Neglect

The court reverses the trial court's order dismissing defendant's PCR petition as time-barred following guilty pleas to shoplifting and receiving stolen property entered post Padilla vs. Kentucky and remands for an evidentiary hearing. The court finds defendant established excusable neglect as his Texas immigration counsel, who has represented defendant since shortly after he was placed in ICE detention in 2014, certified he failed to advise defendant until September 2019 of the availability of a PCR application in New Jersey, and that there is a reasonable probability if defendant's factual assertions that he pleaded guilty to receiving stolen property, not because he was guilty, but based on incorrect advice about the immigration consequences of risking trial and a jail term, are found to be true, "enforcement of the time bar would result in a fundamental injustice." Rule 3:22-12(a)(1)(A).

See also excusable neglect discussion in State vs. DiFrisco, 187 N.J. 156, 166(2006).

State vs. Tucker, 473 N.J.Super 329(App.Div.2022)
State of Mind Opinion Evidence

In this matter of first impression, the court considered whether the holding in State vs. Cain, 224 N.J. 410 (2016), prohibiting expert witnesses from opining on a defendant's state of mind in drug cases, should also apply to grand jury proceedings. The Court concluded that Cain's holding does apply to grand jury proceedings because concerns about the prejudicial effect of such testimony on petit jury deliberations are equally present during one-sided grand jury presentations, if not more so. Consequently, the court reversed in part the trial court order denying defendant's motion to dismiss the indictment charging defendant with numerous drug-distribution related offenses and remanded for further proceedings because a police officer testified before the grand jury, based on his training and experience, that defendant had possessed controlled dangerous substances with the intent to distribute them.

State vs. Supreme Life, 473 N.J.Super 165(App.Div.2022)
Prosecutor's Inflammatory Summation

Defendant testified on his own behalf at trial, asserting self-defense and defense of his son. Defendant admitted during cross-examination that the statement he provided to police on the night of the incident failed to include critical details, for example, that his son was present or that defendant stabbed the two victims. Defendant admitted that he lied to police.

During the course of his summation, the prosecutor expressed his personal opinion that defendant was guilty, repeatedly called defendant a "liar," told the jury "we know he's a liar," and said defendant's testimony was "a story created by a liar." The court concluded the prosecutor's repeated derogatory comments amounted to plain error requiring reversal.

Defendant admitted lying to police in his statement after the stabbings - the prosecutor's opening salvo early in summation was defendant "lied his rear end off" - but the prosecutor did not limit his characterization of defendant as a liar to the falsity of that version of events. Instead, the prosecutor

used defendant's admission that he lied to police as a cudgel to explicitly argue defendant's testimony at trial was more lies told by an admitted liar.

In addition to simply calling defendant a “liar” numerous times, the prosecutor wove the accusation into an attack on defendant's claims of self-defense and defense of another, seemingly blurring which party had the burden of proof:

I also want to include an explanation of self-defense and defense of others and why they don't apply in this case. Because for any of those things to apply, there's one thing that you would have to find.

You have to find that this man is not a liar. Something he got on that stand and admitted to you he was. You'd have to believe him in order to believe the lesser included. You would have to believe him in order to find self-defense or that he acted in the defense of others.

You can't believe a word that man says. Based on his testimony yesterday we know he's a liar.

Well, we know that is a lie because he g[ot] on the stand and t[old] you he lied.

Then he takes the stand yesterday, his story changes completely. That's what liars do. When they get caught in a lie, they have to come up with something to justify it... They lie to get out of trouble.

It's a story that's created by a liar.

Again, he's a liar, he's not worthy of belief. You have to believe him to find passion/provocation. You have to believe him to find self-defense or defense of others.

At another point, early in the summation, the prosecutor told jurors his personal opinion that defendant “is definitely guilty of the murder of Moriah Walker.”

State vs. Cambrelen, 473 N.J.Super 70(App.Div.2022)
Terms & Conditions of a Plea Agreement

In this appeal, the court considered the propriety of a negotiated plea agreement provision, permitting the State to revoke its sentencing recommendation if the defendant is arrested on new charges that are not adjudicated prior to sentencing. Because the court concluded a no-new-arrest or no-new-charges provision violates a defendant's right to due process and is fundamentally unfair, the court vacated defendant's conviction and remanded the matter to allow the parties to negotiate a new plea agreement or permit defendant to withdraw his guilty plea. The court's decision does not affect those plea agreement provisions that limit the State's right to revoke its sentencing recommendation or recommend a harsher sentence if a defendant fails to appear at sentencing, provided the defendant is afforded a fair hearing pursuant to established case law.

State vs. Olenowski 253 N.J. 153(2023) **Admissibility of Novel Scientific Evidence**

This Supreme Court holding dramatically changed the New Jersey law related to the admissibility of novel scientific evidence. Prior to the decision, in a criminal trial, a court's evaluation of the scientific reliability of novel scientific devices or procedures had been decided under the century old decision in Frye vs. United States, 293 F. 1013(D.D.Cir.1923).¹ The Supreme Court has now adopted a radically different standard for expert testimony and has applied it prospectively to drunk-driving and criminal cases in both municipal and Superior Court trials.

In general, to satisfy the criteria for expert testimony under N.J.R.E. 702, the proponent of expert evidence must establish three things: (1) the subject matter of the testimony must be beyond the ken of the average juror; (2) the field of inquiry must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the testimony.

On the issue of reliability, the former standard under Frye permitted judges to consider only whether the subject of the testimony has been generally accepted in the relevant scientific community. This restrictive standard was difficult to apply to certain types of expert evidence, including novel areas. Essentially, Frye required judges to approach the question of reliability indirectly. Its focus was on general acceptance, rather than on reliability itself. By doing so, Frye obscured the heart of the issue. Instead of directing judges to examine actual measures of reliability, like the soundness of the methodology used to validate a scientific theory or technique, the strength of the reasoning underlying it, and the accuracy of the theory or technique in practice, Frye only permitted judges to consider the views of individuals in the relevant field. As a result, over the past 30 years, Frye had been criticized in the case law and published literature as both unduly restrictive and unduly

¹The so-called Frye standard had been adopted by the New Jersey Supreme Court for criminal trials in State vs. Harvey, 151 N.J. 117, 171, 699 A.2d 596(1997).

permissive. Frye also presented a difficult threshold question: identifying the relevant scientific community in which general acceptance must be measured. In some instances, scientific evidence may be studied by multiple scientific communities or none at all.

The new standard adopted by the New Jersey Supreme Court in Olenowski was first articulated by the United States Supreme Court in Daubert vs. Merrell Dow, 509 U.S. 579(1993). Daubert created a new methodology-based standard to determine admissibility.

When faced with a proffer of expert scientific testimony, the trial judge must determine at the outset whether the expert is proposing to testify to:

- (1) scientific knowledge that
- (2) will assist the trier of fact to understand or determine a fact in issue.

This analysis entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

The Supreme Court went on to provide a non-exclusive list of four factors (commonly referred to as the Daubert factors) to help courts apply the new standard.

Those factors are:

- (1) whether the scientific theory or technique can be, or has been, tested;
- (2) whether it “has been subjected to peer review and publication”;
- (3) “the known or potential rate of error” as well as the existence of standards governing the operation of the particular scientific technique; and;
- (4) General acceptance in the relevant scientific community.

The Court also emphasized the inquiry is a flexible one and that its focus must be solely on principles and methodology, not on the conclusions that they generate. Ultimately, consistent with the Federal Rules of Evidence, the new standard was designed to ensure that expert testimony would rest on a reliable foundation. Essentially, Daubert empowers trial courts to directly examine the reliability of expert evidence and consider a broader range of relevant information.

The New Jersey Supreme Court adopted this test for all civil cases in 2018 with its decision in In re Accutane Litigation, 234 N.J. 340, 398-99(2018). In the Olenowski holding, the New Jersey Supreme Court found that Daubert's focus on methodology and reasoning, which applies in civil cases, is a superior approach to criminal cases as well.

It is important to note that nothing in the Olenowski decision disturbs prior rulings that were based on the Frye standard. Future challenges in criminal cases that address the admissibility of new types of evidence should be assessed under the Daubert methodology standard. The same is true for challenges to the admissibility of evidence that has previously been sanctioned but the scientific reliability underlying the evidence has subsequently changed.

Related Discussion

Status of 9510 rollout in Monmouth County under the Daubert Standard

State vs. Zadroga, 472 N.J.Super 1(App.Div.2022)
Mistrial Due to Errors in Chain of Custody
Double Jeopardy

On occasion, a review of the chain of custody of a blood sample during the course of trial will reveal mistakes. This is precisely what occurred in Zadroga, where, in an aggravated manslaughter trial, the State mistakenly attempted to introduce in evidence the results of a blood sample that had not been extracted from the defendant's body. The trial court granted a mistrial based upon both manifest necessity and the prosecution's bad faith. However, that ruling by the judge did not bar a representation of the case to a new grand jury and a second trial on double jeopardy grounds.

A.G. Directive 2022-6
Municipal Court Bench Warrants

I. Municipal Court Warrants with Bail Amounts Of \$500 Or Less

A) Location of Release. Officers may encounter individuals with qualifying warrants (i.e., municipal court warrants with \$500 or less bail) in a variety of settings. Such individuals shall not be arrested (subject to limited exceptions in Section I.B), but shall be released at the scene, on their own recognizance with the conditions in Section I.G. The completion of a bail recognizance form and release is intended to occur as expeditiously as possible.

B) Custodial Arrest Generally Prohibited. Individuals encountered with qualifying warrants should generally not be subject to a custodial arrest, a search, or handcuffing, unless (a) issuing the notice on scene poses a safety risk or (b) probable cause that a crime has been committed or a pre-existing circumstance - independent of the warrant - justifies such action.

1) In situations that fall within these limited exceptions, the officer may take the individual into custody on the warrant, conduct a search incident to arrest, and transport them to a police station for processing the warrant and release on their own recognizance.

2) In rare instances, an officer may—in their discretion—determine that an individual is not suitable for release and take the individual into custody on the warrant. For example, this provision may apply where the individual has an unusually high number of outstanding qualifying warrants that indicates a substantial risk of non-appearance.

C) Identification. Before releasing an individual on their own recognizance on a warrant under this Directive, officers should obtain valid identification from the individual or otherwise take reasonable steps to verify their identity and current address.

D) Multiple Warrants. If an individual is encountered with multiple warrants with bail amounts of \$500 or less, so long as each warrant individually qualifies, then the procedures of Section I (Domestic violence) apply. That is, the bail amounts should generally be considered individually, not added together.