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New Jersey Criminal Law Review – 2019



Lesson Plan

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State v. Rodriguez, ___ N.J. ___ (2019) 2019 WL 2180375

Periodic confinement for NJSA 2C:40-26

N.J.S.A. 2C:43-2(b) is its own list of mutually exclusive sentencing options. As a result, an intermittent sentence is not available where the Legislature has otherwise provided for the specific sentence that an offender is to serve, such as we have in N.J.S.A. 2C:40-26.

Therefore, construing N.J.S.A. 2C:40-26 in the context of Title 2C's sentencing scheme, we conclude that the language of N.J.S.A. 2C:40-26(c) manifests a legislative intent to bar intermittent sentences. The legislative choice of very specific wording regarding the custodial sentence to be imposed under N.J.S.A. 2C:40-26(c) does not permit resort to an alternative, intermittent sentence available as a general sentencing option under N.J.S.A. 2C:43-2(b)(7).

A finding to the contrary could allow offenders sentenced under NERA, the Graves Act, or for the most serious CDS offenses to serve their periods of parole ineligibility on nights or weekends. The parties agree that allowing the most dangerous offenders -- those guilty of crimes the Legislature has found are the most serious -- to serve their sentences on nights or weekends is illogical. It is a result the Legislature could not have intended.

When the Legislature proscribes parole, the offender cannot be released from custody. During an intermittent sentence, however, an offender is given complete freedom during the time they [sic] are not incarcerated. Therefore, allowing a person convicted under N.J.S.A. 2C:40-26 the increased freedom of intermittent sentencing when the Legislature has simultaneously prohibited the regulated release of parole for the fixed minimum period of time of 180 days creates an illogical result that cannot be the intention of the Legislature.

Contrast State v. Anicama, 455 N.J.Super. 365 (2018) (Same result for 3rd offender drunk-drivers)

State v. Johnson, ___ N.J. ___ (2019) 2019 WL 2292399

PTI for 3rd degree intent to distribute

Ordinarily, an abuse of discretion will be manifest if defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgement [sic]. In order for such an abuse of discretion to rise to the level of “patent and gross,” it must further be shown that the prosecutorial error complained of will clearly subvert the goals underlying Pretrial Intervention.

The presumption against PTI for first- and second-degree offenses should encompass third-degree school zone offenses, although well-reasoned at the time, is no longer consistent with the Legislature's intent. Based on the changed statutory language and the Legislature's clear intent in amending [N.J.S.A. 2C:35-7](#), we hold the presumption against PTI for first- and second-degree offenders can no longer be applied to [N.J.S.A. 2C:35-7\(a\)](#) (third degree) offenders. Because the prosecutor relied, in part, on the presumption against PTI for second-degree offenses, we believe it appropriate to remand defendant's application to the prosecutor to reconsider defendant's application.

Defendant was not charged with selling or dispensing narcotics because there was no evidence that he sold or dispensed narcotics. Imputing a presumption against PTI for a “sale” to defendant, who was charged with “possession with intent to distribute,” was improper.

State v. Locane, 454 N.J.Super. 98 (App. Div. 2018)

Jury trial required on DWI associated with reckless vehicular homicide

Reckless vehicular homicide requires a three-year parole disqualifier if the defendant's recklessness was based upon a BAC of 0.08% or greater.

In *Alleyne v. United States*, 570 U.S. 99 (2013), the Court ruled that a mandatory minimum sentence, such as the three-year parole bar found in our vehicular homicide statute, violates the Sixth Amendment right to a jury trial when a fact upon which it is predicated, such as intoxication, is not submitted to the jury for their determination. In other words, unless a jury finds a defendant was intoxicated when the homicide occurred, no sentence enhancement can be imposed.

Contrast with *State v. Denelsbeck*, 225 N.J. 103 (2016).

State v. McIntype-Caulfield, 455 N.J.Super. 1 (App. Div. 2018).

Civil reservations in Superior Court criminal cases

It is well known that guilty pleas in criminal proceedings are evidential in a related civil case as a statement by a party under However, “[f]or good cause shown[,] the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding.” R. 3:9–2.

“The purpose of [Rule 3:9–2] is to avoid an unnecessary criminal trial of a defendant who fears that a civil claimant will later use [her] plea of guilty as a devastating admission of civil liability.”

Case law has defined two examples of what constitutes good cause under Rule 3:9–2. First, ‘good cause’ exists for a no-civil-use agreement when such an agreement is necessary to remove an obstacle to a defendant's pleading guilty to a criminal charge. Second, good cause may be shown to grant a reservation where the civil consequences of a plea may wreak devastating financial havoc on a defendant.

The motion judge observed there was no pending civil lawsuit at the time of the plea. That is true. But the plain text of the rule, and the case law interpreting it, does not make its applicability dependent on a filed lawsuit. The lack of a pending civil lawsuit is not determinative, especially here where the statute of limitations (SOL) would not run for approximately nineteen and one-half years.

State v. Fede, 237 N.J. 138 (2019)

Hindering the administration of law (NJSA 2C:29-1)

In order to violate [N.J.S.A. 2C:29-1\(a\)](#), a person must not only “purposely obstruct[], impair[] or pervert[] the administration of law” but must do so through one of the specifically enumerated acts in the statute, through “physical interference or obstacle,” or through an “independently unlawful act.” In its second sentence, the statute specifically distinguishes the above behaviors from failures to perform non-official duties and other conduct.

The statute is unambiguous. It defines the explicit means by which one may be criminally liable for obstruction and requires affirmative interference. The statute's second sentence informs interpretation of the statute's meaning overall, namely, that the obstruction statute in its entirety requires as a necessary element an act of affirmative interference. Otherwise, the outer contours of the statute would be difficult to limit. For example, a defendant could be convicted of obstruction for sitting on his couch and declining to respond to the police officer's knock.

We hold that to find criminal liability under [N.J.S.A. 2C:29-1](#) requires an affirmative act or some affirmative interference.

Fede's refusal to remove the already-fastened chain lock required no physical effort; it was not an act. It would be both counterintuitive and contrary to the plain meaning of the term “affirmative,” which requires effort, to find that defendant affirmatively interfered with the police by failing to remove an already-fastened chain lock from his door. Our case law and the statute do not compel a different result.

State v. Vincenty, 237 N.J. 122 (2019)

Informing a criminal suspect of active warrants

In [State v. A.G.D.](#), this Court held that “[t]he government's 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. Defendant Adrian Vincenty argues that two detectives failed to inform him of the criminal charges filed against him when they interrogated him and asked him to waive his right against self-incrimination. Relying on [A.G.D.](#), Vincenty filed a motion to suppress statements he made to the detectives.

The record reveals that the detectives failed to inform Vincenty of the charges filed against him when they read him his rights and asked him to waive his right against self-incrimination. That failure deprived Vincenty of the ability to knowingly and intelligently waive his right against self-incrimination. Pursuant to [A.G.D.](#), Vincenty's motion to suppress should have been granted.

Vincenty's interrogation is precisely what [A.G.D.](#) prohibits, and it substantiates [A.G.D.](#)'s holding. That is to say, Vincenty's interrogation illustrates that suspects cannot knowingly and intelligently determine whether to waive their right against self-incrimination if, when making that determination, they have not been informed of the charges filed against them.

State v. Miller, 237 N.J. 15 (2019)

Double counting aggravating factors

Miller was convicted of possessing and distributing over 900 images and videos of child pornography through the use of online peer-to-peer file-sharing programs. He was also in possession of thirty-three CDs and DVDs, eleven of which contained photographs and recordings of child pornography separate from those found on his computer. At Miller's sentencing hearing, the trial judge applied aggravating factor one, the nature and circumstances of the offense, [N.J.S.A. 2C:44-1\(a\)\(1\)](#), because the pornography possessed and distributed by Miller depicted the rape, penetration, and sexual assault of extremely young children, at least one of whom was an infant. After considering the relevant aggravating and mitigating factors, the trial judge sentenced Miller to seven years' imprisonment for the distribution charge, and one year of imprisonment for the possession charge, to be served consecutively. Miller subsequently appealed.

Aggravating factor one requires the trial court to consider “[t]he nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel, or depraved manner.” [N.J.S.A. 2C:44-1\(a\)\(1\)](#). When applying factor one, “the sentencing court reviews the severity of the defendant's crime, ‘the single most important factor in the sentencing process,’ assessing the degree to which defendant's conduct has threatened the safety of its direct victims and the public. “When it assesses whether a defendant's conduct was especially ‘heinous, cruel, or depraved,’ a sentencing court must scrupulously avoid ‘double-counting’ facts that establish the elements of the relevant offense.

Nevertheless, “[a] sentencing court may consider ‘aggravating facts showing that [a] defendant's behavior extended to the extreme reaches of the prohibited behavior.’” Thus, “[i]n appropriate cases, a sentencing court may justify the application of aggravating factor one, without double-counting, by reference to the extraordinary brutality involved in an offense.

State v. Brown, 236 N.J. 497 (2019)

Failure to provide *Brady* materials

One week after defendants' murder trial began, after counsel made opening statements and examined four of the State's witnesses, the prosecutor turned over to defense counsel nineteen reports that were in the State's possession but had not previously been provided to defendants. Defendants then moved to dismiss the indictment with prejudice, relying on [Brady v. Maryland, 373 U.S. 83 \(1963\)](#).

We first conclude that the State's failure to produce nineteen discovery items until one week after the beginning of defendants' murder trial did violate defendants' due process rights under [Brady](#). We reach this conclusion, in part, because the trial court abused its discretion by excluding admissible impeachment and exculpatory evidence withheld by the State. Though there is no evidence or allegation that the State acted in bad faith or intentionally in failing to timely produce the discoverable material, we nonetheless reverse the judgment of the Appellate Division, vacate defendants' convictions, and remand for a new trial because defendants were deprived of a fair trial.

Three essential elements must be considered to determine whether a [Brady](#) violation has occurred: (1) the evidence at issue must be favorable to the accused, either as exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the defendant's case. The existence of those three elements evidences the deprivation of a defendant's constitutional right to a fair trial under the due process clause.

In determining the effect of the withheld evidence “in the context of the entire record,” we consider the strength of the State's case, the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility.

State v. Santamaria, 236 N.J. 390 (2019)

Graphic sexual photographs used to draw an inference

The defendant began a sexual relationship with one of his students, when the victim was 14 years old. The relationship continued for years until after she turned 18 years old and went off to college. The evidence at trial included a large number of graphic photographs of a sexual nature involving both the defendant and the victim. The State sought to use these photographs at trial to have the jury draw an inference that the defendant and victim had a relationship while she was a juvenile and his student.

The Supreme Court ruled that the photographs were relevant and not subject to exclusion as cumulative or unduly prejudicial under NJRE 403. Moreover, the defendant commented upon the photographs to argue that what was depicted was not illegal.

Here, the State used the photographs to demonstrate that the consensual relationship admitted to by both parties logically must have preceded the victims's majority based on the highly intimate nature of the photographs taken shortly after she turned eighteen. That use of the photographs made the evidence intrinsic to the charged crime as proof of the ongoing relationship between the victim and defendant. The photographs served to demonstrate the control defendant had over the victim, and suggested defendant groomed her over their years-long sexual relationship beginning shortly after the victim's fourteenth birthday. The photographs were intrinsic, not evidence of "other crimes, wrongs, or acts," so the Appellate Division was incorrect to find the photographs should have been excluded under 404(b).

State v. Green, 236 N.J. 71 (2018)

Prior DWI convictions as proof of recklessness in a vehicular homicide case.

Green was charged in a grand jury indictment with first-degree vehicular homicide while intoxicated and within 1,000 feet of a school, contrary to [N.J.S.A. 2C:11-5\(b\)\(3\)\(a\)](#). Before trial, the State moved in limine to introduce Green's two prior DWI convictions, which the State argued were relevant to the issue of recklessness. According to the State, the prior convictions demonstrated that Green “had knowledge of the substantial and unjustifiable risks associated with driving while intoxicated.”

In State v. [Cofield](#), we adopted a four-part test to determine the admissibility of other-crimes evidence under NJRE 404(b):

- (1) The evidence of the other crime must be admissible as relevant to a material issue;
- (2) It must be similar in kind and reasonably close in time to the offense charged;
- (3) The evidence of the other crime must be clear and convincing; and
- (4) The probative value of the evidence must not be outweighed by its apparent prejudice.

Turning to prejudice, admission of the prior DWI convictions suggests to the jury that Green acted in conformity with his prior behavior. The circumstances surrounding this vehicular homicide prosecution indicate that, although intoxicated, Green was not speeding, swerving, or otherwise committing any traffic infractions. Therefore, the motion court could reasonably conclude that admission of Green's prior DWI convictions would confuse or risk misleading the jury, causing it to convict Green based solely on his propensity to drive while intoxicated. The potential for jury confusion is especially high when, as here, proof of causation is tenuous. Even with the most carefully crafted limiting instruction, admission of Green's two prior DWI convictions could result in the jury's conflating recklessness and causation.

State v. Cassidy, 235 N.J. 482 (2018)

Need for NIST certified thermometers in Alcotest

We do not accept the State's contention that the risk of inaccurate calibration is infinitesimal due to the numerous other fail-safes in the calibration procedure. It is improbable such a showing could satisfy the general acceptance standard because the temperature probes used in the calibration process would still have an unknown level of measurement uncertainty and would not be traceable to the national standards. But assuming such a showing could satisfy the State's burden, the State failed to demonstrate why we should reject the Special Master's findings, specifically his concern that a laboratory error or a confluence of multiple minor errors could lead to undetected erroneous calibrations.

We order the State to notify all affected defendants of our decision that breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer are inadmissible, so that they may take appropriate action. We further commend to the State that it require the manual recording of the NIST-traceable readings going forward as a check against negligent performances of this integral human test. Further, we lift the stay on all pending cases so that deliberations may commence on whether and how those cases should proceed. For those cases already decided, affected defendants may now seek appropriate relief. Because the State waited approximately a year to notify the affected defendants, we relax the five-year time bar, R. 7:10-2(b)(2), in the interests of justice. We ask the Director of the Administrative Office of the Courts to monitor these cases and recommend how best to administer them in the event any special measures are needed. Finally, as to defendant Cassidy, we exercise our original jurisdiction and vacate her conviction.

State v. J.L.G., 234 N.J. 265 (2018)

Scientific reliability of CSAAS (“Child Sexual Abuse Accommodation Syndrome” (CSAAS)).

Thirty-five years ago, Dr. Roland Summit, M.D., a clinical psychiatrist, identified five categories of behavior that were reportedly common in victims of child sexual abuse: secrecy; helplessness; entrapment and accommodation; delayed, conflicted, unconvincing disclosure; and retraction. Dr. Summit drew on various sources, including his own clinical practice, and asserted that the five behaviors comprised a syndrome -- the “Child Sexual Abuse Accommodation Syndrome” (CSAAS).

In criminal cases, this Court has continued to rely on the [Frye](#) standard to assess reliability. The test requires trial judges to determine whether the science underlying the proposed expert testimony has “gained general acceptance in the particular field in which it belongs.” *Frye v. United States*, [293 F. 1013, 1014 \(D.C. Cir. 1923\)](#).

There are three ways to establish general acceptance under [Frye](#): expert testimony, authoritative scientific and legal writings, and judicial opinions. Although we look for wide support within the relevant scientific community, complete agreement is not required for evidence to be admitted.

We hold that expert testimony about CSAAS in general, and its component behaviors other than delayed disclosure, may no longer be admitted at criminal trials. Evidence about delayed disclosure can be presented if it satisfies all parts of the applicable evidence rule. See [N.J.R.E. 702](#). In particular, the State must show that the evidence is beyond the understanding of the average juror.

That decision will turn on the facts of each case. Here, because the victim gave straightforward reasons about why she delayed reporting abuse, the jury did not need help from an expert to evaluate her explanation. However, if a child cannot offer a rational explanation, expert testimony may help the jury to understand the witness's behavior. We therefore ask the Committee on Model Jury Charges to develop an appropriate instruction on delayed disclosure.

State v. Twiggs, 233 N.J. 513 (2018)

Tolling the SOL based upon DNA evidence

The defendant was indicted after the SOL had run based upon DNA evidence that linked a co-defendant to the crime. The co-defendant confessed and implicated the defendant. The defendant moved to dismiss the indictment while the State claimed the statute of limitations had been tolled due to DNA that was used to [prosecuted the co-defendant.

The New Jersey Code of Criminal Justice (the Code) contains a tolling provision that delays the start of the clock on the statute of limitations “when the prosecution is supported by physical evidence that identifies the actor by means of DNA testing ... until the State is in possession of both the physical evidence and the DNA ... evidence necessary to establish the identification of the actor by means of comparison to the physical evidence.” [N.J.S.A. 2C:1-6\(c\)](#). These consolidated appeals hinge on the meaning of the term “actor” within that provision and require us to determine whether the provision applies when a DNA identification does not directly identify the defendant but rather begins an investigative chain that leads to the defendant.

We conclude that the DNA-tolling exception applies only when the State obtains DNA evidence that directly matches the defendant to physical evidence of a crime. Because the DNA identifications at issue in these cases did not directly link the defendant to the relevant offense, his indictment is barred by the SOL.

State v. Ferguson, ___ N.J. ___ (2019) 2019 WL 2167335

Territorial jurisdiction

This case involves a prosecution for strict liability for a drug-induced death. The defendant purchased drugs in Paterson. He then returned to his home in New York with the drugs and resold the drugs to a third person. The third person quickly died of an overdose in New York from the drugs he had injected.

The question for the Court is whether New Jersey had jurisdiction to prosecute the homicide as a strict liability offense.

We hold that New Jersey's Code of Criminal Justice restricts the State's exercise of territorial jurisdiction over the defendant for a violation of [N.J.S.A. 2C:35-9](#). Under [N.J.S.A. 2C:1-3\(a\)\(1\)](#), the State cannot exercise territorial jurisdiction over the defendant on the strict-liability drug-induced death charge because the distribution of heroin to the victim and his death -- both essential elements of the offense -- did not occur in New Jersey.