

Garden State CLE Presents:

N.J. DWI Annual Review - 2023



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Part I

Sentencing Issues

Laurick Relief on N.J.S.A. 2C:40-26 - Sentencing **State vs. Konecny, 250 N.J. 321(2022)**

We now hold that 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 that 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.

However, in the present case, defendant unquestionably had counsel during the prior proceedings at issue. The municipal courts, therefore, erred in granting defendant Laurick relief. Moreover, the PCR petition for ineffective assistance of counsel was filed years out of time and cannot be considered by the courts.

Proof of Prior Conviction Based Upon Cassidy Issues
State vs. Zingis, 471 N.J.Super 590(App.Div.2022)

The municipal prosecutor relied on what he described as a list on the Attorney General's website of defendants notified by the State that their prior DWI convictions were subject to review under Cassidy for two propositions: (1) that defendant's 2012 DWI conviction was not tainted by Dennis because defendant's name was not on the list; and (2) Dennis's misconduct did not affect any DWI convictions arising from Camden County. Both the municipal court and the Law Division accepted the municipal prosecutor's representations as proof of both propositions.

We find this to constitute an error. The record contains no evidence with respect to how the Attorney General's list was compiled and whether it definitively includes all DWI convictions tainted by Dennis's malfeasance.

A notice issued by the judiciary raises doubt about the comprehensive nature of the list. The judiciary's Cassidy website, of which we take judicial notice, N.J.R.E. 201, states that although “notices have been sent to all [defendants] eligible” to have a prior DWI conviction reviewed under Cassidy, “[y]ou may be eligible even if you did not get a notice” This is an acknowledgement by the judiciary that the list of defendants who received a Cassidy notice from the State is not definitive.

There is, therefore, reasonable doubt with respect to whether defendant's 2012 DWI conviction was based on false calibration records executed by Dennis. We do not foreclose the possibility that a more robust record in a future case may establish beyond a reasonable doubt that the State had identified every DWI conviction possibly tainted by Dennis's misconduct, provided notice to the defendant in each of those cases, and compiled a record of each such notification. If so, such a list might well constitute evidence that a prior DWI conviction was not tainted by Dennis and can be used as a predicate to enhance a sentence for a subsequent DWI conviction. That record was not compiled here.

State vs. Zingis, 251 N.J. 502(2022)
(Stay & Review Granted By Special Master)

A petition for certification of the judgment in A-000905-20 having been submitted to this Court together with a motion to stay the Appellate Division's opinion, and the Court having considered the same;

IT IS ORDERED that the petition for certification and motion for stay are granted.

IT IS FURTHER ORDERED that the matter is remanded to a Special Master for a plenary hearing to consider and decide the following questions, along with any other questions that the Special Master, in his discretion, deems relevant to the undertaking: (1) Which counties had convictions affected by the conduct of Marc W. Dennis, a coordinator in the New Jersey State Police's Alcohol Drug Testing Unit, as described in State vs. Cassidy, 235 N.J. 482(2018), and (2) What notification was provided to defendants affected by Dennis's conduct?

Sentencing – Credit For Time Served on IID - Jurisdiction
State vs. Coviello, 252 N.J. 539(2023)

When a portion of a defendant's sentence for driving while intoxicated requires the installation of an ignition interlock device (IID), should the defendant's application for credit toward that portion of the sentence be heard by the sentencing court or the Motor Vehicle Commission (MVC)?

We conclude the sentencing court, and not the MVC, has the appropriate jurisdiction over defendant's motion for sentencing credit concerning the IID requirement. That conclusion is supported by well-established sentencing principles and the text and structure of the drunk-driving statutes.

Part II
Driving Without liability Insurance
N.J.S.A. 39:6A-4.5

Memudu vs. Gonzalez, N.J.Super (App.Div.2023)
2023 WL 2229487
Operation of a Motor Vehicle Required

On October 26, 2019, the decedent, whose vehicle was not covered by a policy of liability insurance, was driving a 2007 Lexus southbound on the New Jersey Turnpike in Edison. Defendant Khawaja Hameed was driving behind decedent, in a vehicle owned and operated by defendants Hameed and A-1 Limousine (A-1 defendants), when he rear-ended decedent's vehicle. After the accident, decedent's vehicle was disabled.

A tow truck driver, Brandon McMahan, who happened to be traveling southbound in the area of the accident, came upon the scene. He noticed debris on the road and decedent standing outside of his vehicle. McMahan turned on the beacon lights on the top of his vehicle, along with floodlights and hazard lights. He promptly contacted the police and exited his tow truck to render assistance. McMahan spent approximately fifteen minutes first assisting Hameed. Subsequently, he checked on Decedent, who exhibited no physical injuries from this initial accident. Decedent requested to use McMahan's cell phone light to search for his cell phone inside his Lexus. At that time, the front portion of decedent's vehicle was partially in the left travel lane, and the rear of the vehicle was on the shoulder.

McMahan remained on the left shoulder. As Decedent was searching for his cell phone, McMahan observed a Ford Transit Van driven by Gonzalez crash into the front passenger side of the Lexus. McMahan subsequently observed Decedent face down on the road outside of his vehicle. Approximately thirty minutes elapsed between the first and second accident. Decedent was pronounced dead at the scene.

The pivotal issue before us on appeal is whether N.J.S.A. 39:6A-4.5(a) operates to bar plaintiff's Wrongful Death and Survivor Acts claims as a result of decedent being uninsured at the time of the fatal accident. In addressing this question, we must determine whether decedent was “operating” his vehicle at the time of the second accident pursuant to N.J.S.A. 39:6A-4.5(a).

We conclude he was not operating his vehicle for the purposes of N.J.S.A. 39:6A-4.5(a), and the trial court correctly denied defendants' motion for summary judgment. Based on the summary judgment record, decedent's vehicle was inoperable prior to the second and fatal accident, and considerable time passed between the two accidents. Decedent utilized McMahon's cell phone flashlight to enter his car to retrieve his own cell phone—not for any other purpose. Shortly thereafter, Gonzalez's vehicle struck the decedent's car. Even if we were to consider a broader reading of the “while operating” language under N.J.S.A. 39:6A-4.5(a), there is simply no evidence in the record decedent was operating or had any intent to operate the disabled vehicle at that juncture.

Driving While Intoxicated as a Statutory Bar
Castano vs. Augustine, N.J.Super (App.Div.2023)
2023 WL 2358451

This appeal requires us to consider whether, in the absence of a conviction or guilty plea to DWI, the statute nevertheless bars the claim of a plaintiff who was seriously injured in a traffic accident after admittedly drinking liquor and beer at several establishments during the day, and who may have had a blood alcohol concentration (BAC) that exceeded the legal limit at the time of the accident.

During his deposition, plaintiff sometimes admitted being “drunk” at the time of the accident; at other times he admitted having alcohol in his system but said he was not “drunk.” He detailed the drinks that he had that day at three different bars until approximately twenty minutes before the crash. Plaintiff also admitted that he was speeding at the time of the crash.

However, the plaintiff never pleaded guilty nor was he found guilty of the predicate DWI or refusal offenses. The statute requires a conviction to trigger the bar.

Part III
New Standards For Admission of Novel Scientific Proofs
State vs. Olenowski, , N.J. (2023)
2023 WL 2053169

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 permissive. Frye also presented a

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

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 N.J. 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

Part IV

Trial Issues

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.

Part V

Social Host Liability

DelValle vs. Trino, N.J.Super (2022)

2022 WL 17419646

This case involves an intoxicated, adult decedent who drowned in a swimming pool while attending a party where alcoholic beverages were served and consumed.

The Social Host Liability Act (SHLA) specifically addresses a person's bodily injury from a motor vehicle accident negligently caused by an intoxicated person who was willfully and knowingly served alcohol while visibly intoxicated by a social host of an unlicensed premises. N.J.S.A. 2A:15-5.6(b)(1)-(3). This does not mean the SHLA is the exclusive civil remedy in all circumstances when a cause of action alleges a social host negligently served alcohol. There is no case law standing for the proposition that a social host's liability for the service of alcohol to an intoxicated person is limited to claims under the SHLA to the exclusion of other negligence theories. The SHLA is limited to injuries sustained in the negligent operation of a motor vehicle. Because injuries can arise from negligent conduct related to intoxication outside of motor vehicle accidents, those claims should be entitled to relief if there was a breached duty of care that actually and proximately caused damages.