

Garden State CLE Presents:

Post-Conviction Relief
In
DWI Cases



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Presenters for
our Next
Lunchtime
Learning Event:



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Lesson Plan

Part I

General Legal Principles

- a) Utility – PCR in DWI matters can be a critically important defense motion in cases involving prior DWI convictions that impact on a pending DWI charge, a charge of N.J.S.A. 39:3-40(f)(2) and (3) or N.J.S.A. 2C:40-26.
- b) Burden of Proof – Post-conviction relief applications are considered to be civil in nature. Thus, the burden of going forward with the evidence is upon the petitioner and the burden of proof is a mere preponderance of the evidence. State vs. Zold, 105 N.J.Super 194, 203, 251 A.2d 475(LawDiv.1969), aff'd, 110 N.J.Super 33, 264 A.2d 257(App.Div.), certif. denied, 57 N.J. 131, 270 A.2d 34(1970). The petitioner must be prepared to establish by a preponderance of the credible evidence that he is entitled to the requested relief. State vs. Mitchell, 126 N.J. 565, 579, 601 A.2d 198(1992).
- c) Status quo ante – The granting of a PCR application returns the parties to the status quo ante. This means that all the complaints in the original case are reactivated and must be resolved de novo.
- d) Notification to NJ MVC – To remove the record of a conviction where PCR has been granted, the Court Administrator should send a corrected MF-1 card to the NJ MVC.
- e) Public Defender – An indigent petitioner is entitled to representation by the public defender on post-trial hearings. N.J.S.A. 2B:24-6(b). See also Rule 7:10-2(e).
- f) Motions and Briefs – Technically, except for motions to suppress evidence (Rule 7:5-2) and PCR applications under Rule 7:10-2(a), motions in municipal court are to be done orally. This procedure should be relaxed in other PCR applications under Rule 1:1-2 so as to provide the court with an adequate legal basis to fairly decide the motion. See also State vs. Holup, 253 N.J.Super 320, 325(App.Div.1992).
- g) Evidentiary Hearings – Typically, a PCR motion under Rule 7:10-2(a) based upon ineffective assistance of counsel will require a formal evidentiary hearing since the facts underlying the motion will be entirely outside the trial record.
- h) Case Disposition – The results of a pending PCR application on a DWI case may impact the sentence to be imposed upon the defendant in his new case. However, awaiting the outcome of a PCR motion in another municipal court may unreasonably delay the new case's disposition. One possible approach is to resolve the case but withhold sentence imposition on those aspects of sentence where the PCR application could make a difference. See State vs. Robertson, 228 N.J. 138(2017).

Part II
Post Conviction Relief Applications
Available in a Drunk-Driving Case

1) Motion to Reconsider – Rule 1:7-4(b)

On motion made not later than 20 days after service of the final order or judgment upon all parties by the party obtaining it, the court may grant a rehearing or may, on the papers submitted, amend or add to its findings and may amend the final order or judgment accordingly, but the failure of a party to make such motion or to object to the findings shall not preclude that party's right thereafter to question the sufficiency of the evidence to support the findings. The motion to amend the findings, which may be made with a motion for a new trial, shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or on which it has erred.

a) Time Limitations - The time limit in the Rule set at 20 days may not be enlarged. (See Rule 1:3-4(c)). This time limitation conflicts with the municipal appeal Rule 3:23-2 following a conviction which also has a non-enlargement prohibition beyond 20 days. However, an adverse post-conviction ruling by the Court can itself be appealed under Rule 3:23-2 by either the defendant or the State.

b) Commentary – The 20-day limitation requires defendants to make a rapid decision as to which avenue to pursue following a DWI trial conviction. The issue does not arise in Superior Court as the appeal period is stayed pending the reconsideration of the motion. This motion can also be used following the denial of a motion to suppress where appropriate. The defendant has no right to pursue an interlocutory appeal of an adverse ruling from a trial court on a motion to suppress.

2) Motion For a New Trial – Rule 7:10-1

On defendant's motion, the court may, pursuant to the time limitations of this rule, grant the defendant a new trial if required in the interest of justice. The court may vacate the judgment if already entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial, based on the grounds of newly discovered evidence, shall be made within two years after entry of a final judgment. A motion for a new trial on the grounds of fraud or lack of jurisdiction may be made at any time. A motion for a new trial, based on any other grounds, shall be made within twenty days after the entry of judgment of conviction or within such further time as the court fixes during the twenty-day period.

a) Time Limitations - The time limit in this Rule days may not be enlarged. (See Rule 1:3-4(c)).

Newly discovered evidence – two years

Fraud or lack of jurisdiction – no time limitation

Any other grounds - 20 days

b) Commentary – The 20-day limitation is included to permit the State to retry the DWI matter quickly while the witnesses and evidence are still available. The extended time limitations in the Rule may make retrial impossible, although that is not a consideration for the Court in deciding the motion.

3) Motion to reconsider a sentence - Rule 7:9-4

(a) Time. The court, in its discretion, may reduce or change a sentence, either on its own motion or on the motion of defendant, which may be either oral or written, at any time during which the court retains jurisdiction over the matter.

(b) Procedure. All changes of sentence shall be made in open court upon notice to the defendant and the prosecuting attorney. An appropriate order setting forth the revised sentence and specifying the change made and the reasons for the change shall be entered on the record.

a) Time Limitations – None provided that the Court still maintains jurisdiction over the matter (e.g., the sentence has not been completed. See State vs. Coviello, 252 N.J. 539, 556(2023) (Five- year passage of time on an ignition interlock device issue.)

b) Commentary – The revised sentence must be legal in the sense that it conforms to New Jersey law that existed at the time of the DWI offense. This may involve a reduced period of jail, license suspension or a fine reduction that was imposed in excess of any statutorily required minimum.

4) Motion to Vacate a Guilty Plea – Rule 7:6-2(b)

A motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice.

a) Time Limitations – None

b) Commentary – This post-conviction application is becoming increasingly common in municipal court due to its simplicity of filing, lack of time limit and requirements for supporting documentation. At a minimum, the defendant should provide a transcript of the plea colloquy. Typical applications are based upon a failure to strictly follow the plea requirements of Rule 7:6-2(a) which mandates that a municipal court judge shall not accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant and, in the court's discretion, of others, that the plea has been made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea.

c) The typical motion under this Rule will rely upon the plea transcript to demonstrate that:

There was no factual basis for the DWI plea; or
The plea was no voluntary; or
The plea was not knowingly given.

Typically, the Court should judge these motions on an interests of justice standard prior to sentencing and on a manifest injustice standard thereafter.

See discussion on elements of a proper plea in State vs. J.J., 397 N.J.Super 91(App.Div.2007)

d) When a guilty plea has been vacated, the defendant may not be subject to a second punishment if he has completed the initial DWI sentence. This legal proposition is grounded in principles of double jeopardy and substantive due process. See State vs. Best, 70 N.J. 56, 60(1976). This prohibition creates a tension for prosecutors as to whether to continue a DWI prosecution after a guilty plea has been vacated.

e) Cases Relevant to Plea Withdrawal

State vs. Barboza, 115 N.J. 415, 420-21(1989).

State vs. Campfield, 213 N.J. 218, 237(2013)

State in the Interest of T.M., 166 N.J. 319(2001) (juvenile plea vacated for no factual basis); State vs. Urbina, 221 N.J. 509(2015) (assertion of self-defense claim during plea colloquy vitiated factual basis); State vs. Pineiro, 385 N.J.Super 129(App.Div.2006) (inadequate factual basis during plea colloquy.); State vs. Pena, 301 N.J.Super 158(App.Div.1997) (Inadequate factual basis required vacating plea and returning parties to the status quo ante.)

The necessary criteria for plea withdrawal are set forth in State vs. Slater, 198 N.J. 145(2009). These criteria do not apply in a case where the basis for the plea withdrawal is lack of a factual basis. See State vs. Tate, 220 N.J. 393, 404(2015).

State vs. Abbondanza, 201 N.J.Super 181(App.Div.1985) (Painstaking and searching inquiry). Collateral Consequences not revealed - (immigration, etc)

5) Relief from an Enhanced Custodial Term Based on a Prior Un-counseled Conviction. Rule 7:10-2(g) (State vs. Laurick, 120 N.J. 1(1990)).

The most recent updates to Laurick applications under Rule 7:10-2(g) came from the Court's holding in State vs. Patel, 239 N.J. 424(2019). The Court made the following changes to the substantive law and procedure.

a) Procedure and Limitations – For a defendant facing a second or subsequent DWI conviction, an indigent or non-indigent defendant may file a petition for post-conviction relief to bar the use of a prior un-counseled DWI conviction as a predicate conviction for increasing a term of incarceration. This form of post-conviction relief does not prohibit the imposition of enhanced financial or administrative penalties, such as a period of license suspension. By “un-counseled” we mean an unrepresented defendant who was not advised by the municipal court of his right to retain counsel or, if indigent, of his right to appointed counsel without cost; who otherwise did not know of his right to counsel in the proceeding and did not waive that right; and who, if properly advised of his rights, would have secured counsel or accepted appointed counsel. The defendant has the burden of proving he was un-counseled but is not required to establish that the outcome would have been different had he been represented. (Patel at 448).

b) There is no longer any time limit for filing Laurick applications.

c) The venue is the municipal court where the plea was entered.

d) Availability of Proofs - The defendant must secure the relevant court documents or the electronic recording or transcript of the proceeding to establish a violation of the notice requirement. In the absence of documentary evidence or witnesses with a recollection, the defendant is in a position to do no more than file an affidavit or certification averring that he was not advised of his right to counsel and did not know that he could retain counsel. The defendant who claims he was indigent at the time of the prior proceeding should attest that he was not advised and did not know of his right to appointed counsel and was unable to afford an attorney. In future cases, he also should attach to his affidavit or certification relevant documents -- bank statements or other financial documents that would establish his indigence in accordance with the standards set forth in N.J.S.A. 2A:158A-14 and N.J.S.A. 2B:24-9. (Patel at 444).

e) Non-Indigent Defendants - To secure relief from an enhanced custodial sentence for a subsequent DWI conviction, a non-indigent defendant must establish that in the earlier un-counseled DWI proceeding, (1) he was not advised or did not know of his right to counsel and (2) had he known of his right to counsel, he would have retained a lawyer.

f) Indigent Defendants - A defendant contending he was indigent must establish that in the earlier un-counseled DWI proceeding (1) he was not advised and did not know of his right to appointed counsel, (2) he was entitled to the appointment of counsel under the applicable financial means test, Rule 7:3-2(b), and (3) had he been properly informed of his rights, he would have accepted appointed counsel.

g) To secure relief from an enhanced custodial sentence, neither an indigent nor a non-indigent defendant must show that the outcome would have been different had he been represented.

h) Other Crimes and Offenses -The rule of law in Laurick also applies to other offenses that utilize prior DWI convictions as predicate offenses. See State vs. Konecny, 250 N.J. 321(2022) (N.J.S.A. 2C: 40-26); State vs. Thomas, 401 N.J.Super 180(LawDiv.2007) (Driving on the revoked list).

i) Application to DWI Step-Downs – Laurick offenses are not counted as prior convictions in determining the eligibility for a DWI sentence step-down. State vs. Revie, 220 N.J. 126(2014); State vs. Conroy, 397 N.J.Super 324(App.Div.2008). Proof of this issue requires submission of a Laurick order from the Court that granted the relief.

6) Post-Conviction Relief - Rule 7:10-2(a)

There is a five-year limitation on filing these petitions which begins to run on the date of conviction. The time limitation may be dispensed for illegal sentence or excusable neglect. Relaxation per Rule 1:1-2 should be granted only under “exceptional circumstances” to avoid an injustice - State vs. Mitchell, 126 N.J. 565, 580(1992).

Procedures - Petition must be in writing, verified by petitioner and strictly comply with requirements of Rule 7:10-2(f);

May not raise issues that were not raised in a prior proceeding (Rule 7:10-2(d))

Must assert cognizable grounds for relief under Rule 7:10-2(c):

Substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of New Jersey;

Lack of jurisdiction of the court to impose the judgment rendered on defendant's conviction;

Imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law; or

Any ground previously available as a basis for collateral attack on a conviction by habeas corpus or any other common law or statutory remedy

Granting of a PCR application vacates Conviction and return parties to *status quo ante* based upon cognizable grounds such as ineffective assistance of counsel, illegal sentence, etc.

Hearing on the merits only should be granted based upon a prima facie showing of grounds for relief in the verified pleadings. (Example – ineffective assistance of counsel should require testimony from former defense attorney.)

Ineffective assistance of counsel – State vs. Fritz, 105 N.J. 42, 59(1987)

Per se ineffective assistance – United States vs. Cronin, 466 U.S. 648(1984)

Part III

PCR Rules of Court

Rule 7:10-2. Post-Conviction Relief

(a) Petition for Relief. A person convicted of an offense may, pursuant to this rule, file with the municipal court administrator of the municipality in which the conviction took place, a petition for post-conviction relief captioned in the action in which the conviction was entered.

(b) Limitations and Exclusiveness.

(1) A petition to correct an illegal sentence may be filed at any time.

(2) A petition based on any other grounds shall not be accepted for filing more than five years after entry of the judgment of conviction or imposition of the sentence sought to be attacked, unless it alleges facts showing that the delay in filing was due to defendant's excusable neglect.

(3) A petition for post-conviction relief shall be the exclusive means of challenging a judgment of conviction, except as otherwise required by the Constitution of New Jersey, but it is not a substitute for appeal from a conviction or for a motion incident to the proceedings in the trial court and may not be filed while appellate review or the filing of a motion in the municipal court is available.

(c) Grounds. A petition for post-conviction relief is cognizable if based on any of the following grounds:

(1) substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of New Jersey;

(2) lack of jurisdiction of the court to impose the judgment rendered on defendant's conviction;

(3) imposition of sentence in excess of or otherwise not in accordance with the sentence authorized by law; or

(4) any ground previously available as a basis for collateral attack on a conviction by habeas corpus or any other common law or statutory remedy.

(d) Bar of Grounds Not Raised in Prior Proceedings; Exceptions.

(1) The defendant is barred from asserting in a proceeding under this rule any grounds for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of Rule 3:22-4, or in any appeal taken in any of those proceedings, unless the court on motion or at the hearing finds that:

(A) the grounds for relief not previously asserted could not reasonably have been raised in any prior proceeding;

(B) enforcement of the bar would result in fundamental injustice; or

(C) denial of relief would be contrary to the Constitution of the United States or of New Jersey.

(2) A prior adjudication on the merits of any grounds for relief asserted in the petition is conclusive, whether made in the proceedings resulting in the conviction or any prior post-conviction proceeding, or in any appeal taken from those proceedings.

(e) Assignment of Counsel. A defendant may annex to the petition a sworn statement asserting indigency in the form (Form 5A) prescribed by the Administrative Director of the Courts, which form shall be furnished by the municipal court administrator. If the court finds that the defendant is indigent as herein provided, and that the original conviction involved a consequence of magnitude, it shall order counsel assigned to represent defendant and shall further order a transcript of testimony of any proceeding shown to be necessary in establishing the grounds of relief asserted. Absent a showing of good cause, which shall not include lack of merit of the petition, the court shall not substitute new assigned counsel. If counsel is assigned, the court shall not thereafter substitute new assigned counsel absent a showing of good cause, which shall not, however, include lack of merit of the petition.

(f) Procedure.

(1) The municipal court administrator shall make an entry of the filing of the petition in the proceedings in which the conviction took place, and if it is filed pro se, shall forthwith transmit a copy to the municipal prosecutor. An attorney filing the petition shall serve a copy on the municipal prosecutor before filing.

(2) The petition shall be verified by defendant and shall set forth with specificity the facts upon which the claim for relief is based, the legal grounds of the complaint asserted and the particular relief sought. The petition shall include the following information:

(A) the date, docket number and contents of the complaint upon which the conviction is based and the municipality where filed;

(B) the sentence or judgment complained of, the date it was imposed or entered, and the name of the municipal court judge then presiding;

(C) any appellate proceedings brought from the conviction, with copies of the appellate opinions attached;

(D) any prior post-conviction relief proceedings relating to the same conviction, including the date and nature of the claim and the date and nature of disposition, and whether an appeal was taken from those proceedings and, if so, the judgment on appeal;

(E) the name of counsel, if any, representing defendant in any prior proceeding relating to the conviction, and whether counsel was retained or assigned; and

(F) whether and where defendant is presently confined. A separate memorandum of law may be submitted.

(G) In addition, the moving papers in support of such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(3) Amendments of the petitions shall be liberally allowed. Assigned counsel may, as a matter of course, serve and file an amended petition within 25 days after assignment.

Within 30 days after service of a copy of the petition or amended petition, the municipal prosecutor shall serve and file an answer to the petition or move on ten days' notice for dismissal. If the motion for dismissal is denied, the government's answer shall be filed within fifteen days after entry of the order denying the dismissal.

(4) A defendant in custody shall be present in court if oral testimony is adduced on a material issue of fact within the defendant's personal knowledge. A defendant in custody may otherwise be present in court only in the judge's discretion.

(5) In making a final determination on a petition, either on motion for dismissal or after hearing, the court shall state separately its findings of fact and conclusions of law and shall enter judgment or sentence in the conviction proceedings and any appropriate provisions as to re-arraignment, retrial, custody, bail, discharge, correction of sentence or as may otherwise be required.

(g) Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Uncounseled Conviction.

(1) Venue. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction in which a defendant was not represented by counsel and not advised of the right to counsel or, if indigent, of the right to have counsel assigned shall be brought in the court where the prior conviction was entered.

(2) Time for filing. A petition seeking relief under this paragraph may be filed at any time.

(3) Procedure. A petition for post-conviction relief sought under this paragraph shall be in writing and shall conform to the requirements of Rule 7:10-2(f). In addition, the moving papers in support of such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(4) Grounds. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction is cognizable only where a defendant was not represented by counsel and was not advised of the right to counsel or, if indigent of the right to have counsel assigned.

(5) Appeal. Appeals from a denial of post-conviction relief from the effect of a prior conviction shall be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under Rule 3:23-2(a).