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**Garden State CLE Presents:**



## **Winning Your Municipal Appeal:**

### **Strategy and Tactics**

**Instructors:**



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

### **Lesson Plan**

# Part I

## Introduction

**a) Municipal Appeals. Appellate Division Review** – Generally speaking, the decisions made by a trial judge in municipal court are seldom subject to direct review in the Appellate Division.<sup>1</sup> Rather, the Appellate Division will review a decision made by the Law Division stemming from a municipal appeal. The standard of review in these cases places the focus on whether there was sufficient credible evidence in the record to support the Law Division’s findings.<sup>2</sup>

**b) Presumption of Innocence** - Technically, a review of a quasi-criminal conviction in municipal court by the Law Division does not constitute an appeal in the usual sense. Unlike cases on appeal on the Appellate Division where the defendant is no longer presumed innocent,<sup>3</sup> the presumption of innocence that the defendant enjoyed in the municipal court proceedings continues before the Law Division. The review in the Superior Court is conducted as a trial *de novo* on the municipal court record where the prosecution must once again prove the defendant’s guilt beyond a reasonable doubt.<sup>4</sup>

**c) Standard of Review** - In trying the case on the municipal court record, the Law Division judge must make his own findings of fact and conclusions of law while deferring to the municipal judge’s credibility findings.<sup>5</sup> On factual issues, standard of review for the Law Division judge is to give due, although not necessarily controlling, regard to the opportunity of the municipal court judge to assess the credibility of the witnesses.<sup>6</sup> However, the reviewing Law Division judge owes no special deference to the legal conclusions of the municipal court judge which are determined *de novo*.<sup>7</sup>

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<sup>1</sup>Such appeals are made on application made pursuant to Rule 2:5-6, by leave granted, in extraordinary cases, and in the interest of justice. See Rule 2:2-3(b).

<sup>2</sup>State vs. Johnson, 42 N.J. 146, 162, 199 A.2d 809(1964).

<sup>3</sup>State vs. Robertson, 228 N.J. 138, 148, 155 A.3d 571(2017).

<sup>4</sup>State vs. Snyder, 337 N.J.Super 59, 61–62, 766 A.2d 316(App.Div.2001).

<sup>5</sup>See State vs. Ross, 189 N.J.Super 67, 75, 458 A.2d 1299(App.Div.1983).

<sup>6</sup>State vs. Johnson, 42 N.J.146, 157, 199 A.2d 809(1964).

<sup>7</sup>Manalapan Realty, L.P. vs. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230(1995).

**d) Range of Issues on Appeal** - Review of municipal court decisions can cover a wide range of other outcomes, including sentencing or the granting (or denial) of a motion to suppress evidence. The Law Division may also entertain interlocutory appeals from the defendant or prosecutor and the denial post-conviction applications by the defendant.

**e) Denial of post-conviction applications** - The denial of a post-conviction application by the municipal court judge is also subject to Law Division review. These may include applications for post-conviction relief (Five-year statute of limitations with the burden of proof set at preponderance of the evidence), *Laurick* relief, motions to vacate a plea (Rule 7:6-2(b)) and motions to amend a sentence (Rule 7:9-4), none of which has a statute of limitations. Rule 3:23-2 provides that the prosecutor may appeal these determinations as well.

**f) Ten Practice Tips from Joe** - Certain strategic decisions taken early in the appeals process will often affect the outcome of the case. These include the following considerations and tactics:

i) Avoid disputing factual findings by the trial judge. These are entitled to an enormous level of deference in the Law Division. The standard for reversal is that the appellate court will not disturb a trial court's findings unless they went so wide of the mark that the judge was clearly mistaken. One exception to this rule deals with factual findings based upon video evidence. In those instances, Law Division judges are permitted to make their own factual determinations.

ii) Avoid challenging credibility determinations by the trial judge. These assessments at trial are entitled to enormous deference on appeal and do not have to be explained in the record. See State vs. LoCurto, 157 N.J. 463(1999).

iii) Since the legal conclusions of the municipal court judge are not entitled to any level of special deference on appeal, the best results normally come from challenges to the local court's legal determinations (e.g., incorrect, overruled by other law, inconsistent with statute, rule, or regulation).

iv) Do not waste time on challenging trial level determinations for which the judge will be accorded latitude, such as in evidence decisions, rulings on objections, adjournment requests and the like. These rulings are subject to an abuse of discretion standard on appeal.

v) On sentencing issues, assuming that the sentence is otherwise legal, the challenge can be based upon its excessiveness and that the municipal court judge did not weigh the statutory aggravating and mitigating factors in d/p and petty d/p matters (N.J.S.A. 2C:44-1) or the case law factors in traffic cases (See State vs. Moran, 202 N.J. 311 (2010) and State vs. Palma, 219 N.J. 584 (2014)).

vi) Conditional pleas – Often, it is strategically better to plead guilty following the loss of an important pre-trial motion. This procedure will save time, money and the need for the defendant to present potentially incriminating evidence at trial. Under Rule 7:6-2(c), With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty, reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. A defendant who prevails on appeal will be afforded the opportunity to withdraw the guilty plea. A conditional plea is unnecessary in motions to suppress because the right to appeal is contained within Rule 7:5-2.

vii) Structural errors will entitle the defendant to a new trial in every case. These include issues related to public trials, confrontation issues, evidence being heard by the court in the absence of the defendant or counsel, and other fundamental criminal procedure trial rights.

viii) The stay procedure is not available in cases involving an interlocutory appeal from the municipal courts. Basically, the municipal court case will continue to chug along while the case is before the Law Division.

ix) A post-trial motion for the municipal court judge to reconsider a decision must be made within 20 days after the signing of the final order under Rule 1:7-4. Simultaneously, the period to file a municipal appeal in the Law Division is also 20-days under Rule 3:23-2. Ironically, neither of these 20-day time limits can be expanded by virtue of Rule 1:3-4(c). Thus, as a practical matter, parties to litigation in municipal court must choose between these two procedures since there is no provision to toll the appeal time limits of Rule 3:23-2 pending the determination of a motion to reconsider.<sup>8</sup>

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<sup>8</sup>See discussion in State vs. Resorts International, 173 N.J.Super 290, 294-95, 414 A.2d 269(App.Div.1980) where time was extended under Rule 2:5-6 in the interests of justice. See also State vs. Burten, 207 N.J.Super 53, 58-59, 503 A.2d 907(App.Div. 1986).

x) Under Rule 2:9-1, the supervision and control of the proceedings on appeal or certification is in the appellate court from the time the appeal is taken or the notice of petition for certification filed. This means that as soon as the notice of appeal has been filed, the municipal court loses jurisdiction over any further involvement in the case.

## **Part II**

### **Direct Appeal - Rules of Court**

a) Text of Rule 3:23-1: Exclusive method of review - Except as provided by Rule 2:2-3(b), review of a judgment of conviction in a criminal action or proceeding in a court of limited criminal jurisdiction shall be by appeal as provided by Rule 3:23.

#### **Discussion and Analysis**

This Rule provides that the Law Division will be the proper forum for municipal appeals in virtually all cases. It corresponds to municipal court Rule 7:13-1 that states appeals must be taken in accordance with Rules 3:23, 3:24, and 4:74-3, and in extraordinary cases and in the interest of justice, in accordance with Rule 2:2-3(b). The references to Rule 2:2-3(b) set an almost insurmountable bar to direct review by the Appellate Division in that such an appeal must meet the standards of being accepted by leave granted, only in extraordinary circumstances and in the interests of justice. As a result, the appeal of a municipal court determination will almost never be directly reviewed in the Appellate Division. Rather, such an appeal will first involve an initial review of the Law Division's determination of a municipal appeal.

b) Text of Rule 3:23-2: How to take an appeal - The defendant, a defendant's legal representative, or other person aggrieved by a judgment of conviction, or the defendant or State, if aggrieved by a final post-judgment order entered by a court of limited jurisdiction, shall appeal therefrom by filing a notice of appeal with the clerk of the court below within 20 days after the entry of judgment. Within five days after the filing of the notice of appeal, one copy thereof shall be served on the prosecuting attorney, as hereinafter defined, and one copy thereof shall be filed with the Criminal Division Manager's office together with the filing fee therefor and an affidavit of timely filing of said notice with the clerk of court below and service on the prosecuting attorney (giving the prosecuting attorney's name and address). On failure to comply with each of the foregoing requirements, the appeal shall be dismissed by the Superior Court, Law Division without further notice or hearing. However, if the appeal is from a final judgment of the Superior Court arising out of a municipal court matter heard by a Superior Court judge sitting as a municipal court judge, the appeal shall be to the Appellate Division in accordance with Rule 2:2-3(a)(1) and the time limits of Rule 2:4-1(a) shall apply.

### **Discussion and Analysis**

**1) Standing to appeal** – Under this Rule, both the defendant himself and his legal representative (defense attorney) have standing to file a municipal appeal. But such standing is not limited to these parties. The Rule extends standing to any person who has been aggrieved by a judgment of conviction. This could conceivably include a victim who objected at the municipal court level to an order that the defendant's guilty plea not be evidential in any civil proceeding<sup>9</sup> It might also include a civilian complainant who was dissatisfied about some aspect of a plea agreement negotiated by the defendant and the prosecutor. On the other hand, a private citizen complainant has no standing to appeal the dismissal of a complaint<sup>10</sup> or the refusal of the municipal court to issue process on a complaint based upon a purported lack of probable cause.<sup>11</sup>

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<sup>9</sup>See Rule 7:6-2a(1). See Maida vs. Kuskin, 221 N.J. 112, 110 A.3d 867(2015).

<sup>10</sup>State v. Vitiello, 377 N.J.Super 452, 873 A.2d 591(App.Div.2005).

<sup>11</sup>State v. Bradley, 420 N.J.Super 138, 19 A.3d 479(App.Div.2011).

**2) Standing - Appeals by the prosecution** – Double jeopardy considerations generally bar the State of New Jersey from pursuing an appeal following conviction or acquittal in a criminal or quasi-criminal case heard in municipal court.<sup>12</sup> Moreover, there is no provision in this Rule for the prosecution to appeal either the legality or punitive component of a municipal court sentence, although such an appeal by the State is available as part of New Jersey common law.<sup>13</sup> The double jeopardy bar will generally not affect a post-judgment application, such as a defendant’s application for post-conviction relief or to vacate a guilty plea. As a result, Rule 3:23-2 allows these types of appeals by the prosecution.

**3) Time requirements and tolling** – The initial filing of the municipal appeal must be made with the court municipal court administrator with 20-days after the entry of judgment.<sup>14</sup> This time limitation may not be expanded by consent of the parties<sup>15</sup> although it has been subject to tolling through the case law.<sup>16</sup> Entry of judgment in this context means that the court has imposed sentence or, in the case of an interlocutory appeal, has signed an order granting or denying the application. The notice of appeal must also be filed within five days after serving the municipal court administrator with the county prosecutor and the Criminal Division Manager's office together with the filing fees and an affidavit of timely filing with the municipal court administrator. A failure to follow these procedures by the party seeking to appeal will result in a dismissal.

**4) Direct appeal to the Appellate Division** – There is a small category of municipal court cases that will be heard in the Law Division with the Superior Court judge sitting as a judge of the municipal court. By way of example, when a sitting judge has been charged with driving while intoxicated, the case will be heard by the vicinage assignment judge or his designee in Superior Court. Upon conviction, the appeal, which would normally be heard *de novo* in the Law Division, should be made directly to the Appellate Division.<sup>17</sup>

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<sup>12</sup>State vs. Barnes, 84 N.J. 362, 420 A.2d 303 (1980); State vs. Carlson, 344 N.J.Super 521, 782 A.2d 950 (App.Div.2001); State vs. Costello, 224 N.J.Super 157, 539 A.2d 1258(App.Div.1988).

<sup>13</sup>State vs. Faunce, 244 N.J.Super 499, 582 A.2d 1268(App.Div.1990).

<sup>14</sup>Rule 3:23-2 still refers to the clerk of the municipal court, but that position no longer exists and has been replaced by the court administrator.

<sup>15</sup>Rule 1:3-4(c).

<sup>16</sup>State vs. Martin, 335 N.J.Super 447, 762 A.2d 707(App.Div.2000). Under Rule 7:14-1c, every defendant must be informed on an individual basis by the judge of his right to appeal and to do so without cost if indigent.

<sup>17</sup>See State vs. Cerefice, 335 N.J.Super 374, 762 A.2d 668(App.Div.2000).

**5) Deposit for transcript - Indigence** - One issue of major concern to people seeking to file a municipal appeal is the deposit for transcript. Rule 2:5-3(d) requires a deposit in the sum of \$ 500.00 for each day or fraction thereof of trial or hearing. This amount presents a significant obstacle for many litigants and, in most cases, is far in excess of the final cost of the transcript. In order to eliminate this barrier, an attorney who seeks to file a municipal appeal should seek a relaxation of Rule 2:5-3(d) under the general relaxation provisions of Rule 1:1-2. An accompanying certification should stress that the defendant is without sufficient funds to pay \$500 and some lesser deposit amount (perhaps \$50) is appropriate since the final cost of the transcript will be insignificant. On the other hand, Rule 3:23-8a(3) provides that a defendant who is indigent may have his transcript paid for by the county or the municipality in the case of an ordinance violation.

**c) Text of Rule 3:23-5: Relief pending appeal - Relief from Custodial Sentence.** If a custodial sentence has been imposed, and an appeal from the judgment of conviction has been taken, the defendant shall be admitted to bail by a judge of the Superior Court in accordance with the standards set forth in Rule 3:26-1a.

**Relief from Fine.** A sentence to pay a fine, a fine and costs, or a forfeiture may be stayed by the court in which the conviction was had or to which the appeal is taken upon such terms as the court deems appropriate.

**Relief from Order for Probation.** An order for probation may be stayed if an appeal is taken.

### **Discussion and analysis**

**1) Release from incarceration** – The main case dealing with the stay of a municipal court sentence pending appeal is *State v. Robertson*, 228 N.J. 138 (2017). Since a defendant who files a municipal appeal will continue to be presumed innocent once the case is heard *de novo* in the Law Division, there is no particular justification that he be subject to the imposition of sanctions before the case has been decided by the Law Division judge. As a result, a defendant who has been sent to jail as part of his municipal court sentence is entitled to bail under this Rule in conformity with the standards set forth under Rule 3:26-1a. As a practical matter, this means that most defendants will be released from custody based upon certain conditions set by the Superior Court without posting cash bail.

**2) Stay of fines and other financial sanctions** – Rule 3:23-5b authorizes a stay of payment of the financial obligations associated with the municipal court sentence. This paragraph of the Rule also allows this application to be granted by either the municipal court judge or the Superior Court. This procedure technically violates the limitations imposed by Rule 2:9-1a which vests exclusive jurisdiction in the appellate court once an appeal has been filed. The better procedure for appellate counsel to follow is to seek a stay of the fines and other financial sanctions in the municipal court pending the filing of the appeal. Thereafter, relief should be sought in the Superior Court.

**3) License suspension** – Once again, *Robertson* is the key case. Rule 3:23-5 does not specifically address a stay of license suspension. However, the Rule’s use of the word “forfeiture” may be interpreted as a license suspension in the sense that this is the word the Legislature now uses (effective December 1, 2019) to describe this sanction in drunk-driving cases under N.J.S.A. 39:4-50. In reality, none of this technical argument matters in that *Robertson* provides practitioners and judges with abundant guidance on the terms and conditions of a stay of a license suspension on appeal to both the Law Division and the Appellate Division.<sup>18</sup> The power to stay any aspect of a sentence is also set forth in the municipal court Rules.<sup>19</sup>

**d) Text of Rule 3:23-8: Hearing on appeal** - Options available to the Court - The court to which the appeal has been taken may reverse and remand for a new trial or may conduct a trial de novo on the record below. The court shall provide the municipal court and the parties with reasons for a reversal and remand. If the court to which the appeal is taken decides the matter *de novo* on the record, the court may permit the record to be supplemented for the limited purpose of correcting a legal error in the proceedings below.

**Briefs** - Briefs shall be required only if questions of law are involved on the appeal or if ordered by the court and shall be filed and served prior to the date fixed for hearing or such other date as the court fixes.

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<sup>18</sup>State vs. Robertson, 228 N.J. 138, 155 A.3d 571(2017). See also N.J.S.A. 39:5-22 which provides. “Where a license has been revoked for a violation of section 39:4-50 of this Title, and an appeal has been taken from the judgment, the appeal shall not operate to restore the license during the pendency of the appeal, however, the license may be restored either by the trial court or the appellate court pending disposition of the appeal.”

<sup>19</sup>See Rule 7:13-2, “Notwithstanding Rule 3:23-5, a sentence or a portion of a sentence may be stayed by the court in which the conviction was had or to which the appeal is taken on such terms as the court deems appropriate.”

**Waiver; Exception.** The appeal shall operate as a waiver of all defects in the record including any defect in, or the absence of, any process or charge laid in the complaint, and as a consent that the court may, during or before the hearing of the appeal, amend the complaint by making the charge more specific, definite or certain, or in any other manner, including the substitution of any charge growing out of the act or acts complained of or the surrounding circumstances of which the court from whose judgment or sentence the appeal is taken had jurisdiction, except that if the appeal is from a conviction for an indictable offense, the appeal shall not operate as a consent that the complaint may be amended so as to charge such an offense or a new or different indictable offense, unless the defendant agrees to such amendment.

**Defenses Which Must Be Raised Before Trial.** The defenses of double jeopardy, lack of jurisdiction in the court, failure of the complaint to charge an offense, the unconstitutionality of the statute, regulation promulgated pursuant to statute or ordinance under which the complaint is made and all other defenses and objections based on defects in the institution of the prosecution or in the complaint must be raised by motion and determined in accordance with Rule 3:10.

**Disposition by Superior Court, Law Division.** If the defendant is convicted, the court shall impose sentence as provided by law. If the defendant is acquitted, the court shall order the defendant discharged, the conviction in the court below set aside, and the return of all fines and costs paid by the defendant. An appropriate judgment shall be entered, and a copy thereof transmitted to the court below.

**Appearance by Prosecuting Attorney.** The prosecuting attorney shall appear and act on behalf of the respondent at the hearing.

### **Discussion and analysis**

**1) Range of options on appeal** – This Rule begins by authorizing judges of the Law Division to take any one of the following steps when considering an appeal.

i) After hearing oral argument and reviewing the briefs of the parties, the Court may summarily reverse or affirm the decision of the municipal court judge. If the legal issue is susceptible to immediate correction, such as in the imposition of an illegal sentence, the Law Division judge may correct the error.

ii) In cases where the decision made by the municipal court judge involved guilt or innocence as a result of a trial, the Law Division may reverse the decision and remand for a new trial in municipal court. More often, the Law Division judge will conduct a trial de novo on the record made in the lower court. In limited instances, the Law Division may also permit the record to be supplemented for the limited purpose of correcting a legal error in the proceedings below. By way of example, this might include excluded testimony from an expert or lay witness.

**2) Waiver** – The filing of a municipal appeal constitutes a waiver of any defects in the record. This means that the appellant will not be permitted to argue legal issues that were not preserved in the record in municipal court by way of motion, objection or otherwise.<sup>20</sup> A good example is a statement made by the defendant in violation of his Miranda right.<sup>21</sup> Another is a challenge to the admissibility of evidence seized by the police in violation of the defendant's rights under the Fourth Amendment. However, such a waiver does not apply to defects that are either constitutional or jurisdictional in nature. By way of example, an indigent defendant who was subject to a consequence of magnitude at trial will be permitted to challenge his conviction if he was improperly denied his right to appointed counsel. A jurisdictional challenge may involve a prosecution for a statute that had been ruled to be unconstitutional by an appellate court or for an offense that was beyond the territorial jurisdiction of the local municipal court.<sup>22</sup>

A defendant may raise plain error on appeal. Under Rule 2:10-2, any error or omission shall be disregarded by the appellate court unless it is such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

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<sup>20</sup>State vs. Ross, 189 N.J.Super 67, 458 A.2d 1299(App.Div.1983).

<sup>21</sup>Miranda vs. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694(1966).

<sup>22</sup>State vs. Bernstein, 189 N.J.Super 212, 459 A.2d 1185(App.Div.1983).

As another adjunct to this rule of exclusion, Rule 3:23-8(d) specified that certain defenses must be raised at trial in order to be preserved for appeal. These include defenses of double jeopardy, lack of jurisdiction in the court, failure of the complaint to charge an offense, the unconstitutionality of the statute, regulation promulgated pursuant to statute or ordinance under which the complaint is made, and all other defenses and objections based on defects in the institution of the prosecution or in the complaint.

Finally, the waiver provisions in this Rule are also set forth under N.J.S.A. 39:5-11 for motor vehicle offenses in subtitle 1<sup>23</sup> of Title 39, the New Jersey motor vehicle code.<sup>24</sup>

**3) Sentencing** – If the defendant is convicted following a trial de novo, the Law Division judge will impose a new sentence. However, that sentence may not exceed what was initially imposed in the municipal court, provided that the initial sentence was otherwise legally authorized.<sup>25</sup> On the other hand, an illegal sentence that has not been completed may be corrected at any time.<sup>26</sup> A defendant should have no expectation of finality in an illegal sentence.<sup>27</sup>

**4) Prosecuting attorney** – The definition as to who constitutes a prosecutor for the purposes of appeal is set forth in Rule 3:23-9. In most instances, the person appearing on behalf of the State of New Jersey on a municipal appeal will be an assistant county prosecutor.

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<sup>23</sup> Subtitle 1 includes the statutes set forth in Chapters 1 through 6 inclusive in Title 39.

<sup>24</sup> N.J.S.A. 39:5-11. If the defendant appeals to the Superior Court, the appeal shall operate as a consent to an amendment of the complaint in that court so as to substitute a new or different charge growing out of the act or acts complained of or the circumstances surrounding such acts; and any provision of law limiting the time within which any such charge may be brought or proceedings taken in the prosecution thereof shall not operate and shall be deemed to have been waived by the appeal.

<sup>25</sup> State vs. Kashi, 180 N.J. 45, 49, 848 A.2d 744(2004).

<sup>26</sup> State vs. Schubert, 212 N.J. 295, 53 A.3d 1210(2012).

<sup>27</sup> State vs. Eigenmann, 280 N.J.Super 331, 655 A.2d 452(App.Div.1995).

**5) Appointment of counsel** – Rule 3:23-8a(4) provides for the appointment of counsel to represent indigent defendants in cases involving consequences of magnitude. The Court may also provide for counsel in cases that involve lesser consequences if either the legal issues are complex, or the defendant is incapable of presenting a coherent defense on his own. Because the State Office of the Public Defender has not been tasked by statute with representing defendants on a municipal appeal, attorneys for the defense of indigents are selected from the so-called “Madden List”<sup>28</sup> and may have no experience in handling these types of cases.

**6) Joe’s Practice tip** - Although Rule 3:23-8(b) specifies that briefs shall be required only if questions of law are involved on the appeal or if ordered by the court, every appellant should always seek to file a brief in every case. A well-researched, persuasive brief immeasurably adds to the probability that the appellant will receive a favorable result on appeal.

**7) Joe’s Practice tip** - As a matter of historical interest, special procedures apply the appeal of motor vehicle offenses under subtitle 1 of Title 39. N.J.S.A. 39:5-20, a statute that dates back to 1953 and is all but ignored in the modern era. It provides for the following appearances during an appeal:

On an appeal by the defendant in any proceeding instituted under this subtitle, the county prosecutor of the county wherein the alleged violation was committed shall represent the complainant; but where a complaint is made by a member of the State Police charging a violation of either section N.J.S.A. 39:3-40, N.J.S.A. 39:4-50 or N.J.S.A. 39:4-96 of this Title, the Attorney General, and not the prosecutor, shall represent the complainant, and where there is violation of a municipal ordinance relating to traffic regulations and the proceeding was instituted by a municipal officer, the municipal attorney shall represent the complainant. The county prosecutor, charged with the enforcement of this subtitle, may request the Attorney General to attend personally, or by such assistant or assistants as he shall designate, to aid in the prosecution of the appeal.

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<sup>28</sup> Madden vs. Delran Township, 126 N.J. 591, 601 A.2d 211(1992).

## Part III

### Interlocutory Appeals – Rules of Court

**a) Text of Rule 3:24** - Either the prosecuting attorney or the defendant may seek leave to appeal to the Superior Court, Law Division from an interlocutory order entered before trial by a court of limited criminal jurisdiction.

The prosecuting attorney may appeal, as of right, a pre-trial or post-trial judgment dismissing a complaint and, notwithstanding the provisions of paragraph (a), an order suppressing evidence entered in a court of limited criminal jurisdiction.

Appeals pursuant to this rule shall be taken within 20 days after the entry of such order by filing with the Superior Court, Law Division in the county of venue a notice of motion for leave to appeal under paragraph (a) or the notice of appeal under paragraph (b), except that an appeal from the grant of a motion to suppress shall be taken within 30 days after the entry of the order. A copy of the notice shall be filed with the clerk of the court below, and a copy thereof shall be served on the prosecuting attorney as defined by Rule 3:23-9 or on the defendant or defendant's attorney, as appropriate, at least 10 days prior to the return date fixed therein. The original filed with the court and the copy served shall have annexed thereto copies of all papers of record and any affidavits essential to the determination of the motion and shall be accompanied by a brief. The respondent shall file and serve any answering brief and other papers in opposition at least 3 days before the hearing. With respect to interlocutory applications, the court may grant or deny leave to appeal on terms and may elect simultaneously to grant the motion and decide the appeal on the merits on the papers before it, or it may direct the filing of additional briefs or make such other order as it deems appropriate for the expeditious disposition of the matter. A copy of any order or judgment entered by it shall be promptly transmitted to the clerk of the court below.

On appeal by the State from the grant of a motion to suppress the matter shall be tried *de novo* on the record. In cases in which the Attorney General or county prosecutor did not appear in the municipal court, the State shall be permitted to supplement the record and to present any evidence or testimony concerning the legality of the contested search and seizure. The defendant shall be permitted to offer related evidence in opposition to the supplementary evidence offered by the State.

## Discussion and Analysis

**1) In general** – Rule 3:24a authorizes the filing of leave to appeal a pretrial decision by the municipal court judge by either the prosecutor or the defendant. The moving papers supporting an application for leave to appeal should argue that the municipal court's decision was incorrect, that it will improperly taint the outcome of the case and that the moving party will prevail based upon the applicable law. The limitation in this Rule to the pretrial status of the case seems to imply that such applications are not permitted by either side during the course of a trial. As a result, an interlocutory appeal will be limited to judicial decisions related to pretrial motions, with the sole exception of the denial of a motion to suppress for which the defendant has no right of interlocutory appeal.

**2) Appeals by the prosecution** – While interlocutory appeals are normally heard as a matter of discretion by the Law Division, the prosecution may appeal as a matter of right the granting of a motion to suppress or any pretrial or post-trial judgment dismissing a complaint. It is important to note that a post-trial dismissal of a complaint may also be barred on double jeopardy grounds if the dismissal stemmed from a judicial decision on the merits.

**3) Time limitation** – The process of seeking leave to appeal begins with the preparation and signing of an order by the municipal court judge that recites the decision which will be subject of the interlocutory appeal. Once the order has been signed, the moving party has 20-days to file his application with the Law Division. The prosecution has 30-days to file an interlocutory appeal from the granting of a motion to suppress evidence. These time periods may not be expanded.<sup>29</sup>

**4) Briefs** – A brief must be filed with the initial motion for leave to appeal with responding and supplemental briefs filed in accordance with Rule 3:24c.

**5) Options available to the Law Division** - The Law Division judge may grant or deny leave to appeal on terms and or elect simultaneously to grant the motion and decide the appeal on the merits on the papers. The review by the Law Division will be de novo as to both the underlying facts and the applicable law.<sup>30</sup>

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<sup>29</sup>Rule 1:3-4c.

<sup>30</sup>C.S. vs. Middletown Twp. Bd. of Educ., 259 N.J.Super 340, 343, 613 A.2d 492(App.Div.1992).

**6) Motions to suppress evidence** – Since the suppression of physical evidence will often be fatal to a prosecution, the provisions of Rule 3:24d are intended to prevent the dismissal of a municipal court case base upon a mistake of Fourth Amendment law by the municipal court judge. The motion to suppress will tried *de novo* on the record with the prosecution permitted to add supplemental evidence if the State was represented by the municipal prosecutor at the municipal court motion hearing. The defendant has no right to file leave to appeal from a denial of a motion to suppress. The issues related to the denial are automatically preserved for appeal upon a finding of guilt or a guilty plea in municipal court.<sup>31</sup> As a result, a conditional plea is not necessary (and procedurally improper) following the denial of the motion to suppress.

**7) Stay of municipal court proceedings** – The filing of an application for leave to appeal has no immediate impact on the progress of the municipal court case. Only the granting of leave to appeal by the Law Division will divest the municipal court of jurisdiction to continue the case or begin the trial.

**8) Joe’s Practice tip** - As noted above, leave to appeal on an interlocutory basis is never granted as a matter of right to the defendant but only upon leave granted. In order to persuade a Law Division judge to grant leave to appeal, the application should be supported by a brief, affidavit and other moving papers that will support three critical issues:

- 1) The decision of the municipal court judge was wrong either as a matter of law or as a matter of facts;
- 2) The decision of the municipal court judge will likely result in the court reaching the wrong conclusion in the case on the merits, thus constituting a manifest injustice; and
- 3) Based upon the applicable law, the defendant is likely to prevail before the Law Division on the merits of the appeal if leave is granted.

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<sup>31</sup>See Rule 7:5-2c(2).

**Part IV**  
**Interlocutory Appeals**  
**Motions to Suppress Evidence by the State**

**a) In general** – The Appellate Division has adopted an informal policy of granting leave to appeal from an interlocutory order of the Superior Court Law Division ordering the suppression of evidence. The reasoning behind this rule is based upon the reality that the suppression of evidence will often be dispositive of the criminal case and will leave the prosecution without the evidence necessary to secure a conviction. There is no public interest served by the dismissal of a criminal indictment based upon a mistake of Fourth Amendment law by the motion judge. As a result, the Appellate Division will routinely grant leave to appeal to prosecutors who have been subject to the granting of a defense suppression motion.

The same procedure is generally unavailable to defendants. A defendant who has had his motion to suppress denied may still contest his case at trial or may preserve the contested motion to suppress issues for later review by the Appellate Division by entering a conditional plea of guilty.<sup>32</sup>

The procedure used by the Appellate Division for the Law Division of the Superior Court has been engrafted into the Rules of Court for motions to suppress in municipal court under Rule 7:5-2. That is to say that the prosecution has an appeal of right to the Law Division following the granting of a motion to suppress in the municipal court.<sup>33</sup> No analogous right is accorded to defendants. Moreover, if the motion to suppress is denied in the municipal court, the issues in the motion are automatically preserved for appeal to the Law Division without the need for the defendant to enter a conditional plea.<sup>34</sup>

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<sup>32</sup>See Rule 3:5-7(d). This procedure only applies to motions to suppress physical evidence. It does not extend to confessions or admissions. State vs. Robinson, 224 N.J.Super 495, 540 A.2d 1313(App.Div.1988). A conditional plea following the denial of a motion to suppress a confession or admission can be entered only with the consent of the trial judge and the prosecutor under Rule 3:9-3(f).

<sup>33</sup>Rule 7:5-2(c)(1).

<sup>34</sup>Rule 7:5-2(c)(2).