

Garden State CLE Presents:

“Driving Yourself to Jail”

Prosecution and Defense of N.J.S.A. 2C:40-26



Lesson Plan

**2C:40-26. Driving while license is suspended or revoked;
degree of crime; minimum sentence**

a. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [R.S.39:3-40](#), if the actor's license was suspended or revoked for a first violation of [R.S. 39:4-50](#) or section 2 of P.L.1981, c. 512 ([C.39:4-50.4a](#)) and the actor had previously been convicted of violating [R.S.39:3-40](#) while under suspension for that first offense. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

b. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [R.S.39:3-40](#), if the actor's license was suspended or revoked for a second or subsequent violation of [R.S.39:4-50](#) or section 2 of P.L.1981, c. 512 ([C.39:4-50.4a](#)). A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

c. Notwithstanding the term of imprisonment provided under [N.J.S.2C:43-6](#) and the provisions of subsection e. of [N.J.S.2C:44-1](#), if a person is convicted of a crime under this section the sentence imposed shall include a fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole.

1. Basic Characteristics of the Statute

a. Enacted into law on January 18, 2010

b. Became effective August 1, 2011

c. No culpability state included as an element – thus the argument is whether it implies knowing or (notwithstanding the presumption against it) is a strict liability offense: See NJSA 2C:2-2(c)(3):

(3) Construction of statutes not stating culpability requirement. Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime with the culpability defined in paragraph b.(2) of this section. This provision applies to offenses defined both within and outside of this code.

2. Elements of Offenses

a. Elements of Offense under subsection a: [TWO Revokes + ONE DWI]

- 1. Operate a motor vehicle;**
- 2. during a period of suspension (or revocation) in violation of NJSA 39:3-40;**
- 3. imposed for a first offense dwi or refusal;**
- 4. and has a prior conviction for NJSA 39:3-40 related to the same first offense DWI/Refusal suspension (or revocation).**

b. Elements of Offense under subsection b: [ONE Revoked + TWO DWI's]

- 1. Operate a motor vehicle;**
- 2. During a period of suspension (or revocation) in violation of NJSA 39:3-40;**
- 3. that was imposed for a second offense DWI or refusal.**

Practice pointer – Be sure to order Grand Jury transcript of instructions given by assistant prosecutor as a basis to dismiss the indictment. See Rule 3:6-6(b)

Elements of Driving on the Revoked List

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

I. Driver Status

Refused D/L
Suspended D/L or Reciprocity
Revoked D/L or Reciprocity
Prohibited from Obtaining D/L

A. Includes the following types of Cases:

1. Reciprocity Privileges that are Suspended or Revoked

State v. Profita, 183 N.J. Super. 425 (App. Div. 1982)

State v. Colley, 397 N.J. Super. 214 (App. Div. 2007)

2. New Jersey License Suspended or Revoked

Court Imposed or Administrative

3. Grant of License Refused

Health, immigration status, not a fit person under N.J.S.A. 39:3-10

4. Prohibited from Obtaining

N.J.S.A. 39:3-10(b) or violators under the age of 17

II. Personally Operate

- 1. Acts Constituting Operation of a Motor Vehicle**
State v. Derby, 256 N.J. Super. 702 (Law Div. 1992)
- 2. Personal Operation**
State v. Cattafi, 226 N.J. Super. 409 (App. Div. 1988)
- 3. Place of Operation**
State v. McColley, 157 N.J. Super. 525 (App. Div. 1978)

III. Motor Vehicle Defined

Words & Phrases from 39:1-1

‘Motor vehicle’ includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks and motorized bicycles.

Mo-peds – N.J.S.A. 39:4-14.3(d) - No person shall operate a motorized bicycle unless he is in possession of a valid driver's license of any class or a motorized bicycle license, which shall be issued by the commission to any person 15 years of age or older, upon proof of identity and date of birth, and after he has passed a satisfactory examination as to his ability as an operator. Such examination shall include a test of the applicant's knowledge of such portions of the mechanism of motorized bicycles as is necessary to insure their safe operation and of the laws and ordinary usages of the road and a demonstration of his ability to operate a motorized bicycle.

Automobile” includes all motor vehicles except motorcycles.

Driver” means the rider or driver of a horse, bicycle or motorcycle or the driver or operator of a motor vehicle, unless otherwise specified.

“Operator” means a person who is in actual physical control of a vehicle or street car.

Suspension Period

1. Term of Suspension Period

State v. Zalta, 217 N.J. Super. 209 (App. Div. 1987) (see next section)

Accord - State v. Sandora, 272 N.J. Super. 206 (App. Div. 1994)

Overrules - State v. Somma, 215 N.J. Super. 142 (Law Div. 1987)

2. Requirement of Notice of Suspension vs. Strict Liability Offense

Collateral Attack on Suspension – State v. Ferrier, 294 N.J. Super. 198 (App. Div. 1996).

3. Suspension of Driving Privileges Issues

a. Determinate Suspension Term Complete – Under the statute, it does not matter that the determinate term of the DWI/Refusal suspension was over at the time of the MV stop. Suspension term triggered initially by the DWI/Refusal sentence is what matters. That suspension continues indefinitely until driving privileges are restored. State v. Zalta, 217 NJ Super. 209 (App. Div. 1987).

b. Defendant under suspension for DWI/Refusal - Defendant is deemed to be immediately under suspension for DWI/Refusal upon imposition of sentence even though he is serving an unrelated, previously imposed suspension at that time. State v. Cuccurullo, 228 NJ Super. 517, 521 (App. Div. 1988).

“Defendant contends that the Legislature did not intend that a person receiving a DWI driver's license suspension be subject to the enhanced penalties of the DWS statute for a period longer than the DWI period of suspension. He argues from that premise that his exposure to enhanced penalties may not begin before the DWI suspension period begins. We reject the premise. There is no evidence of such legislative intent in the language of the DWI or DWS statute, nor would such intent be consistent with the legislative policies those statutes advance.”

c. See also unreported App. Div. holding in *State v. Panico*, 2011 WL 4633877:

Applying our reasoning in *Zalta* here, the source of the MVC's authority to continue defendant's license suspension beyond the seven-month period imposed by the court was defendant's non-compliance with the statutory requirement that she participate in the IDRC program by virtue of her conviction for the refusal offense. [N.J.S.A. 39:4–50.4a](#) provides, in pertinent part, that “a person whose operator's license is revoked for refusing to submit to a test shall be referred to an [IDRC] ... and shall satisfy the same requirements of the center for refusal to submit to a test as provided for in [[N.J.S.A. 39:4–50.2](#)].” The requirement that defendant participate in the IDRC program is statutorily linked to defendant's refusal conviction. Thus, whether the most recent charge for driving while on the revoked list arose out of defendant's failure to pay the requisite restoration fee or from the continuation of the revocation by the MVC for non-compliance with the IDRC aspect of her sentence is of no consequence. The basis for that part of the sentence requiring her to participate in the IDRC program finds its roots in the refusal conviction.

[N.J.S.A. 39:3–40\(f\)\(2\)](#) provides that any person under suspension for a violation of [N.J.S.A. 39:4–50.4a](#) shall be subject to enhanced penalties, which include an additional period of suspension of “not less than one year or more than two years,” and imprisonment in the county jail “for not less than [ten] days or more than [ninety] days.” Because defendant's suspension stems from her refusal conviction, the court properly imposed the enhanced penalties.

4. Ethical Issues

**The prosecutor/police have not charged your guy.
What is your obligation as defense attorney?**

a. Plea to 39:3-40 will establish a bar to prosecution in Superior Court. See State v. Hand, 416 NJ Super. 622 (App. Div. 2010); State v. DeLuca, 108 NJ 98 (1987); State v. Dively,

b. See State v. Seelig, 180 NJ 234 (2004). State v. Colon, 374 NJ Super. 199 (App. Div. 2005).

5. Plea Bargaining Issues

Note strength of State's Case related to operation

Note leverage of plea /jail on traffic offenses as a condition of PTI (State v. Mosner, 407 NJ Super. 40 (App. Div. 2009))

Concurrent time of traffic (especially DWI) and other open indictments/accusations.

6. Trial Issues

Jury will try the Indictment for NJSA 2C:40-26 while Superior Court judge will try NJSA 39:3-40 and related motor vehicle offenses. State v. Muniz, 118 NJ 319 (1990).

Defenses will probably involve operation issues, especially when police do not make the initial traffic stop.

7. Sentencing Issues

a. No fine specified in statute. Maximum for 4th degree is \$10,000 NJSA 2C:43-3(b)(2);

b. Jail term requires a parole disqualifier of 180 days;

c. Jail term could be as long as 18 months with a 180 parole disqualifier – NJSA 2C:43-6(a)(4);

d. License suspension under NJSA 2C:43-2(c) probably not permitted. See State v. Gross, 225 NJ Super. 28 (App. Div. 1988);

e. Presumption of non-incarceration for first offenders does not apply – NJSA 2C:44-1(e);

f. PTI is not excluded from consideration but prosecutors will object based upon mandatory jail term and evidence of non-amenable to correction. See NJSA 2C:43-12(b) (“Admission of an applicant into a program of supervisory treatment shall be measured according to the applicant's amenability to correction, responsiveness to rehabilitation and the nature of the offense.”)

g. Merger – A violation of NJSA 39:3-40 will always be companion to the indictable offense. Since this is a lesser-included offense of NJSA 2C:40-26 and must be dismissed by way of merger on double jeopardy grounds. However, the penalties survive the merger. See *State v. Baumann*, 340 NJ Super. 553, 556-557 (App. Div. 2001)

Since we conclude that the State's only evidence of recklessness was intoxication, we are satisfied that the DWI must merge into the assault conviction. But that conclusion does not dispose of the DWI penalties mandated by [N.J.S.A. 39:4-50](#), including a six-month license suspension. Those penalties, in our view, must survive the merger, particularly since they represent not only punishment for the offender but also protection for the driving public. Nor do we have any doubt that the criminal jurisprudence of this State permits the survival of mandatory penalties attendant upon a lesser charge when merged with a more serious offense that does not carry those penalties. (Accord *State v. Wade*, 169 NJ 302, 303 (2001).

