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GARDEN STATE CLE LESSON PLAN

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LESSON PLAN AND EVALUATION

DWI ANNUAL REVIEW 2015

Featuring…

Robert Ramsey
Garden State CLE Senior Instructor

and

Joseph P. Rem, Jr.
Certified Criminal Trial Attorney

Program description

Join Joseph P. Rem Jr. and Robert Ramsey as they explore all the new DWI case law for 2015.

I. Sentencing

A. Aggravating and Mitigating Factors in Traffic Cases

- **Code of Criminal Justice contains statutory aggravating and mitigating factors – NJSA 2C:44-1**
- **Determination judges have to use for sentencing felonies and DPs**
- **Go through negative factors and state how they do not apply to your client**
- **Do not "double count" – if elements already include an aggravating factor then cannot reuse the aggravating factor as well as elements of the offense**
- **Argue which mitigating factors apply**
- **Not just a simple calculation – must determine the weight of the factors and not how many mitigating and how many aggravating factors exist**
- **You and your client are the only ones who have the information about mitigating factors – be prepared to present to the court at sentencing**
- **State v. Palma, 219 NJ 584 (2014)**
- **State v. Moran, 202 NJ 311 (2010)**
- **If in municipal court and have client with DP or PDP, judge must review aggravating and mitigating factors during sentencing**
- **For traffic tickets – outlawed to use 2c:44-1 in sentencing (State v. Palma), must use aggravating factors and mitigating factors set forth in *Moran* – especially for license suspension and jail**
- **Title 39 has its own aggravating and mitigating factors that come through the caselaw – not statutorily**
- **Judge must make findings of fact based on evidence presented**
- **Double counting – State v. Lawless 214 NJ 594 (2013) – how to utilize an element of the offense as either an aggravating or mitigating factor**
- **"trial tax" – days of judge setting whatever sentence he/she wants is long gone – see Palma – judge must balance aggravating and mitigating factors to justify the sentence**
- ***Palma*: "Random and unpredictable sentencing is anathema to notions of due process."**
- **Trial tax is the opposite of predictability**

- ***Moran* factors apply to NJSA 39:4-96, 4-97, 3-10 (State v. Carreon, 437 NJS 81 (App. Div. 2014)**
- ***Carreon* – dealt with jail terms for 39:3-10; if going to put someone in jail on MV ticket – must use Moran factors; superseded by *Palma* which came out soon after this opinion**
- ***State v. Henry*, 418 NJS 481 (Law. Div. 2010) – uses 2C:44-1 aggravating factors for DWI case – abrogated by the Supreme Court – cannot use criminal code for MV offenses**

II. Stay of Sentence Imposition

- ***State v. Robertson*, 438 NJS 47 (App. Div. 2014) – factors for a court to grant a stay**
  - **Relief is needed to prevent irreparable harm**
  - **Defendant's claim rests on settled law and has a reasonable probability of succeeding on the merits (focus on the legal issues since no deference is given to the lower court's legal conclusions while deference is given to the lower court's findings of fact);**
  - **Balancing the relative hardships to the defendant and the public reveals that greater harm would occur if a stay is not granted than if it were**
- **Ability of courts to offer stays is codified at R. 7:13-2 and R. 3:23-5**
- **R. 3:23-5(b) – says may be entered for fines, fines and costs ,or forfeiture**
- **If asking for stay of jail sentence – against a directive by AOC from 10/2005 – when dealing with third offender who plead or found guilty after trial, individuals should go directly from courtroom to jail – so dangerous that needs to be kept off the streets; there may be compelling issues that would prevent the person from being incarcerated immediately, i.e. child care issues; client can express compelling reason and put that on the record; was supposed to be a very short period of time for a stay – not an extended period of time.**
- **R. 3:23-5(a) – entitled as of right to bail pending appeal; be sure to be in touch with the prosecutor to agree to an amount of bail**
- **For DWI clients – consider requesting a stay with IID installed; or stay with license suspension – just asking for stay as to jail term**

- ***In re Daniels*, 118 NJ 51 (1990) – even 1 day in jail is irreparable harm.**

III. Drunk Driving and Refusal Enhancements

- ***State v. Frye*, 217 NJ 566 (2014)**
- **A drunk will enhance a refusal, but a refusal will not enhance a drunk**
- **If you only have a refusal conviction, then it is assumed that there was insufficient evidence to prove the DWI against you – therefore it cannot be used to enhance a future DWI**
- **Client has DWI conviction in 2008, arrested 2015 and gets a refusal**
  - **2nd offender and refusal**
  - **Refusal is in connection with a second or subsequent DWI, so it is a 2nd refusal**
- ***State v. Bischoff*, 232 NJS 5125 (App. Div. 1989) – offense date that counts**
- **2003 arrest – guilty; 2015 arrest**
  - **2nd offender and refusal**
  - **Going to get step down on drunk driving**
  - **Must be treated as 1st offender on drunk driving because more than 10 years between arrests – but what to do about the refusal**
  - **Ask for step down on refusal – *State v. Fielding*, 290 NJS 191 (App. Div. 1996) – allows for step down for refusal cases**
  - **If prosecutor agrees to step down for both DWI and refusal – client looking at 3 months on DWI and 7-12 months on refusal which can run concurrently**
  - **Also possibility of getting 3 month because step down on DWI, but Refusal would be a second offense – 24 month license suspension; must run consecutively**
  - **Another strategy: No step down on refusal because can plea bargain DWIs related to 2nd or subsequent refusal and refusal can be dismissed; left with single DWI conviction with client losing license for 3 months – Look at guideline 4B**

IV. Drunk Driving and Refusal Enhancements

- ***State v. Revie*, 220 NJ 126 (2014) – came as a result of issues with *State v. Ciancaglini*, 204 NJ 597 (2011) where the court said we need not decide whether people in NJ can 2X take advantage of step down; holding is that you can take step down more than once as long as more than 10 years between offenses**
  - ***Revie* also had a *Laurick* issue (right to counsel issue) – which made court's opinion a bit confusing**
  - **1980; 1991 (second offender, sentenced as 1st); 2004 (third offender, entitled to be treated as 2nd offender); 2015 (fourth offender; treated as 3rd offender – step down is meaningless because no practical difference) – 2 step downs in this scenario**
- **As a practical matter – no benefit after 2nd step down**
- ***Laurick* timeline regarding step downs after *Revie*;**
  - **1980 (1st offense – plead guilty at 1st appearance)**
  - **1991 (2nd offense, treated as 1st offender)**
  - **2004 (3rd offense, treated as 2nd offender)**
  - **2015 (4th offense, review abstact and note client not represented at 1980 conviction; since no lawyer at first conviction, get paperwork from 1980 conviction; go back to 1980 court and judge agrees that client was not represented and grants *Laurick* motion; get order noting that 1980 conviction cannot be used to enhance any future incarceration; not a PCR and conviction still stands; treated as 3rd offender – usually 10 years DL suspension and 6 months jail; but will be sentenced differently on custodial aspect – only sentenced as a 2nd offender since 1st offense cannot be used to enhance incarceration)**
- **R. 7:10-2g – Post Conviction Relief/*Laurick* application – burden of proof by preponderance of the evidence, civil in nature, different from traditional PCR because traditional PCR returns the parties to the *status quo ante*; with *Laurick* the conviction remains but the conviction cannot be used to enhance a future custodial sentence**
- ***Laurick* applies when you can show that you went into court and plead guilty without an attorney and did not waive your right to be represented by counsel and were indigent – would have been appointed counsel; OR – plead guilty pro se, did not waive right to counsel, were not indigent, must prove that if you had an**

attorney it is likely to have made a difference, i.e. an experienced attorney would have evaluated the case and would have made a difference in the outcome

- ***State v. Bringhurst*, 401 NJS 421 (App. Div. 2008) – if you can make prima facie case in pleadings then judges must relax statute of limitations on PCRs; the reason is because the issue does not become ripe until a future arrest**
- ***State v. Conroy*, 397 NJS 324 (App. Div. 2006) – same as *Revie***

V. Jury Trial

- ***State v. Robertson*, 438 NJ 47 (2014) – Jury trial for DWI cases, RPC excuse you when filing a good faith pleading when looking toward modifying existing law (RPC 3.1 Meritorious Claims)**
- ***State v. Denelsbeck*, 220 NJ 575 (2015), certification granted – jury trial issue for DWI**
  - **Asking for stays on third offenders**
  - **Request jury trial for pipeline retroactivity**
- ***State v. Owens*, 54 NJ 153 (1969)**
- ***Blanton v. North Las Vegas*, 489 US 538 (1989) – SCOTUS discusses drunk driving like a petty offense, petty offense proscribed by maximum sentence – sentencing exposure, 180 days for DWI because not constitutionally entitled to trial by jury; See *State v. Hamm*, 121 NJ 109 (1990); detainment at IDRC (12-48 hours) – 182 days is ½ day short of 6 months; packing DWI with additional penalties may tip the scale in favor of a trial by jury notwithstanding the fact that sentence is 180 days; collateral consequences equate to need for trial by jury.**

VI. Inpatient Credit – Concurrent Time with NJSA 2C:40-26

- ***State v. French*, 437 NJS 333 (App Div 2014) – guy has 3rd DWI and 2C:40-26, plea offer of concurrent time, defendant agreed and was sentenced, defendant wants to go to rehab program, prosecutor's office objects; criminal sentence takes precedence over DWI sentence therefore must spend 180 days in jail and not entitled to good time credit, etc.**
- ***State v. Harris*, 439 NJS 150 (App. Div. 2015) – 7 different defendants; all convicted of 2C:40-26; defendants serving sentences in ways that did not include the county jail – ankle monitor, SLAP, community service; AD said only 1 way to spend**

sentence – must go to jail and not permitted to serve alternative ways for your sentence – must serve full amount of parole disqualifier; illegal sentences for things other than straight jail.

- **2C:40-26 contains "imprisonment" not "jail" – what does this mean? Does this mean state prison?**
- **Rule 3:9-3 plea discussions, agreements, withdrawals**
- ***DCPP v. JA*, 436 NJS 61 (App. Div. 2014) – allowing offense; if allow an individual to be in car with intoxicated person that is child endangerment; liability under Title 9.**

VII. Post-Conviction Relief for NJSA 2C:40-26

- ***State v. Sylvester*, 437 NJS 1 (App Div 2014) – 2011 pleads guilty to DWI 2nd offender 2 year suspension; 2012 defendant arrested for 2C:40-26; files petition for PCR for 2011 matter; 2011 judge grants PCR application; eliminated prior DWI conviction in order to vacate 2C:40-26 charge; App Div says it does not matter, on the day defendant was on the revoked list and was driving he violated the statute; "insist on compliance with judicial orders to promote order and respect for the judicial process"; as long as court order exists then it must be followed.**

VIII. Fourth Amendment – Blood Extraction – Exigent Circumstances

- ***State v. Jones*, 437 NJS 68 (App. Div. 2014) – pre-McNeeley case; accident in rush hour in winter time and dark – serious crash involving 3 vehicles – serious injuries – police believe vehicular homicide; every possible police, hazmat, EMTs, etc. at scene; Jones crashed into building, she is unconscious and need to get her out; EMTs say odor of alcohol; complex scene; after 1 hour after Jones at hospital – still unconscious – finally she wakes up and police are able to speak with her; NJ law allowed blood to be taken without a warrant; NJ had categorical exception to warrant requirement – hospital was own exigent circumstances; App Div says this is McNeeley issue and recognize NJ law was inconsistent with federal law – any judge would have excused police from getting warrant because exigency; police did not have time to get a warrant; therefore exigency justified no warrant here**
- ***State v. Dyal*, 97 NJ 229 (1984)**

- **Be sure it is not police-created exigency, i.e. police wasting time to create exigency**

IX. Mistake of Law – Review of Pena-Flores

- ***State v. Witt*, 435 NJS 608 (App. Div. 2015) – automobile exception to warrant requirement; federally search of car only requires probable cause *PA v. Labron*, 518 US 938 (1996); in NJ we have required additional element of exigent circumstances – *State v. Cooke*, 63 NJ 657 (2000); police at MV stop – officer is out of his car, another vehicle driving toward officer does not lower his headlights, officer believes violation of statute requiring dimming of lights when within 500 feet of an oncoming vehicle, PO stops driver and arrests for DWI, PO goes into car to search for evidence of drunk driving – *State v. Irelan*, 375 NJS 100 (App. Div. 2005) –when arrest someone from drunk driving automatically can search for evidence of drunk driving, during search PO finds gun; issue as to stop of vehicle and issue as to search; defense argues no exigency; stop issue is mistake of law argument – officer believed that he saw violation of 39:3-60 which requires that both cars be operated and on the street heading toward each other; here PO was parked on side of the road; PO was wrong as a matter of law therefore stop was unreasonable – no good faith exception in NJ; search issue**
- ***Heien v. North Carolina*, 135 SCT 530 (2014) – mistake of law case**
- ***State v. Robertson*, 438 NJS 47 – destruction of data downloads**

X. Trial and Evidence – Rule 104(a) hearing

- ***State v. Campbell*, 436 NJS 264 (App. Div. 2014) – defendant says In re Winship mandates cannot be convicted unless each element is proven beyond a reasonable doubt; here judge found defendant guilty of driving beyond a reasonable doubt, but only found the BAC reading by clear and convincing evidence; defendant argued that due process rights were violated because judge found guilty on BAC for evidence less than beyond a reasonable doubt; court says that when judge accepts BAC into evidence – rulings are interlocutory and can challenge at any point in the case and can try to get judge to change his mind.**
- **Cannot admit reading without core foundational documents**

XI. Adopting motion to suppress evidence at trial

- ***State v. Gibson*, 219 NJ 227 (2014) – [no reason for supreme court to consider this case because App Div wrote an exhaustive opinion] motion to suppress, judge says to adopt evidence from motion to suppress hearing to save time – prosecutor agrees – defense objects because rule of evidence are relaxed during motion hearing; cannot force defendant to accept ruling of court that court will accept evidence ascertained at motion to suppress; if defendant objects, then must begin trial anew.**
- ***State v. Allan*, 283 NJS 622 (Law. Div. 1995) – this case had same holding at *Gibson*.**

XII. Confrontation – Testimony by Laboratory Supervisors

- ***State v. Michaels*, 219 NJ 1 (2014) – blood case, urine case, drug case – demand that person who did testing must testify; when someone who is not lab tech who did testing shows up at trial, then object; the lab supervisor had sufficient information regarding the testing done by each technician that the court allowed him to come and testify instead of requiring the actual lab techs who performed the testing. Dissent – considered this unconstitutional.**
- ***State v. Berezansky*, 386 NJS 84 (App Div 2006); *State v. Renshaw*, 390 NJS 456 (App. Div. 2007); *State v. Kent*, 391 NJS 352 (App. Div. 2007) – all stand for evidence from lab techs is testimonial in nature and defendant has right to cross examine – cannot rely on business record exception.**
- ***Melendez Diaz v. MA*, 557 US 305 (2009) and *Bullcoming v. NM*, 131 S CT 2705 (2011)**
- ***State v. Rehmann*, 419 NJS 451 (App. Div. 2011) – cannot have straw-witnesses in NJ, must have the actual person who did testing to testify.**
- ***Williams v. Illinois*, 32 S Ct 2221 (2012) – "indecipherable opinion", plurality decision, cannot tell what ruling is.**

XIII. Reading Paragraph 36

- ***State v. Peralta*, 437 NJS 570 (App. Div. 2014) – defendant arrested for DWI, gives 2 valid samples at .08, defense was never read standard statement telling him to take the test; fact that cops did not read Paragraph 36 does not nullify valid Alcotest results.**