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The New Jersey Annual

DWI & Criminal Case Law Review – 2012

Lesson Plan

Part I

Drunk Driving

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Part II - Criminal Cases

Prior Refusal Conviction as Sentence Enhancement

More than one step-down

State v. Ciancaglini, 204 N.J. 597 (2011)

The critical issue presented by this appeal is whether a conviction for refusing to submit to a breathalyzer test, *N.J.S.A.* 39:4–50.4a, can be used to enhance a sentence for driving while intoxicated (DWI), *N.J.S.A.* 39:4–50. In *State v. DiSomma*, 262 *N.J.Super.* 375, 383, 621 *A.*2d 55 (App.Div.1993), the Appellate Division held that "a prior refusal conviction cannot serve as the basis" to enhance a subsequent DWI conviction. In this case, however, the Appellate Division held that a refusal conviction does qualify as a "prior violation" under the DWI statute. We granted certification to resolve the conflict and hold that the defendant's prior refusal conviction cannot be considered as a "prior conviction" for purposes of her subsequent DWI conviction.

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That said, we need not decide in this case whether a person can twice take advantage of a "step-down." Defendant's refusal conviction cannot be considered as a prior DWI violation for enhancement purposes, and thus she is not precluded from the benefit of the "step-down" under *N.J.S.A.* 39:4–50 for a prior DWI, because her first DWI conviction was more than ten years prior to her second, the 2008 DWI conviction.

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Drunk Driving - Aggravating & Mitigating Factors

Introduction & Background:

State v. Moran, 202 NJ 311 (2010).

State v. Kromphold, 162 NJ 345 (2000).

State v. Henry, 418 NJ Super. 481 (Law Div. 2010).

Rule 7:9-1(c).

State v. Lawless, 423 N.J.Super. 293 (App. Div. 2011)

[Family Members as Victims]

NJSA 2c:44-1(a)

(2) **The gravity and seriousness of harm inflicted on the victim, including whether or not the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance;**

We have located no case in which the Court has approved consideration of the direct effect of a defendant's actions on people other than the victim of the offense for which a defendant was being sentenced. In fact, we [have previously] held aggravating factor two relates only to the harm inflicted on the victim of the offense, not the family. We stated, "[t]he wording of *N.J.S.A.* 2C:44–1a(2), which includes consideration of the victim's power of resistance, indicates that the Legislature intended this aggravating factor to relate to harm inflicted on the 'victim of the offense' rather than the victim's relatives." By contrast, the cases in which the judge properly considered the effect of the defendant's conduct on other occupants of a car or building involved circumstances where the defendant had been charged and convicted of offenses involving those other occupants. We conclude, therefore, that the harm caused to injured and non-injured family members of a single victim is not a basis to invoke aggravating factor two.
5.

[But see Art. 1, para 22 NJ Constitution of 1947 “For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.]

(3) The risk that the defendant will commit another offense;

[T]he judge also applied aggravating factor three, the risk that defendant will commit another offense. In doing so, he referenced defendant's substantial history of driving while intoxicated and in some instances while his license was suspended. A judge may consider prior *N.J.S.A.* 39:4–50 convictions "as part of defendant's overall personal history" as well as "pertinent to the risk that defendant would commit another offense and the need for deterrence."

Thus, the sentencing judge appropriately applied aggravating factor three. Moreover, the record firmly supports according defendant's driving while intoxicated history great weight. Over nine years, defendant was arrested eight times for driving while intoxicated. At no time had he sought treatment for alcohol abuse. In addition, defendant continued to drive a motor vehicle even when his driver's license had been suspended or revoked. This record unequivocally demonstrates a horrendous risk of other catastrophic driving offenses.

(6) The extent of the defendant's prior criminal record and the seriousness of the offenses of which he has been convicted;

The judge also identified aggravating factor six, the extent of defendant's prior criminal record and the seriousness of the offenses of which he has been convicted, and accorded it substantial weight. He considered defendant's prior driving under the influence of alcohol convictions in the Commonwealth of Pennsylvania, noting they are not indictable offenses in New Jersey. Defendant argues the judge committed legal error by considering these out-of-state convictions under factor six.

Driving while under the influence of alcohol is not a "crime" as defined by *N.J.S.A.* 2C:1–4, or an "offense" as defined by *N.J.S.A.* 2C:1–14k. Hence, such prior convictions cannot support consideration of aggravating factor six.

Defendant’s BAC as an Aggravating Factor

(9) <u>The need for deterring the defendant and others from violating the law;</u>

Lastly, the judge identified aggravating factor nine, the need for deterring defendant and others from violating the law, and accorded it great weight. Regarding the need to deter defendant, the judge found defendant demonstrated a disregard for the law, based, in part, on his prior driving while intoxicated convictions and the circumstances attendant to this accident, including defendant's .229 blood alcohol content. The judge again noted defendant's blood alcohol content with regards to the need to deter the public

Where a high level of intoxication is, in part, the basis for the reckless element of an aggravated manslaughter conviction, the sentencing judge cannot consider that fact in fashioning aggravating factor one. In applying factor nine, however, a judge may make “determinations that go beyond the simple finding of a criminal history and include an evaluation and judgment about the individual in light of his or her history.” Here, the judge did not double count. Rather, he considered defendant's high blood alcohol content in assessing a need to deter defendant and the public. The judge did not err in applying factor nine.

Out of State Violation as Sentencing Enhancement

State v. Zeikel, 423 N.J.Super. 34 (App. Div. 2011).

Defendant also raises a statutory argument that the New York DWAI convictions in violation of *N.Y. Veh. & Traf. Law* § 1192(1) are not "of a substantially similar nature" as New Jersey's DWI statute.

The Legislature did not specifically define "substantially similar nature" in amending the New Jersey statute in 1997. However, the amendment deleted a requirement that the prosecution prove a BAC level above the threshold to demonstrate that an out-of-state conviction is substantially similar. Thus, the Legislature indicated its intent that a finding of substantial similarity would not necessarily turn on evidence of the BAC level.

Defendant's argument presumes a narrow interpretation of the phrase driving "under the influence of intoxicating liquor." "Intoxication" not only includes obvious manifestations of drunkenness but any degree of impairment that affects a person's ability to operate a motor vehicle. Like New Jersey, New York defines impairment broadly to include any degree of impairment of a person's physical or mental abilities to operate a motor vehicle. Furthermore, the New Jersey precedents are presumed to have been known to the Legislature when it amended the statute in 1997. By designating as an affirmative defense violations of "substantially similar" out-of-state laws that are based *exclusively* on a BAC of less than 0.08%, the Legislature indicated its understanding that such lower BAC levels can nevertheless co-exist with offenses "of a substantially similar nature" as New Jersey's DWI statute.

In sum, because New Jersey has interpreted "intoxication" to include any degree of impairment in driving ability, defendant's convictions in 1981 and 1984 were of a substantially similar nature as a DWI conviction in New Jersey. Without clear and convincing proof from defendant that they were based exclusively on a BAC of less than 0.08%, the New York convictions were properly considered in determining his sentencing status in 2010.

Speedy Trial

State v. Misurella, 421 N.J.Super. 538 (App. Div. 2011)

The State concedes that the right not to be subjected to unreasonable delay applies to an appeal, and consequently, to a trial *de novo* on appeal to the Superior Court from a municipal court conviction.

[We have] stated that the same framework and standard apply to evaluating undue delay on appeal as applies to a defendant's right to a speedy trial in the trial court. The constitutional standard for a speedy trial was established by the United States Supreme Court in *Barker v. Wingo*, 407 *U.S.* 514 (1972), and applied by our Supreme Court in *State v. Szima*, 70 *N.J.* 196, (1976).

In *Barker*, the Court set forth a "balancing test ... in which the conduct of both the prosecution and the defendant are weighed" to aid in determining when a defendant's right to a speedy trial under the Sixth Amendment has been violated. The Court identified four factors that should be examined: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

Laurick Applications - *Prima Facie* Case

State v. Weil, 421 N.J.Super. 121 (App. Div. 2011)

In this appeal, defendant urges us to revisit *State v. Bringhurst*, 401 *N.J.Super.* 421, 951 *A.*2d 238 (2008), and hold, in essence, that a defendant who files a *Laurick* post-conviction relief (PCR) petition to obtain relief from enhanced penalties for driving while intoxicated (DWI) based on a purported un-counseled prior DWI conviction is absolved from establishing a prima facie case for relief where her time delay has resulted in destruction of most of the records pertaining to the prior conviction. We decline to do so and affirm defendant's conviction.

We consider as an element in the equation the interval of time between the purportedly un-counseled DWI and the PCR application, the records retention policy and actual destruction of the sound recording and police reports, the evidence in the record, and the paucity of defendant's certification. This is not a situation where defendant clearly disputed the documentary evidence and categorically denied being represented by counsel at the 1994 municipal court hearing. Nor did she certify to any good faith efforts to obtain information or locate documents in furtherance of her *Laurick* PCR petition. Rather, defendant appears to take the position that she need only assert the mere claim of an un-counseled first DWI conviction at a time when the bulk of the records are no longer available to obtain step-down relief. We are satisfied, in accordance with *Bringhurst,* that defendant must establish she is entitled to relaxation of *Rule* 7:10–2(g)(2)'s time limit and must also allege facts in the petition sufficient to establish a prima facie case for relief under *Laurick* and its progeny.

12.

Required Reading of Second Part of Paragraph 36

State v. Schmidt, 206 N.J. 71 (2011).

Those who are required to provide a breath sample in order to determine whether they have operated a motor vehicle while under the influence of intoxicating liquor are statutorily entitled to "[a] standard statement, prepared by the chief administrator [of the Motor Vehicle Commission, which] shall be read by the police officer to the person under arrest." *N.J.S.A.* 39:4–50.2(e). That statement, prepared by the Executive Branch, differentiates between those who consent to providing the required breath sample and all others, and it requires that an additional statement "be read aloud only if, after all other warnings have been provided, a person detained for driving while intoxicated either conditionally consents or ambiguously declines to provide a breath sample." Because defendant consented to provide the required sample of his breath yet, despite warnings, failed to do so, he remained among those who have consented and, hence, was not entitled to any additional readings.

At the outset, it is telling that defendant never has asserted that he was somehow unable to provide the volume and length of breath required for a valid reading; he claims no limitation, whether by physical condition, disease, or some other verifiable cause, that somehow prevented him from providing the breath samples as required. Therefore, the question is whether defendant's failure to provide proper breath samples despite repeated warnings, standing alone, was sufficiently "ambiguous or conditional" to require the reading of the Additional Statement. Because defendant unequivocally consented to the breath test, his later failures to provide the necessary volume and length of breath samples did not render his earlier consent ambiguous or conditional.

13.

That said, for the avoidance of future doubt and to provide consistency of administration, the inclusion in the main body of the Standard Statement of a notice to a DWI arrestee that the failure to provide sufficient breath volume for a sufficient period of time will constitute a refusal to submit to the breath test is both reasonable and salutary. Consistent with our earlier expressions in both *Widmaier* and *Spell,* we recommend to the Attorney General that the main text of the Standard Statement be supplemented to address specifically those instances where a DWI arrestee attempts to manipulate the results of the breath test, which supplement should inform the arrestee of the consequences of failing to submit fully and completely to the breath test requirements. That notice should avoid any future due process claims arising out of facts similar to those present in this appeal.

Commercial Drivers – Refusals

NJSA 39:3-10.24

[A] person who operates a commercial motor vehicle on a public road, street, or highway, or quasi-public area in this State, shall be deemed to have given his consent to the taking of samples of his breath for the purposes of making chemical tests to determine alcohol concentration; provided, however, that the taking of samples shall be made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that the person has been operating a commercial motor vehicle with an alcohol concentration of 0.04% or more.

State v. Nunnally, 420 N.J.Super. 58 (App. Div. 2011)

While driving a commercial vehicle, [defendant] was arrested for a suspected violation of *N.J.S.A.* 39:3–10.13 (prohibiting operation of a commercial motor vehicle by a driver "with an alcohol concentration of 0.04% or more."). After defendant refused to submit to an Alcotest, the arresting officer also charged him with violating the general refusal statute, *N.J.S.A.* 39:4–50.4a, instead of the statute pertaining to refusal by a person driving a commercial vehicle, *N.J.S.A.* 39:3–10.24 (CDL refusal statute). The Law Division dismissed the refusal charge, agreeing with the municipal judge that the State could not prosecute defendant under the general refusal statute in these circumstances and the State could not amend the complaint to charge defendant with CDL refusal, on the day of trial and after the ninety-day statute of limitations had run. The State appealed.

Because CDL refusal is not a lesser included offense of general refusal, we agree that the State was precluded from amending the complaint to charge CDL refusal after the statute of limitations expired. We also hold that the driver of a commercial vehicle who is arrested and charged only with CDL DUI, *N.J.S.A.* 39:3–10.13, and who thereafter refuses a breath test, may only be charged under the cognate CDL refusal statute, *N.J.S.A.* 39:3–10.24, and may not be prosecuted under the general refusal statute, *N.J.S.A.* 39:4–50.4a. Therefore, we affirm the decision of the Law Division.

For future guidance, we note that a commercial vehicle driver whose conduct violates both the general and CDL DUI statutes may be arrested and charged under both statutes. If the driver then refuses a breath test after being advised of the consequences of refusal pertaining to both statutes, the driver may also be charged under both refusal statutes. Finally, if law enforcement perceives potential difficulties in enforcing the CDL DUI statute, because it prohibits driving with a BAC of .04% or higher but does not specifically prohibit "driving under the influence of intoxicating liquor," those concerns should be directed to the Legislature.

Surrogate Witnesses

Related Case – Bullcoming v New Mexico, 131 S. Ct. 2705 (2011).

State v. Rehmann, 419 N.J.Super. 451 (App. Div. 2011)

Our courts have yet to consider this surrogate-witness problem. After careful consideration, we have no hesitation in agreeing [that] experts and their opinions are not fungible; to hold otherwise would make a mockery of the Confrontation Clause. We thus agree with the argument that the Confrontation Clause is not satisfied by calling just anyone to the stand to testify about laboratory tests or other scientific results. A "straw man" will not do. The State must provide a witness who has made an independent determination as to the results offered. The right of cross-examination must be meaningful and is not satisfied when the State calls a witness whose knowledge is limited to the four corners of the laboratory certification produced and executed by another.

Refusal – Ability to understand Paragraph 36

State v. Rodriguez-Alejo, 419 N.J.Super. 33 (App. Div. 2011)

Defendants who claim that they do not speak or understand English must bear the burden of production and persuasion on that issue. In addition, this approach will help separate feigned claims from real ones.

We have the ability to make factual findings when necessary on appeal. Defendant testified that he spoke little English. He had recently arrived from a Spanish-speaking country and works with Spanish-speaking supervisors. He immediately informed the arresting officer that he spoke little English, and the officers attempted to assist communication by using a lay interpreter, hand signals and a few words of Spanish. Understanding the breathalyzer instructions requires greater language fluency than acknowledging a home address or supplying a phone number

Many persons may be able to speak or understand a few rudimentary phrases in languages other than their own. But, just because a person may be able to express greetings or order a cup of coffee in an unfamiliar language does not necessarily mean that the person may be able to understand legal rights and obligations expressed in a less than familiar language.

We find under these circumstances that defendant has met the burden of production and persuasion as to his limited knowledge of English.

[Granting pipeline retroactivity to State v. Marquez, 202 NJ 485 (2010).]

Ertco-Hart Thermometers

State v. Holland, 423 N.J.Super. 309 (App. Div. 2011)

[T]he Law Division conducted a three-day hearing during which it heard expert testimony adduced by the State on the comparability of the Control Company and Ertco–Hart digital thermometers and the validity of the Control Company's certificate establishing National Institute of Standards and Technology (NIST) traceability. Following that hearing, the judge, in a thorough, detailed and well-reasoned sixty-seven page written decision, concluded that the Control Company digital thermometer is comparable in all material respects to the Ertco–Hart digital thermometer previously used during the Alcotest calibration process; that the Control Company certificate is facially valid, establishes NIST traceability comparable to the Ertco–Hart certificate, and satisfies the requirements as a foundational document as required in *Chun;* and that the calibration of the Alcotests in the Holland and Pizzo matters were both completed within the two-year period of the thermometer's certification. These findings, in which we concur, find ample support in the facts and law.

[W]e are satisfied that sufficient credible evidence supports the remand court's findings that the Control Company digital thermometer is comparable in all material respects to the Ertco–Hart digital thermometer previously used during the Alcotest calibration process, and that the Control Company certificate is facially valid and satisfies the requirements as a foundational document as required by *Chun.* Accordingly, we reverse the order of the Law Division in the Holland matter suppressing the Alcotest results for failure to provide a Draeger certificate as a requisite foundational document.

19.

Seizure for Purposes of Field Sobriety Testing

State v. Bernokeits, 423N.J. Super. 365 (App. Div. 2011)

We have uncovered no authority in this State imposing a probable cause requirement for the administration of roadside sobriety tests. On the contrary, our courts have consistently, albeit without extended discussion, upheld such routine, standardized testing on the basis of a reasonable, articulable suspicion of driver intoxication. These rulings obviously presume that a police officer may legitimately request a field sobriety test in the process of determining whether probable cause for an arrest exists, rather than only after probable cause for arrest has been established.

Dram Shop Act – NJSA 39:6A-4.5

Voss v. Tranquilino, 206 NJ 93 (2011)

Nowhere in that legislative history was there any suggestion that the statute *96 would affect liability under the Dram Shop Act. Indeed, there is no evidence that the specific bar to suit set forth in *N.J.S.A.* 39:6A–4.5(b) was intended to have impact beyond the motor vehicle accident and insurance setting that Title 39 addresses. That understanding of the words of subsection 4.5(b) keeps the provision's application consistent with the clear purpose and single object advanced by the omnibus insurance reform legislation.

Finally, it is no small matter in our analysis that the bar in subsection 4.5(b) can coexist with the Dram Shop Act's deterrence and liability-imposing principles. There is no incompatibility between the two provisions. An intoxicated person is deterred from driving drunk by losing the right to sue under Title 39 for insurance coverage for his injuries. On the other hand, permitting an injured drunk driver to file an action against a liquor establishment and its servers for serving a visibly intoxicated patron similarly advances the goal of deterring drunk driving. In allowing the latter form of action to proceed, rather than barring it *ab initio* by *N.J.S.A.* 39:6A–4.5(b), we can be assured that the application of established principles of comparative negligence will apportion properly responsibility for damages as between dram shop parties and the injured drunk driver.

Failure to Maintain a Lane NJSA 39:4-88(b)

Related Cases:

State v. Woodruff, 403 NJ Super. 620 (Law Div. 2008)

State v. Regis, 208 NJ 439, 442 (2011)

We conclude that *N.J.S.A.* 39:4–88(b) describes two separate and independent offenses, one for a driver's failure to maintain a lane to the extent practicable and the other for changing lanes without ascertaining the safety of the lane change, and that defendant was properly convicted of the former offense.

Part II

Criminal Cases

Post-Conviction Relief – Collateral Consequences

Related Cases:

State v. Nunez-Valdez, 200 NJ 129 (2009)

Padilla v. Kentucky, 130 S. Ct. 1473 (2010)

State v. Hupka, 203 NJ 222 (2010)

State v. Agathis, ___ NJ Super. ___ (App. Div. 2012)

The *Nunez–Valdez* Court thus incorporated this principle in the traditional paradigm for determining whether a defendant has established a prima facie case of ineffective assistance of counsel:

When a guilty plea is part of the equation, we have explained that "[t]o set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases'; and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.' "

Applying these principles to the facts presented here, and in the context of this case where a statute clearly shows that defendant's conviction rendered him permanently ineligible to obtain a firearms identification card, defendant has shown that his trial counsel's performance fell below the standard expected of an attorney licensed to practice law in this State. Under these circumstances, the PCR court must determine whether 'there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial.'

Eye-witness Identification

State v. Henderson, 208 N.J. 208 (2011)

First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. (using same standard to trigger pretrial hearing to determine if child-victim's statements resulted from suggestive or coercive interview techniques). That evidence, in general, must be tied to a system—and not an estimator—variable.

Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless.

Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.

Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions, as discussed further below.

To evaluate whether there is evidence of suggestiveness to trigger a hearing, courts should consider the following non-exhaustive list of system variables:

1. *Blind Administration.* Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" described above, to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?

2. *Pre-identification Instructions.* Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make identification?

3. *Lineup Construction.* Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?

4. *Feedback.* Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?

5. *Recording Confidence.* Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. *Multiple Viewings.* Did the witness view the suspect more than once as part of **921 multiple identification procedures? Did police use the same fillers more than once?

7. *Showups.* Did the police perform a show-up more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. *Private Actors.* Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. *Other Identifications Made.* Did the eyewitness initially make no choice or choose a different suspect or filler?

The court should conduct a *Wade* hearing only if defendant offers some evidence of suggestiveness. If, however, at any time during the hearing the trial court concludes from the testimony that defendant's initial claim of suggestiveness is baseless, and if no other evidence of suggestiveness has been demonstrated by the evidence, the court may exercise its discretion to end the hearing. Under those circumstances, the court need not permit the defendant or require the State to elicit more evidence about estimator variables; that evidence would be reserved for the jury.

By way of example, assume that a defendant claims an administrator confirmed an eyewitness' identification by telling the witness she did a "good job." That proffer would warrant a *Wade* hearing. Assume further that the administrator credibly denied any feedback, and the eyewitness did the same. If the trial court finds that the initial allegation is completely hollow, the judge can end the hearing absent any other evidence of suggestiveness. In other words, if no evidence of suggestiveness is left in the case, there is no need to explore estimator variables at the pretrial hearing. Also, trial courts always have the authority to direct the mode and order of proofs, and they may exercise that discretion to focus pretrial hearings as needed.

Eye-witness Identification – Private Citizen

State v. Chen, 208 N.J. 307 (2011)

This case is not about government conduct. It therefore does not implicate due process concerns raised by suggestive police procedures. Here, the victim's husband is the primary actor, not anyone connected to the police. As a result, we are not concerned about deterring future conduct by law enforcement officers.

Nonetheless, the reasons animating the case law on eyewitness identification extend beyond police procedures and also address the reliability of evidence presented in court.

We therefore agree with the Appellate Division that although no *Wade* hearing was necessary, that hardly ends the inquiry. We must consider the admission of eyewitness identifications tainted by private suggestive procedures in light of the rules of evidence and the trial courts' gate-keeping function.

Accordingly, we hold that the following modified approach shall apply to assess the admissibility of identification evidence when there is suggestive behavior but no police action: (1) to obtain a pretrial hearing, a defendant must present evidence that the identification was made under highly suggestive circumstances that could lead to a mistaken identification, (2) the State must then offer proof to show that the proffered eyewitness identification is reliable, accounting for system and estimator variables, and (3) defendant has the burden of showing a very substantial likelihood of irreparable misidentification. To reiterate, only the first prong is modified from the test in *Henderson.*

At the *Rule* 104 hearing, courts will weigh both system and estimator variables. As in *Henderson,* the court can end the hearing if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless. Ultimately, if the identification evidence is admitted, judges should also make use of enhanced jury instructions at trial and allow expert testimony only if warranted, consistent with We expect that with enhanced jury charges, there will be less of a need for expert witnesses.

Under the revised formulation, behavior that would trigger a *Wade* hearing if engaged in by a law enforcement officer would not automatically require a *Rule* 104 hearing unless the conduct was highly suggestive in its context. Thus, for example, if a police officer conducting a photo array asked, "Are you sure the attacker wasn't wearing glasses?" that procedure would compel a *Rule* 104 hearing. The same words uttered in conversation by a friend with no apparent knowledge or authority, though, would not warrant a hearing. By contrast, if an eyewitness provided a detailed identification to a fellow eyewitness, those highly suggestive comments would require exploration at a hearing.

In the end, if a defendant can demonstrate a very substantial likelihood of irreparable misidentification, the identification evidence would not survive scrutiny under *Rule* 403. Its likelihood to mislead the jury and cause undue prejudice would substantially outweigh any probative value it might offer. In light of the courts' gate-keeping function, such evidence would properly be excluded under the rules of evidence.

Eye-witness Identification – Photo Array

Related Case

State v. Branch, 182 NJ 338 (2005)

State v. Lazo, ___ N.J. ___ (2012)

There are any number of valid reasons for the State to offer a photo of a defendant to meet its burden of proof at trial. Arrest photos raise particular concerns, though, because they can inject prejudice by suggesting a defendant has a prior criminal record. As a result, if "identification is an issue and the State's use of a mug shot is reasonably related to that issue," an arrest photo may be admitted only if it is presented "in as neutral a form as possible.

It was therefore error for the detective in this case to tell the jury why he included defendant's photo in the array. The evidence was not relevant—indeed, there was no challenge of any sort to the array—and the testimony ran afoul of *Branch.* And just as in *Branch,* the error invited problematic testimony into the trial. In essence, the detective told the jury that he believed defendant closely resembled the culprit—even though the detective had no personal knowledge of that critical, disputed factual question. By doing so, the officer enhanced the victim's credibility and intruded on the jury's role. The *Branch* error also led to the admission of improper lay opinion testimony.

Confrontation – *Crawford* Issues

State v. Cabbell, 207 N.J. 311 (2011).

In a recorded statement to the police, [the witness] identified the two defendants as participants in the shooting death of [the victim]. Before the jury, she admitted that the prior statement was truthful but refused to respond to further questions posed by the prosecutor. At a hearing out of the presence of the jury, she testified that she was under the influence of crack cocaine both when she observed the shooting incident and when she gave the statement to the police.

The court admitted the witness's damning out-of-court statement without allowing defense counsel the opportunity to cross-examine her before the jury. Both defendants were convicted of various crimes related to the killing of [the victim].

The opportunity to question [the witness] at a hearing out of the presence of the jury was not a proper substitute for defendants' right to cross-examine the witness before the jury—the fact-finder responsible for determining whether defendants were guilty of the crimes charged. Both defendants were deprived of their federal and state confrontation rights, an error that was not harmless.

Sentencing

Related cases:

State v. Warren, 115 NJ 433 (1989)

State v. Briggs, 349 NJ Super. 496 (App. Div. 2002)

State v. Hess, 207 N.J. 123 (2011).

A plea agreement that prevents a defense attorney from presenting or arguing mitigating evidence to the sentencing court deprives the court of the information it needs to faithfully carry out its unfettered obligation to identify and weigh the appropriate sentencing factors. The unhindered adversarial process at sentencing allows the court to be fully informed about all the evidence and factors that will lead to a just sentence. A lopsided presentation by the State, and the virtual gagging of defense counsel, does not accomplish that goal.

Putting aside defense counsel's failure to object to the restrictions in the plea agreement at the time of sentencing, perhaps out of fear that the downgrade to aggravated manslaughter would be jeopardized, the failure to present and argue the mitigating evidence can only be explained as attorney dereliction. In the end, the restrictive plea agreement helped to fuel the breakdown of the adversarial process in this case. The net effect of counsel's abdication of his role as an advocate was that the sentencing court was deprived of information and arguments that might well have led it to impose a lesser term. The sentencing court heard the prosecution's impassioned account, and from the defense a deafening silence.

We find that the failure to present mitigating evidence or argue for mitigating factors was ineffective assistance of counsel—even within the confines of the plea agreement. Defendant's attorney was not functioning as the "counsel" guaranteed by either our Federal or State Constitution.

Discovery – Preservation of Notes
Child Sexual Abuse Accommodation Syndrome (CSAAS)
State v. W.B., 205 N.J. 588 (2011).

Our criminal discovery rules do not currently require the recordation of all statements of witnesses obtained by law enforcement officers. But they do provide for discovery of all statements whether signed or unsigned, of witnesses as well as police reports which are "in the possession, custody and control of the prosecutor." Therefore, we hold today that the *Rule* encompasses the writings of any police officer under the prosecutor's supervision as the chief law enforcement officer of the county. If a case is referred to the prosecutor following arrest by a police officer as the initial process, or on a complaint by a police officer, *see R.* 3:3–1; *R.* 3:4–1, local law enforcement is part of the prosecutor's office for discovery purposes. Logically, because an officer's notes may be of aid to the defense, the time has come to join other states that require the imposition of "an appropriate sanction" whenever an officer's written notes are not preserved.

The use of Child Sexual Abuse Accommodation Syndrome (CSAAS) expert testimony is well settled. In 1993, this Court held that expert testimony in the area of CSAAS was permissible in order to "explain why many sexually abused children delay reporting their abuse, and why many children recant allegations of abuse and deny that anything occurred." Such testimony is categorized as behavioral-science testimony because it describes behavior commonly observed in sexually-abused children. . The behavioral studies of CSAAS are designed not to provide certain evidence of guilt or innocence, but rather to insure that all agencies, including the clinician, the offender, the family, and the criminal justice system offer "the child a right to parity with adults in the struggle for credibility and advocacy.

When CSAAS evidence is presented to a jury, the court must ensure that it is used in accordance with its scientific underpinnings, "i.e. the evidence [i]s not offered to explain the conflicting behavioral traits in this case either of accommodation or delayed disclosure." Accordingly, the evidence cannot be presented to the jury to prove directly and substantially that sexual abuse occurred. Dr. Summit did not intend the accommodation syndrome as a diagnostic device—it does not detect sexual abuse. Instead, it assumes the presence of sexual abuse, and explains a child's often counter-intuitive reactions to it. CSAAS has a limited, therapeutic purpose, not a predictive one, so "the evidence must be tailored to the purpose for which it is being received."

Simply stated, CSAAS cannot be used as probative testimony of the existence of sexual abuse in a particular case. Therefore, introduction of such testimony will be upheld so long as the expert does not attempt to "connect the dots" between the particular child's behavior and the syndrome, or opine whether the particular child was abused.
34.

Withdrawal of Guilty Plea

Related Case:

State v. Slater, 198 NJ 145 (2009)

State v. Michael P.S. Hayes, 205 N.J. 522 (2011).

[State v. Slater, 198 N.J. 145 (2009)] sets forth a four-prong test by which to gauge a defendant's motion to withdraw a guilty plea. It provides that trial judges are to consider and balance four factors in evaluating motions to withdraw a guilty plea: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused.

It also explains that although "[t]he same factors are to be used for motions filed either before or after sentencing," whether the motion is made pre- or post-sentencing "will trigger different burdens of proof for the movant [.]" It underscores that "pre-sentence motions to withdraw a plea are governed by the 'interest of justice' standard in *Rule* 3:9–3(e), while post-sentence motions are subject to the 'manifest injustice' standard in *Rule* 3:21–1.

That said, *Slater's* mandate would be rendered meaningless without the underlying constitutional guarantee of the assistance of counsel in presenting that motion.

When a defendant applies for an adjournment to enable him to substitute counsel, the trial court must strike a balance between its inherent and necessary right to control its own calendar and the public's interest in the orderly administration of justice, on the one hand, and the defendant's constitutional right to obtain counsel of his own choice, on the other.

Those factors in the aggregate instruct that whether a trial court should grant or deny a defendant's request for an adjournment to retain counsel requires a balancing process informed by an intensely fact-sensitive inquiry.
35.

Spousal Privilege

Related Case:

In re Kozlov, 79 NJ 232 (1979)

NJRE 501(2) "The spouse or one partner in a civil union couple of the accused in a criminal action shall not testify in such action except to prove the fact of marriage or civil union unless (a) such spouse or partner consents, or (b) the accused is charged with an offense against the spouse or partner, a child of the accused or of the spouse or partner, or a child to whom the accused or the spouse or partner stands in the place of a parent, or (c) such spouse or partner is the complainant.

State v. Mauti, 208 NJ 519, 538-539 (2012)

[The published cases] establish the narrow circumstances, apart from the express exceptions in the rules, under which the "need" prong can be satisfied: (1) where a constitutional right is at stake, or (2) a party has explicitly or implicitly waived the privilege. It is only such circumstances that permit judicial intervention. Those principles apply equally to all privileges.

Standing - Municipal Appeals

Related Case:

State v. Vitiello, 377 NJ Super. 452 (App. Div. 2005)

In re Loigman, 183 NJ 133 (2005)

State v. Bradley, 420 NJ Super. 138 (App. Div. 2011)

In our State, there is simply no circumstance in which a private complainant can act as a prosecuting attorney without the special approval and process provided in *Rule* 3:23–9(d). In fact, [the complainant] lacks standing not only to have taken the initial appeal in the Law Division, but to further pursue the matter to this court.

The public policy behind the limitation on who may act as a "prosecuting attorney" is well-established: "[u]nlike private citizens, prosecutors are guided and governed by the Rules of Professional Conduct and our case law to ensure fairness in the process."

Because they are mandated to ensure the fairness of the process, only prosecutors, as defined in the court rules, are authorized to act in cases that may result in incarceration or other penalties of magnitude. Such consequences require that prosecution be limited to those more interested in the "fairness [of] the process" than the vindication of individual interests.

37.