Major Municipal Court Cases of 2007
By Kenneth Vercammen, Esq.

1 **Nurse Who Withdrew Blood Can Be Required to Testify in DWI Case.**
State v. Renshaw
390 NJ Super. 456 (App. Div. 2007)

In this case the state introduced a certificate signed by a Nurse who drew blood. The Court held that the admission in evidence of the Uniform Certification for Bodily Specimens Taken in a Medically Acceptable Manner, pursuant to N.J.S.A. 2A: 62A-11, without the opportunity for cross-examination of the nurse who drew the blood, and over the objection of defendant, runs afoul of the right of confrontation protected both by the United States and the New Jersey Constitutions. Therefore, the Nurse Can Be Required to Testify in DWI Blood Case.

2 Defendant Can Contest DWI Blood Lab Reports As Hearsay. State v. Kent 391 NJ Super. 352 (App. Div. 2007)

Defendant was convicted of DWI following a single-car rollover accident, and the Law Division affirmed his conviction. At the municipal trial, the State placed into evidence, among other proofs, (1) a blood sample certificate pursuant to N.J.S.A. 2A: 62A-11 from a private hospital employee who had extracted blood from defendant and (2) reports from a State Police laboratory that had tested the blood samples. The authors of those hearsay documents did not appear at trial.

The court reaffirmed the holdings in State v. Renshaw, 390 N.J. Super. 456 (App. Div. 2007) (regarding blood sample certificates) and in State v. Berezansky, 385 N.J. Super. 84 (App. Div. 2006) (regarding State Police laboratory reports) concluding that the hearsay documents are "testimonial" under Crawford v. Washington, 541 U.S. 36 (2004), and that defendant was thus deprived of his right of confrontation under the Sixth Amendment.

The court also noted that unless our Supreme Court determines otherwise, the confrontation clause of Article I, Paragraph 10 of the New Jersey Constitution does not appear to independently require such cross-examination beyond current federal precedents interpreting the Sixth Amendment. Additionally, the court recommends that legislative and/or rule-making initiatives be pursued to avoid placing undue testimonial burdens on health care workers and law enforcement personnel who may create documents relevant to drunk driving prosecutions.

Defendant's DWI conviction was affirmed on independent grounds, based upon the arresting officer's numerous observations indicative of defendant's intoxication, and defendant's admission of drinking.

3 Crawford hearsay rule does not apply to breathalyzer certification. State v. Dorman 393 N.J. Super. 28 (App. Div. 2007) cert granted __

In this DWI appeal, the court held that notwithstanding the Supreme Court's holding in Crawford v. Washington, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004), a breathalyzer machine certificate of operability offered by the State to meet its burden of proof under State v. Garthe, 1 N.J. 1 (1996), remains admissible as a business record under N.J.R.E. 803(c)(6).

A similar unreported case of State v. Sweet is being heard by the N.J. Supreme Court on the issue of admissibility of breathalyzer certificates.

4 3rd DWI Requires 90 Consecutive Days in jail- no weekends. State v. Kotsev 396 NJ Super. 58 (App. Div. 2007)

1. N.J.S.A. 39:4-50 mandates a minimum of ninety consecutive days incarceration for a third or subsequent conviction for driving while intoxicated (DWI). Sheriff's Labor Assistance Programs (SLAP) and weekend service are not substitute sentencing for third or subsequent offenders.

2. The 1993 statute mandated a third or subsequent offender to serve 180 days incarceration "except that the court may lower such term for each day, not exceeding ninety days, served performing community service." No other options are available.

3. The 2004 amendment to N.J.S.A. 39:4-50, commonly referred to as Michael's Law, similarly mandates 180 days incarceration but allows a reduction of one day for each day, not exceeding ninety days, in an inpatient rehabilitation program.

A third or subsequent DWI conviction, under the current statute requires a defendant to serve a minimum of ninety consecutive days of incarceration.

5. If DV warrant defective, all other evidence suppressed. State v. Dispoto 189 N.J. 108 (2007)

Because there was insufficient evidence to support the issuance of the underlying domestic violence search warrant, the criminal search warrant was invalid as fruit of the poisonous tree.

The failure to re-administer Miranda warnings at the time of arrest required suppression of Dispoto's post-arrest incriminating statements, the Court adds in respect of the issue of the Miranda warnings only that no bright line or per se rule governs whether re-administration is required following a pre-custodial Miranda warning.

6 In DWI Refusal, Officer should Read Additional Paragraph. State v. Spell 395 NJ Super. 337 (App. Div. 2007).

In refusal to take a breathalyzer test N.J.S.A. 39:4-50.2, the Appellate Division wrote, effective October 1, 2007 officers must read the additional paragraph of the statutorily promulgated statement of the Motor Vehicle Commission before any refusal conviction can be sustained. However, this opinion is stayed pending appeal by Attorney General.

7. Reasonable Suspicion Required to Search a Disabled Car. State v. Elders 195 NJ 224 (2007).

The "reasonable and articulable suspicion" standard of State v. Carty. 174 N.J. 351 (2002), which governs consent searches of cars that are validly stopped applies equally to disabled vehicles on the State's roadways. In this case, the Court concludes that there was sufficient credible evidence in the record to support the trial judge's findings that the troopers engaged in an unconstitutional investigatory detention and search. Can't ask for consent to search.

8 Domestic Violence Not Guilty Does Not Bar Criminal Prosecution. State v. Brown 395 NJ Super. 492 (App. Div. 2007).

Neither the doctrine of collateral estoppel nor fundamental fairness preclude a criminal prosecution for the same events following denial of a Final Restraining Order and dismissal of a Domestic Violence complaint in the Family Part.

9. Traffic Ticket Served After 30 Days is Untimely. State v. Buczkowski 395 NJ Super. 40 (App. Div. 2007).

The Court applied the Supreme Court's dictum in State v. Fisher, 180 N.J. 462, 474 (2004), that N.J.S.A. 39:5-3a requires service of process within thirty days from the date of a alleged offense in most instances of charged motor vehicle violations. The Court, therefore, affirmed the Law Division's dismissal of a charge of reckless driving, N.J.S.A. 39:4-96, as untimely. The Court also applied the doctrine requiring "[t]he government [to] 'turn square corners' in its dealings with the public."

10 Hardship Exemption to Avoid Drug DL Suspension Explained. State v. Bendix 396 NJ Super. 91 (App. Div. 2007)

The court concluded that the trial court took too restrictive a view of the court's discretion, under N.J.S.A. 2C:35-16a, to grant defendant a hardship exception from the requirement that his driver's license be suspended due to his conviction for drug offenses. In remanding for a new hearing on the exception issue, the court provided guidance as to the proper procedures for conducting the hearing. Defense counsel should present his client's application through formal witness testimony, and the State's opposition should likewise be presented through testimony rather than representations of counsel.

11. Police can pat down suspect if they observe drug transaction. State v. O'Neal 190 N.J. 601 (2007)

Based on the observations made by law enforcement officers, there was probable cause to search and arrest O'Neal. The police officer's question to O'Neal that elicited his response without prior Miranda warnings violated Miranda v. Arizona, but was harmless under the circumstances.

12. Plaintiff can be guilty of DWI based on cocaine hangover and certified DRE. State v. Franchetta 396 N.J. Super. 23 (App. Div. 2007)

This case presents the novel issue as to whether a "rebound effect" or "hangover effect" from a previous ingestion of cocaine constitutes being "under the influence" of a narcotic drug pursuant to N.J.S.A. 39:4-50. The court held that it does. Although the cocaine ingested by defendant was not pharmacologically active at the time of the incident, the court found that it was the proximate cause of his impaired behavior and that he was therefore "under the influence" of a narcotic drug for purposes of N.J.S.A. 39:4-50

13. Passenger can file suppression motion on traffic stop. Brendlin v. California 127 S. Ct. 2400 6/18/07

After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized petitioner Brendlin, a passenger in the car. Upon verifying that Brendlin was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. Charged with possession and manufacture of that substance, Brendlin moved to suppress the evidence obtained in searching his person and the car, arguing that the officers lacked probable cause or reasonable suspicion to make the traffic stop, which was an unconstitutional seizure of his person. The trial court denied the motion, but the California Court of Appeal reversed, holding that Brendlin was seized by the traffic stop, which was unlawful. Reversing, the State Supreme Court held that suppression was unwarranted because a passenger is not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he was the subject of the officer's investigation or show of authority. The U.S. Supreme Court held when police make a traffic stop, a passenger in the car, like the driver, is seized Fourth Amendment purposes and so may challenge the stop's constitutionality.

14 If Suspended for DWI in Another State, Enhanced Penalty for Driving While Suspended. State v. Colley 397 NJ Super. 214 (Decided December 14, 2007)

A prior conviction in another state for conduct equivalent to that proscribed by N.J.S.A. 39:4-50 subjects the defendant to the enhanced penalty provision set by N.J.S.A. 39:3-40f(2) upon a subsequent conviction in this state.

15. No time limit on appeal until court advises defendant of right to appeal State v. Johnson 396 NJ Super. 133 (App. Div. 2007)

In this appeal the court examine the consequences of a sentencing court's failure to notify a defendant of his right to appeal within forty-five days, when the sentence was imposed prior to the New Jersey Supreme Court's opinion in State v. Molina, 187 N.J. 531 (2006). In Molina, the Court made prospective its holding that such a defendant had five years from the date of sentencing to move for leave to appeal as within time.

16 Police Can Use An Electronic Tracking Devise to Trace a Stolen Cell Phone. State v. Laboo 396 NJ Super. 97 (App. Div. 2007)

Three individual committed a string of armed robberies over the course of a one-hour period, taking items that included two cell phones. Approximately thirty hours after the last robbery, police used a tracking device to track one of the stolen cell phones to a three-family home located in a high crime area. Three officers entered the building and used a handheld tracking device to determine the exact apartment. An officer knocked on the apartment door and announced that he was a police officer. The officer then heard a young female yelling and a man's voice saying "shut up, shut up, 5-0," and scurrying inside the apartment. Without obtaining a warrant, the officers forcibly entered the apartment, wherein they found evidence from the robberies.

The Court reversed the law division's order suppressing the evidence. The search was justified because the exigent circumstances, although police-created, arose as a result of reasonable investigative conduct. The Court held that the police were not required to secure a warrant because a delay presented a real potential danger to the officers and public, under the circumstances.

17. Police Should Have Given 2nd Miranda Warnings. State v. Nyhammer 396 NJ Super. 72 (App. Div. 2007)

The Court reversed a conviction for aggravated sexual assault on a girl, then nine years old, concluding that each of two rulings constituted reversible error. First, the judge should not have admitted defendant's confession. An investigator called defendant and explained he was conducting an investigation against another man in connection with the abuse of another child as well as the victim in this case. The investigator did not indicate to defendant that the victim in this case had made allegations of abuse by defendants. Defendant went to the police station. The investigator gave defendant the Miranda warnings. After defendant gave a formal statement regarding the incident of abuse by the other man, the investigator told him that the victim had made accusations against defendant as well. Defendant became distraught. Miranda warnings were not given a second time. Defendant confessed. The Court concludes that defendant did not make a knowing and voluntary waiver of his right to remain silent. Therefore, his confession was admissible.

Second, the Court concluded that the victim's hearsay videotape, which was the sole substantive evidence proving defendant's conduct, should have been excluded from evidence, pursuant to confrontation clause. The videotaped statement was "testimonial," there was no prior opportunity for defendant to cross-examine the victim, and there was no opportunity for an adequate and meaningful cross-examination at trial because the victim was unresponsive to many questions. At trial, she did not recollect questions going to the heart of the charges. Therefore, the videotape was the sole substantive evidence at trial.

18. Guilty plea permitted to be withdrawn where defendant not advised of plea consequences State v. J.J. 397 NJ Super. 91 (Decided December 11, 2007)

When, as part of a guilty plea, defendant is subject to community supervision under Megan's Law, the court must ensure that defendant understands the particular consequences of such supervision. In this case, defendant was not informed that Megan's Law would prevent him from living with his new wife and her child. Therefore, defendant should have been allowed to withdraw his guilty plea and proceed to trial on all the charges contained in the indictments.

19 Noise ordinance not preempted by state law
State v Krause ___ NJ Super. ___ (App. Div. decided 4/17/2008) A-3737-06T5

Based on defendant's failure to meet his burden of proving facts that would establish that the Hackettstown noise ordinance was preempted by the Noise Control Act of 1971, N.J.S.A. 13:1G-1 to -23, the ordinance was held valid and the conviction affirmed. However, the opinion noted that local noise ordinances may require DEP approval to be enforceable at least with respect to certain facilities, such as commercial and industrial sites. Note- Lexis reports this opinion was withdrawn from at request of Court.

20. Two step police interrogation invalid
State v. O'Neill) 193 NJ 148 NJ Supreme Court (A-79-06) 12-20-07

As a matter of state law, when Miranda warnings are given *after* a custodial interrogation has already produced incriminating statements, the admissibility of post-warning statements will turn on whether the warnings functioned effectively in providing the defendant the ability to exercise his state law privilege against self-incrimination.

21. No trial without defendant unless defendant willfully absent **State v. Luna** 193 NJ 202 NJ Supreme Court (A-68-06) 12-19-07

It is not possible to infer that defendant knowingly waived his right to be present at trial because the trial court did not conduct an inquiry to determine whether defendant willingly absented himself. For that reason, defendant's convictions must be reversed.

Kenneth Vercammen is the 2008 Municipal Court Attorney of the Year by the Middlesex County Bar Association. He was selected one of only three attorneys as a Super Lawyer 2008 in NJ Monthly in the Criminal – DWI category. Kenneth Vercammen was the NJ State Bar Municipal Court Attorney of the Year and past president of the Middlesex County Municipal Prosecutor's Association.□□ He is the past chair of the NJ State Bar Association Municipal Court Section. He is the Deputy chair of the ABA Criminal Law committee, GP Division.

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Kenneth Vercammen was selected one of only three attorneys as a Super Lawyer 2007-2008 in NJ Monthly in the Criminal - DWI. Kenneth Vercammen was the NJ State Bar Municipal Court Attorney of the Year and past president of the Middlesex County Municipal Prosecutor's Association.□□ He is the past chair of the NJ State Bar Association Municipal Court Section. He is the Deputy chair of the ABA Criminal Law committee, GP Division.

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