Summer Municipal Court Law Review 2015

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1. Municipal Court improperly admitted into evidence Drinking Driving Questionnaire (DDQ) and Drinking Driving Report (DDR). State v. Kuropchak __ NJ __ (2015) (A-41-13).

The municipal court's admission of the Alcotest results without the foundational documents required by State v. Chun, 194 N.J. 54 (2009) was error. Further, because the DDQ and DDR contained inadmissible hearsay, which may have unduly influenced the municipal court's credibility findings, the matter is remanded for a new trial.

As for defendant's contention that the DDR and DDQ are hearsay not subject to any exception, the Court observes that hearsay is inadmissible unless it falls into one of certain recognized exceptions. To qualify as a business record,

a writing must: (1) be made in the regular course of business, (2) within a short time of the events described in it, and (3) under circumstances that indicate its trustworthiness. Foundational reports for breath testing, with certain qualifications, are admissible under the business record exception to the hearsay rule. Here, however, the DDR contains a narrative account of what the officer saw at the scene and includes factual statements, observations, and the officer's opinions. Thus, the DDR contains inadmissible hearsay. Although the DDQ also does not appear initially to constitute hearsay, it incorporates by reference the DWI report in the "remarks" section and the DWI report, in turn, contains several inadmissible opinions. The DDQ's content thus also rises to the level of inadmissible hearsay and must be excluded. Therefore, the DDR and the DDQ were inadmissible hearsay outside the scope of the business records exception.

Here, the municipal court heard defendant's testimony concerning the events on the day of the incident, as well as the testimony of Officer Serritella. The court found the Officer's testimony more credible than defendant's and therefore found defendant guilty. The court's credibility determinations, however, were made after the DDR and the DDQ were admitted into evidence, notwithstanding the impermissible hearsay statements they contained, and after the Alcotest results were admitted into evidence despite the lack of requisite foundational documents.

The cumulative effect of the inclusion of the DDR, the DDQ, and the Alcotest results may have tilted the municipal court's credibility findings. Thus, the Court lacks sufficient confidence in the proceedings to sanction the result reached and concludes that the interests of justice require a new trial. It is only because of the unique confluence of events in this case – the inappropriate admission of the Alcotest results as well as the DDR and DDQ – that the Court remands for a new trial. Had the only flaw been the admission of the DDR and DDQ, which contained hearsay, Officer Serritella's testimony would have alleviated much of that problem. Here, however, the cumulative effect of the errors may have tilted the municipal court's credibility findings.

The judgment of the Appellate Division was **REVERSED.**

2. Police needed warrant for blood taking after DWI event in 2010 case, no good faith exception for police actions. State v. Adkins __ NJ __ (2015) (A-91-13).

In this appeal of a 2010 ticket, the Court considers the application of the United States Supreme Court's decision in Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), to a case involving a blood draw, for purposes of determining blood alcohol content (BAC), that took place before the McNeely decision was issued.

McNeely's pronouncement on the Fourth Amendment's requirements must apply retroactively to cases that were in the pipeline when McNeely was issued.

Accordingly, the Appellate Division's judgment is reversed. The matter is remanded to allow the State and defendant the opportunity to re-present their respective positions on exigency in a hearing on defendant's motion to suppress the admissibility of the blood test results. In that hearing, potential dissipation of the evidence may be given substantial weight as a factor to be considered in the totality of the circumstances. The reviewing court must focus on the objective exigency of the circumstances faced by the officers.

3. Ten year step down in DWI also applies to refusal. State v Taylor __ NJ Super. __ (App. Div. 2015) (A-3923-13T2).

In 2013, defendant Thomas Taylor entered a conditional guilty plea to refusal to submit to a breath test, N.J.S.A. 39:4-50.2, reserving the right "to appeal [] any and all issues, including sentencing." Although defendant had no prior convictions for refusal, he had two prior convictions for driving while intoxicated (DWI), N.J.S.A. 39-4-50, in 1985 and 1996. The trial court sentenced defendant as a "third offender," using his DWI convictions to enhance the penalty for his refusal conviction.

On appeal, defendant argues that the "step-down" provision of the DWI statute, N.J.S.A. 39:4-50(a)(3), should apply so as to reduce his refusal conviction from a third to a second offense for sentencing purposes since it followed more than ten years after his second DWI conviction. The court agreed and held that where the penalty attendant to a driver's refusal conviction is enhanced by a prior conviction under the DWI statute, fairness dictates that it be similarly reduced by the sentencing leniency accorded a driver under the "step-down" provision of that statute when there is a hiatus of ten years or more between offenses.

4. Police did not have reason to order passenger out of car. State v Bacome __ NJ Super. __ (App. Div. 2015) (A-3734-12T1).

Based on speculation that defendant and a passenger in his vehicle were involved in illegal drug activity, police officers attempted to follow but lost sight of the vehicle in or near Newark and waited in Woodbridge for its return. Once the vehicle returned, the officers stopped it, ostensibly because the passenger was not wearing his seatbelt. On approaching, an officer, who did not testify, observed defendant reach under his seat. Both driver and passenger were then ordered out of the vehicle; after the passenger exited, an officer was able to observe in plain view materials that suggested drug usage. Based on that observation, a warrantless search of the vehicle ensued, and illegal drugs were found.

Because defendant's mere entry into and departure from Newark did not permit a reasonable suspicion of illegal drug activity and because the State had failed to present facts "that would create in a police officer a heightened awareness of

danger" if the passenger were allowed to remain in the vehicle, State v. Smith, 134 N.J. 599, 618 (1994), the court found no sufficient ground for the ordering of the passenger out of the vehicle and reversed the denial of the suppression motion.

5. **A request for a civil reservation in municipal court must be made in open court. Maida v. Kuskin, 221 N.J. 112 (N.J. 2015).**

A request for a civil reservation in municipal court must be made in open court and contemporaneously with the court's acceptance of defendant's guilty plea. If the prosecutor or the victim demonstrates good cause, or the charge to which a defendant pleads guilty does not arise out of the same occurrence that is the subject of the civil proceeding, a civil reservation order may not be entered.

6. Mere filming of ex spouse is not violation for FRO. State v. D.G.M., 439 N.J. Super. 630 (App.Div. 2015).

In this appeal of a contempt conviction, the court considered whether defendant violated the "no contact or communication" provision of an amended domestic violence final restraining order by sitting near and briefly filming the victim at their child's soccer game. Although the court held that such conduct falls within the restraining order's prohibition on "communication," the court concluded that defendant could not have fairly anticipated this interpretation; therefore, in applying the doctrine of lenity, the court reversed defendant's conviction.

7. Jail Alternative allowed in 3-40(e) and 6B:2. State v. Toussaint, ___ N.J. Super. ___ (App.Div. 2015) (A-3654-13T1).

When a defendant is convicted under N.J.S.A. 39:3-40(e) (being involved in an accident that causes injury to another, while driving with a suspended license), or N.J.S.A. 39:6B-2 (driving without insurance), the court has discretion to permit the defendant to serve the sentence in an electronic monitoring program instead of in the county jail. In construing those provisions, we distinguished State v. French, 437 N.J. Super. 333, 335 (App. Div. 2014), certif. denied, 200 N.J. 575 (2015), which held that N.J.S.A. 2C:40-26(c) did not permit sentencing alternatives for driving during a second or subsequent license suspension imposed for DWI.

8. OPRA can require town and police to provide video of security camera. Gilleran v. Twp. of Bloomfield, ___ N.J. Super. ___ (App.Div. 2015) (A-5640-13T4).

The Open Public Records Act (OPRA) does not include a blanket exemption for video recordings made from an outdoor security camera. To justify denying an

OPRA request pursuant to the definitional exclusions contained in N.J.S.A. 47:1A-1.1 for "security information," "procedures," "measures," and "techniques," the government agency must make a specific showing of why disclosure would jeopardize the security of the facility or put the safety of persons or property at risk.

Because we agree with the trial court that the township did not make a sufficiently specific showing for an exemption, we need not decide whether N.J.S.A. 47:1A-5(g) requires a government agency to review requested recordings and redact only actual confidential information, as argued by plaintiff and the ACLU. Such a requirement of review and redaction seems impractical and virtually impossible to implement when the request is for lengthy surveillance recordings, such as the fourteen hours of recordings requested here by plaintiff.

9. **Bias statute requires proof of defendant intended bias, not victim perception and statute unconstitutional. State v. Pomianek, 221 N.J. 66 (N.J. 2015).**

Subsection (a)(3) of the bias-intimidation statute, N.J.S.A. 2C:16-1, fails to give adequate notice of conduct that it proscribes, is unconstitutionally vague, and violates the Due Process Clause of the Fourteenth Amendment.

10. **Single tablet possession dismissed as de minimis. State v. Cancio, (App. Div. Decided March 16, 2015) 14-3-6154, Unpublished.**

Defendant Alvin Cancio filed a motion to dismiss River Edge summons No. W-2014-000101, in which he was charged with possession of a controlled dangerous substance as de minimis, pursuant to N.J.S.A. 2C:2-11. Defendant was charged with this offense, as well as driving while intoxicated, careless driving and failure to maintain lane after being stopped by police and arrested. The application for de minimis dismissal was opposed by the Office of the Bergen County Prosecutor. The small quantity of Alprazolam found was of little value and no violence or weapons were involved. The pill remained in defendant's wallet. The court found the prosecutor would be hard-pressed to show prosecuting defendant for possession of a single tablet of Alprazolam under a belief the pill was a sexual enhancer would attack either the supply side or demand side of the drug problem. Further, the court found it unclear what societal harm was caused by defendant's possession of a single tablet under the belief it was a sexual enhancer. Defendant's conduct was "trivial," at least as it pertains to creating a permanent record for a young offender attempting to work and pay off hundreds of thousands of dollars of medical bills that arose from a car accident that left him severely injured. Incarceration or a permanent record for inadvertently possessing a single tablet of a CDS would not help defendant, the hospital or society. Defendant's motion to dismiss complaint-summons number 0252-S-2014-000101 as de minimis was granted.

Source: N.J.L.J Daily Briefing March 12-18, 2015

[delete if not enough space..... 11. 3rd offender DWI defendant not entitled to jail credit for house arrest State v Haas. State v. Haas, (App. Div. Decided March 13, 2015) A-3599-13T4, Unpublished.

Under N.J.S.A. 39:4-50(a)(3) a defendant found guilty of Driving While Intoxicated (DWI) for a third or successive time must be sentenced to imprisonment for a term of "not less than 180 days," and that time must be served "in a county jail or workhouse." Defendant in this third-time DWI case argued that he was entitled to jail credits for the 149-day period he spent under what was characterized as the functional equivalent of a "house arrest." The court concluded that such credits are not authorized under the law as the time that defendant spent in his consensual, so-called house arrest was not time served "in custody in jail or in a state hospital." The mandatory jail consequence prescribed by the Legislature must be carried out in full.

Editorial Assistance provided by Jennifer C. Oliver, Esq. & Michael H. Oliver, Esq.

Happy Hour & Networking Social
July 17, 2015 Friday

at Bar Anticipation
703 16th Avenue Lake Como/ Belmar, NJ 07719
Free !
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Kenneth A. Vercammen, Esq.,
Editor- NJ Municipal Court Law Review
2053 Woodbridge Ave.
Edison, NJ 08817
732-572-0500

KENNETH VERCAMMEN
ATTORNEY AT LAW
2053 Woodbridge Ave.
Edison, NJ 08817
(Phone) 732-572-0500