

- **Supreme Court tells Police “Need a Warrant” for Phone Searches. Riley v. California 134 S. Ct. 999 (2014)**

The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested

2. DWI statute and Alcotest not unconstitutional. State v. Campbell 436 N.J. Super. 264 (App. Div. 2014)

Defendant appeals his conviction of drunk driving ("DWI") and the trial court's denial of declaratory relief on his claim of unconstitutionality.

Defendant's prosecution was based upon an Alcotest reading of his blood alcohol content ("BAC") above the per se level of .08 prohibited by N.J.S.A. 39:4-50(a). He argues that case law authorizing the admission of Alcotest BAC results when the prerequisites for such admissibility are shown by "clear-and-convincing" proof, coupled with the statute's conclusively incriminating treatment of a BAC at or above .08, improperly combine to relieve the State of its constitutional burden of proving a driver's guilt by the more rigorous standard of proof "beyond a reasonable doubt."

The Court rejects defendant's claim of unconstitutionality. The argument fails to distinguish the State's threshold burden of establishing the Alcotest's evidential admissibility from the State's ultimate burden at trial of establishing defendant's guilt of a per se offense beyond a reasonable doubt. Even if a pretrial motion to suppress the BAC results has been denied, a defendant can still present competing evidence or arguments at trial to persuade the court that the testing procedures were flawed and that his guilt has not been proven by the more stringent reasonable doubt

standard.

**3. Driving While Suspended Conviction Upheld Although DWI Conviction Vacated. State v. Sylvester \_\_\_ N.J. Super. \_\_\_ (App. Div. 2014) A-5192-12T4**

N.J.S.A. 2C:40-26b makes it a fourth degree offense to drive while one's license is suspended or revoked for a second or subsequent conviction for driving a car while under the influence of alcohol (DWI). In a bench trial before the Law Division on this charge, defendant argued that her second DWI conviction had been voided ab initio by the municipal court when it granted her PCR petition two months after she was indicted for one count of violating N.J.S.A. 2C:40-26b. Thus, defendant argues the State cannot rely on this vacated second DWI conviction to meet its burden of proof under N.J.S.A. 2C:40-26b. The trial court rejected this argument. The court affirmed.

It is undisputed that at the time defendant committed this offense, she was aware her driver's license had been revoked by a presumptively valid second conviction for DWI. The court relied on State v. Gandhi, 201 N.J. 161, 190 (2010) to hold that a second DWI conviction vacated through PCR granted by a court after a defendant engages in conduct prohibited in N.J.S.A. 2C:40-26b, cannot be applied retroactively to bar a conviction under this statute.

**4. Court Says Ban on Fake Government Documents Not Unconstitutional. State v. Borjas 436 N.J. Super. 375 (App. Div. 2014) (A-6292-11T2)**

Defendant was found guilty by a jury of three counts of knowingly making false government documents, second-degree offenses proscribed by N.J.S.A. 2C:21-2.1(b), and four counts of knowingly possessing false government documents, fourth-degree offenses proscribed by N.J.S.A.

2C:21-2.1(d). The incriminating items were created or stored in hard drives on computers at defendant's residence. The items were discovered by law enforcement officers pursuant to a search warrant, although the officers found no printouts of the false items.

The court rejected defendant's argument that subsections (b) and (d) of N.J.S.A. 2C:21-2.1 are unconstitutionally overbroad because they allegedly infringe too much upon protected forms of expression. In doing so, the court does not foreclose a future "as-applied" challenge to the statute by an artist, student, or other person who, unlike the present defendant, makes or stores false images for benign reasons involving constitutionally protected speech.

Additionally, the court rejects defendant's argument that the statute is void for vagueness because it lacks an express element requiring the State to prove a defendant's specific intent to use the false items for illicit purposes. The court also rejects defendant's criticisms of the trial judge's jury instruction defining the term "document" under the statute to encompass items or images stored on a computer. The instruction is consistent with the broader meaning associated with the term "document" in common modern usage.

#### **5. Testimony for State by Defendant's Investigator Violated Right to Counsel. State v. Nunez 436 NJ Super. 70 (App. Div. 2014)**

The court reverses defendant's murder conviction because the trial judge permitted the State to bolster its case by calling defendant's investigator to testify to a prior consistent statement of the State's only eyewitness in violation of defendant's right to counsel.

6. Judge must Recuse from case if involved as prosecutor. State v. Presley 436 N.J. Super. 440 (App. Div. 2014)

In *State v. McCann*, 391 N.J. Super. 542 (App. Div. 2007), the court announced a prospective "bright-line rule" that called for invalidating search warrants issued by a judge who was bound to recuse himself or herself based on a prior relationship. Upon being advised he had prosecuted one of the defendants when he was an assistant prosecutor, the trial judge recused himself. So, the question here is not one of recusal but of remedy. Defendants here ask us to apply *McCann* to the following facts: the judge prosecuted only one of the defendants; no defendant alleges the judge was biased or aware of the disqualifying facts when he issued the warrants or that there was insufficient probable cause for their issuance; and finally, the defendant prosecuted by the judge withheld the disqualifying facts while appearing before the judge on unrelated matters for "strategic" reasons for over a year. The court concludes that *McCann* is distinguishable; the remedy sought by defendants will not serve the interests of the Code of Judicial Conduct; and the appropriate remedy should be determined by what is "required to restore public confidence in the integrity and impartiality of the proceedings, to resolve the dispute in particular, and to promote generally the administration of justice." DeNike v. Cupo, 196 N.J. 502, 519 (2008).

7. Protective sweep permitted where shots fired in high crime neighborhood. State v. Gamble 218 N.J. 412 (2014)

Under the totality of the circumstances, which provided the officers with a reasonable and articulable suspicion that defendant was engaged in criminal activity, the investigatory

stop and protective sweep of the passenger compartment of the van were valid.

#### **8. No warrant needed for DWI blood for DWI tickets issued before 2013**

**State v Jones** \_\_ NJ Super. \_\_ (App. Div. 2014) A-0793-13T1

The Court granted the State leave to appeal from an order that suppressed the results of a blood sample taken without a warrant prior to Missouri v. McNeely 133 S. Ct. 1552 (2013), and now reverses. Defendant caused a multiple vehicle accident, resulting in personal injuries that required hospitalization. Emergency personnel took approximately thirty minutes to extricate the unconscious defendant from her vehicle and the police investigation took several hours.

It is undisputed that the blood sample was obtained consistent with New Jersey law that existed at the time. The Court need not decide whether McNeely should be applied retroactively because the facts support a warrantless blood sample even if McNeely applies. Although McNeely rejected a per se exigency rule, it adhered to the totality of the circumstances analysis set forth in Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 1836 (1966), stating the metabolization of alcohol was an "essential" factor in the analysis. Further, the Court noted that the facts in Schmerber which, like here, included an accident, injuries requiring hospitalization, and an hours-long police investigation, were sufficient to justify a warrantless blood sample for use in an expert's comparison of DNA samples, a defendant's federal and state confrontation rights are satisfied so long as the testifying witness is qualified to perform, and did in fact perform, an independent review of testing data and processes, rather than merely read from or vouch for another analyst's report or conclusions.

**9. Supervising chemist can testify in vehicular homicide if they independently verified correctness of blood test results State v. Michaels \_\_ NJ\_\_ (2014) (A-69-12)**

Defendant's confrontation rights were not violated by the admission of Dr. Barbieri's report or his testimony regarding the blood tests and his conclusions drawn therefrom. Dr. Barbieri was knowledgeable about the testing process, independently verified the correctness of the machine-tested processes and results, and formed an independent conclusion about the results. Defendant's opportunity to cross-examine Dr. Barbieri satisfied her right to confrontation on the forensic evidence presented against her.

**10 Supervising chemist can testify in rape case if they independently verified correctness of DNA results State v. Roach \_\_ NJ \_\_ (2014) (A-129-11)**

Defendant's confrontation rights were not violated by the testimony of the analyst who matched his DNA profile to the profile left at the scene by the perpetrator. Defendant had the opportunity to confront the analyst who personally reviewed and verified the correctness of the two DNA profiles that resulted in a highly significant statistical match inculcating him as the perpetrator. In the context of testing for the purpose of establishing DNA profiles.

**11. Defendant has burden to timely to object to testimony by pathologist who did not perform the victim's autopsy State v. Williams \_\_ NJ\_\_ (2014) (A-5-12)**

Defendant's failure to object to the admission of the testimony on confrontation grounds and his decision to

cross-examine the medical examiner constitute a waiver of his right of confrontation.

12

13 For unlicensed driver, can't get both fine and jail. *State v. Carreon* \_\_ NJ Super. \_\_ (App. Div. 2014) A-5501-12T1

This appeal required the court to consider whether a never-licensed driver may be fined and sentenced to a custodial term under the penalty provisions of N.J.S.A. 39:3-10. Because the court agreed that the statute allows a fine or imprisonment but not both, even for drivers, who, like defendant, have never been licensed, the court-reversed defendant's sentence and remand to the Law Division for resentencing.

#### Old Index:

- Supreme Court tells Police “Need a Warrant” for Phone Searches. Riley v. California
- DWI statute and Alcotest not unconstitutional. State v. Campbell
- Driving While Suspended Conviction Upheld Although DWI Conviction Vacated. State v. Sylvester
- Court Says Ban on Fake Government Documents Not Unconstitutional. State v. Borjas
- Testimony for State by Defendant’s Investigator Violated Right to Counsel. State v. Nunez
- Abuse and Neglect Upheld Where Father Let Children Ride with Drunk Mother. New Jersey Division of Child Protection and Permanency v. J.A
- School Bus Driver Who Left Young Child on Bus Committed Act of Neglect. New Jersey

Department of Children and Families v. R.R.

- Criminal Charge where later civil violation can be expunged. In the Matter of the Expungement Application of P.H.
- Judge must Recuse from case if involved as prosecutor. State v. Presley
- Protective sweep permitted where shots fired in high crime neighborhood. State v. Gamble
- No warrant for DWI blood for DWI tickets issued before 2013. State v. Jones
- Expungement of Single Judgment Encompassing Multiple Crimes Denied. I/M/O The Expungement of the Criminal Records of G.P.B.,
  13. Supervising chemist can testify in vehicular homicide if they independently verified correctness of blood test results State v. Michaels
  14. Supervising chemist can testify in rape case if they independently verified correctness of DNA results State v. Roach
  15. Warrantless DWI blood taking allowed where multiple vehicle accident and hospitalization State v Jones
  16. Defendant has burden to timely to object to testimony by pathologist who did not perform the victim's autopsy State v. Williams
  - 17 For unlicensed driver, can't get both fine and jail. *State v. Carreon*

Removed from Fall and will use in Winter, 2015

6. Abuse and Neglect Upheld Where Father Let



**Children Ride with Drunk Mother. New Jersey Division of Child Protection and Permanency v. J.A. 436 N.J. Super. 61 (App. Div. 2014)**

In this appeal, the court concluded that a parent fails to exercise the minimum degree of care required by N.J.S.A. 9:6-8.21(c)(4) when permitting children to be passengers in a vehicle driven by a person who appears to be inebriated.

**7. School Bus Driver Who Left Young Child on Bus Committed Act of Neglect. New Jersey Department of Children and Families v. R.R. 436 NJ Super. 53 (App. Div. 2014)**

Appellant was a school bus driver. At the end of her route she did not visually inspect the bus to make sure there were no children left on board, as required by N.J.S.A. 18A:39-28. Instead, she had relied upon a school bus aide's representation there were not any children on the bus, even though in the past the driver had found the aide to be unreliable. In fact, a five-year old was left on board after the bus driver left for the day. The child was not discovered for fifty-five minutes.

The court affirmed the finding of the Assistant Commissioner of the Office of Performance Management and Accountability of the Department of Children and Families that the bus driver had engaged in willful and wanton conduct in violation of N.J.S.A. 9:6-8.21(c)(4)(b), for relying upon an undependable aide's representation and not personally inspecting the bus herself to determine if any children remained on board.

**8. Criminal Charge where later civil violation can be expunged. In the Matter of the Expungement Application of P.H. 436 N.J. Super. 427 (App. Div. 2014)**

The court considered the application of the expungement statute, N.J.S.A. 2C:52-1 to -32, where

petitioner was charged with a fourth degree offense but ultimately agreed to a violation of a statute for which he paid a civil penalty. Petitioner requested expungement of all criminal records, which was granted by the trial judge; records of the civil violation and the file of the NJSPCA were not subject to expungement.

The State appealed, advancing numerous reasons for reversal, primarily arguing the final disposition controls whether expungement relief is available. Maintaining the initial criminal charges were part of the same file that was disposed of through a plea agreement-allowing defendant to pay a civil penalty, the State asserts expungement cannot be permitted. The court disagreed and concluded petitioner was not convicted and the final disposition was not a plea agreement. Rather, the criminal charges were dismissed. Accordingly, expungement was permitted under N.J.S.A. 2C:52-6(a).

- **Expungement of Single Judgment Encompassing Multiple Crimes Denied. I/M/O The Expungement of the Criminal Records of G.P.B., 436 NJ Super. 48 (App. Div. 2014)**

The court held that expungement is not permitted by N.J.S.A. 2C:52-2(a), which allows expungement for a person convicted of "a crime," where the petitioner had pleaded guilty to multiple bribes over the course of two days even though those crimes had a single purpose and even though they were memorialized in a single judgment of a conviction.

**Editorial Assistance by Jillian Spielman, 3<sup>rd</sup> year law student, New York Law School.**

Photos: Happy Hour July 18 NJSBA President Paris Eliades was among the hundreds of persons at the Summer Happy Hour at Bar Anticipation. The St. Patrick Happy Hour is March 13, 2015.

Seminar: Handling Drug DWI and Serious Motor Vehicle Cases in Municipal Court

Monday, October 27, 2014 5:30PM-9:00PM

NJ Law Center, New Brunswick

Speakers: Kenneth A. Vercammen, Esq., Past Municipal court Attorney of the Year

William G. Brigiani, Esq., Past President Middlesex County Bar

Hon. William D. Feingold, Esq., North Brunswick

John Menzel, Esq., Past Chair Municipal Court Section

Norma M. Murgado, Esq., Chief Prosecutor- Elizabeth  
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