

## **Spring Municipal Court Law Review 2017**

**By Kenneth Vercammen, Esq.**

### **1. Municipal Court can stay DL suspension after DWI if appeal**

#### **State v. Robertson 228 NJ 138 (2017)**

The Crowe factors are not a good fit to assess license suspensions in driving while intoxicated (DWI) cases. Defendants who seek a new trial before the Law Division should be presumptively eligible for a stay of a driver's license suspension. The State can overcome that presumption by showing that a stay would present a serious threat to the safety of any person or the community. If no conditions would mitigate that risk, the court should not stay the sentence. If a defendant is convicted of DWI by the Law Division, the defendant has the burden to justify a stay of a driver's license pending appeal to the Appellate Division by demonstrating the three elements set forth in Rule 2:9-4. If a stay is granted, the court may impose appropriate conditions similar to those available after a defendant's conviction in municipal court. Municipal court and trial judges should set forth reasons on the record when they rule on a stay motion. (A-58-14)

### **2. DNA on towel not admissible without proper foundation and chain of custody**

#### **State v Mauti 208 NJ 519 (2017)**

A jury found defendant guilty of third degree aggravated criminal sexual contact and fourth degree criminal sexual contact and not guilty of first degree aggravated sexual assault and second degree sexual assault. Defendant is a physician. The complaining witness is his sister-in-law. The court reverse and remand for a new trial.

The court hold the trial judge should have excluded a towel containing defendant's semen based on the absence of competent evidence linking it to the alleged sexual assault. The towel also constituted inadmissible hearsay by conduct under N.J.R.E. 801(a)(2).

The judge also abused his discretion by permitting the State to call five fresh-complaint witnesses and thereafter deciding not to instruct the jury on fresh-complaint testimony. Defense counsel's acquiescence to the trial judge's decision not to charge the jury on fresh-complaint did not constitute invited error.

Finally, The court conclude that the trial court properly admitted a redacted version of a letter sent by defense counsel to the prosecutor as an adopted admission under N.J.R.E. 803(b)(3). Under these circumstances, The court reject defendant's argument that defense counsel's letter falls within the ambit of "plea negotiations," as that term is used in N.J.R.E. 410. Our analysis is guided by the federal courts' review of Fed. R. Evid. 410, the source rule of N.J.R.E. 410.

As a matter of first impression in this State, The court adopt the analytical approach used by the Fifth Circuit Court of Appeals in *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978) to determine when interactions between the State's representative and defense counsel constitute protected "plea negotiations" under N.J.R.E. 410. This approach requires a trial judge to determine: (1) whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion; and (2) whether the accused's expectation was reasonable

given the totality of the objective circumstances. The State bears the burden of proof. Because this two-tiered approach requires a fact-sensitive analysis, the trial judge should conduct an N.J.R.E. 104 hearing to resolve any disputed facts. A-3551-12T3

### **3. Under new court rules, defendant entitled to discovery prior to new pre-detention hearing**

**State v Robinson** 448 NJ Super. 501 (App. Div 2017)

The opinion addresses the scope of the discovery, which the State must produce prior to a pretrial detention hearing held under the Bail Reform Act, N.J.S.A. 2A:162-15 to -26. Specifically, the court construes Rule 3:4-2(c)(1)(B), which requires the prosecutor to produce "all statements or reports in its possession relating to the pretrial detention application."

The court rejects the State's argument that its discovery obligation is limited to producing the probable cause affidavit and the preliminary law enforcement information report (PLEIR). The rule obligates the prosecutor to provide a defendant with those materials in the State's possession that relate to the facts on which the State bases its pretrial detention application. In this case, the probable cause affidavit relied on eyewitness identification of defendant, and the opinion affirms the trial court's order requiring the prosecutor to provide defendant with the two eyewitness statements, photo arrays, a surveillance video, and the initial police reports. A-1891-16T2

**4. If Defendant takes witness stand they can be cross examined on inconsistent statements after Miranda**

**State v. Kucinski 227 NJ 603 (2017)**

Defendant waived his right to remain silent when he took the witness stand and therefore the State permissibly questioned defendant on cross-examination about the inconsistencies between his post-arrest statement to police and his statement on direct-examination at trial even though he initially requested an attorney. (A-58-15)

**5. School Zone map not admissible if not properly authenticated State v. Wilson 227 NJ 534 (2017)**

The map commissioned and adopted by the Board pursuant to N.J.S.A. 2C:35-7.1(e) is nontestimonial and its admission therefore did not violate Wilson's confrontation rights. Further, such maps are admissible, if properly authenticated, under N.J.S.A. 2C:35-7.1(e) and as public records pursuant to N.J.R.E. 803(c)(8). Because the map was not properly authenticated, however, the Court is constrained to reverse the Appellate Division's judgment that the map was properly admitted into evidence at trial and to remand the matter for a new trial

on the count of defendant's conviction that depended on the map. (A-42-15)

**6. No warrantless entry of homes State v. Legette 227 NJ 460 (2017)**

Chrisman and Bruzzese do not support warrantless entries into detainees' homes; they apply only to cases in which a suspect has been arrested prior to the officer's entry into the home. Here, because the State failed to meet its burden of demonstrating that the warrantless entry fell within a recognized exception to the warrant requirement, the entry was illegal and the evidence obtained as a result of that entry should have been suppressed. (A-12-16)

**7. Defendant's furtive movement after car stop justified removal of passenger State v. Bacome 228 NJ 94 (2017)**

The heightened-caution standard announced in Smith, supra, 134 N.J. at 618-20, remains the proper test for determining the appropriateness of ordering

a passenger from a car. Under the Smith test, defendant's furtive movements inside a recently stopped vehicle provided an objectively reasonable basis for officers' exercising heightened caution, justifying removal of the passenger. (A-9-15)

**8. Plain feel search not permitted with strip search for DPState v Evans 449 NJ Super. 66 (App. Div. 2017)**

In this appeal, the court considered the application of the "plain feel" exception to the warrant requirement, *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993); *State v. Jackson*, 276 N.J. Super. 626, 628 (App. Div. 1994), to a strip search that was conducted after defendant was arrested on a warrant for failing to pay a \$6.50 traffic fine. In the absence of a warrant or consent, N.J.S.A. 2A:161A-1 prohibits a strip search of a person "detained or arrested for commission of an offense other than a crime" unless the search is based on probable cause and "a recognized exception to the warrant requirement." N.J.S.A. 2A:161A-1.

Guidelines issued by the Attorney General's Office set forth even more exacting criteria to be satisfied before a strip search is conducted. The court concluded the plain feel exception did not apply and, further, that the seizure of drugs from defendant's person was not objectively reasonable. The court reversed

defendant's convictions and remand for a hearing to determine whether the search of an automobile pursuant to a search warrant was sufficiently free of taint from the unlawful search and seizure. A-0489-14T1

### **9. Limited warrantless search for credentials ok here**

**State v Hamlett** 449 NJ Super. 159 (App. Div. 2017)

The court held that, with respect to a separate warrantless search of the center console of a rental vehicle defendant was driving, the police were authorized to conduct a limited search for credentials after defendant was unable to produce his driver's license or the vehicle's registration, insurance card, and rental agreement.

Defendant challenged the seizure of drugs and a handgun from his Galloway Township motel room pursuant to a search warrant based on probable cause issued by an Atlantic City Municipal Court judge. The court held that although the search warrant application failed to comport with the procedures promulgated for the cross-assignment of municipal court judges pursuant to *State v. Broom-Smith*, 201 N.J. 229 (2010), defendant's constitutional rights were not violated by the procedural deficiency and therefore suppression of the contraband found in defendant's motel room is not warranted.

A-4399-14T2

**10. Letter by defendant admitting culpability admitted State v Marroccoli**  
448 NJ Super. 349 (App. Div. 2017)

In this appeal from her conviction for vehicular homicide, defendant argued that the trial judge erred in excluding a letter she alleged her husband wrote in which he accepted responsibility, six months after the fact, for driving the car at the time of the accident that caused the victim's death. The court concluded that defendant presented a prima facie showing of authenticity based upon her testimony at a Rule 104 hearing that she observed her husband as he wrote and signed the note. Therefore, The court held that the judge should have admitted the note into evidence and given the jury the opportunity to subject it and defendant's testimony to more intense review. The court also concluded that the trial judge erred in barring defendant from introducing evidence of her driving habits in support of her contention that she was not driving on the night of the accident. A-5386-13T3

**11. TRO vacated where defendant not served**

**A.M.C. VS. P.B.** 447 NJ Super. 402 (App. Div. 2016)

The Family Part found defendant physically assaulted his wife twice over a three-week period. Applying the two-prong analysis in *Silver v. Silver*, 387 N.J. Super. 112, 125–27 (2006), the judge found an FRO was not necessary to protect plaintiff from future acts or threats of violence. The court held the Family Part failed to adequately consider the inherently violent nature of the predicate acts. Under these circumstances, the need to issue an FRO was "self-evident." *Silver*, supra, 387 N.J. Super. at 127.

Defendant, a Newark Police Officer, was not served with the TRO. Notwithstanding defendant's failure to object, N.J.S.A. 2C:25-28l, N.J.S.A. 2C:25-28n, and the Domestic Violence Procedures Manual makes the Judiciary responsible to serve



defendant with the TRO. The court held the trial court had an obligation to determine what caused this systemic failure. The court further held the trial court erred as a matter of public policy when it considered the Judiciary's failure to carry out this legal responsibility as a factor in favor of denying plaintiff's application for an FRO. A-4730-14T3

**12 Live witness not mandatory at detention hearing State v Ingram 449 NJ Super. 94 (App. Div. 2016)**

Defendant appealed from an order detaining him pretrial pursuant to the Bail Reform Act (the Act), N.J.S.A. 2A:162-15 to -26. The State presented the complaint-warrant, the affidavit of probable cause, the Preliminary Law Enforcement Incident Report and the Public Safety Assessment to establish probable cause for defendant's arrest and grounds for detention. Collectively, the documents demonstrated that a firearm had been discharged, police officers personally observed defendant in possession of a gun and seized the weapon and spent shell casings. Pretrial Services recommended that defendant be detained, or released with the highest level monitoring, including electronic monitoring.

Defendant objected, arguing a live witness with knowledge of the incident sufficient to permit meaningful cross-examination was required. The judge overruled the objection, considered the State's proffered evidence and entered the order of detention.

On appeal, defendant argued that permitting the State to establish probable cause by proffer and without calling a witness violated his due process rights and the Act. The Court disagreed and affirmed the detention order, finding that allowing the State to proceed by proffer did not violate due process or the Act. However, the court noted that at detention hearings under the Act, the judge retains discretion to reject the adequacy of the State's proffer and compel production of a "live" witness. A-1787-16T6

**13. OPRA permits 3<sup>rd</sup> parties to request copies of other persons OPRA requests**

**Scheeler v Governor et al 448 NJ Super. 333 (App. Div. 2017)**

The Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, does not permit government agencies to deny a citizen access to all requests for public records by third-parties, and *Gannett N.J. Partners, LP v. County of Middlesex*, 379 N.J. Super. 205 (App. Div. 2005), does not provide authority for the blanket denial of access to all third-party OPRA requests. (A-1236-14T3)

Next programs:

May 16-17 NJSBA Annual Meeting at the Borgata  
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**Photo text for page one**

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**KENNETH VERCAMMEN**

**ATTORNEY AT LAW**

2053 Woodbridge Ave.

Edison, NJ 08817

(Phone) 732-572-0500