
CRIMINAL LAW UPDATE

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May 2003

new jersey cases

Sexual assault cases are difficult for a myriad of reasons. They involve issues universally regarded as inordinately private; they frequently involve the cross-examination of minors; typically they are *he-said/she-said* situations in which cross-examination is king; and lastly because the consequences, exacerbated by NERA and Avenel sentencing guidelines, are enormous. Additionally, once your client is done serving his/her full sentence (which, at Avenel, is more likely than not), your client can *still* be held for an indeterminate period of time if he/she is found to be a "sexually violent predator." How does the state prove your client is a "sexually violent predator?" The State must prove by clear and convincing evidence that your client has serious difficulty in controlling his/her harmful sexually violent behavior such that it is highly likely that he/she will reoffend. One of the hurdles the defense attorneys must overcome is that the State need *not* show that the (ex)defendant suffers from a "complete loss of control," but simply that a mental abnormality or personality disorder simply "affects" your client's ability to control his/her sexually harmful conduct. Worse, your client does not get released until a court is convinced that he/she, among other conditions, will be *highly likely* to comply with the plan for safe reintegration into the community." Do you remember the "good ol' days" when you would tell clients sentenced

to state prison that they would likely do 25%-33% of their sentence? In sexual offenses, under the *Violent Sexual Predator's Act*, they are lucky if they only serve 125-133% of their sentence. *In re Commitment of W.Z.*, 173 N.J. 109 (7/11/02).

Can the State, in attempting to involuntarily civilly commit a sexual offender following completion of his/her term of imprisonment, rely on statistics indicating who is likely to reoffend, and the degree of that risk? You would think not, but you would be oh so wrong. So long as the statistics are not the sole determining factor, an expert can testify as to the "actuarial assessments" that formed part of that expert's opinion that the defendant is at risk to commit another offense and testify as to what those "actuarial assessments" were. So, in essence, the State is allowed to show that your client is likely to reoffend because, er, others similarly situated have reoffended in the past? In part, your *client's* future conduct will be judged on what *others* have done in the past. (Too bad those *others* didn't behave better, hum?) *In re Commitment of R.S.* 173 N.J.134 (7/11/02).

An issue that has never been decided in New Jersey is whether one friend sharing a joint with another friend is drug distribution. In *State v. Lopez* (App.Div. 4/8/03) the court has a somewhat surprising and welcome answer: it may well *not* be distribution. The decision in any given case

A Publication of the Bergen County Bar Association

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would depend upon whether the drugs were *jointly possessed*. As the court explains, *one cannot acquire something one already possesses*. What if the drugs were the sole property of one party before he shared? Uh oh. So long as the drugs were jointly bought, intra-offender transfers seem exempt. How appropriate that this marijuana case was decided on the concept of "joint possession."

Parenthetically, for those interested in the paranormal, or here, the para-*abnormal*, the Appellate Division explains that joint possession is premised on a "metaphysical event in which two or more persons simultaneously possess an entire object...." Don't you love it when the Appellate Division goes all spooky on you? And here is the *really* spooky part of the decision. When the assistant prosecutor argues in summation that the defense failed to present innocent explanations for the evidence found at the scene, thus shifting the burden of proof and ignoring, just momentarily, the presumption of innocence and the defendant's right to remain silent, that transgression will *not* earn a new trial. The secret to ignoring the effects of the comments on appeal? Rather than calling them "reversible error," label them as in the opinion "lapses of judgment." New defense strategy: *Your Honor, I fully admit that my robbing the bank at gunpoint was a 'lapse of judgment' and I appreciate your understanding in overlooking it.*

We are entering a brave new world of video courtrooms. With the advent of this new technology comes the ability to play back in summation portions of the testimony. Should that be allowed? Wonder no more, for so speaks the Appellate Division from Mt. Olympus (or Trenton, wherever). In criminal trials such a practice is *allowed*, albeit only within the judge's discretion. The factors? Fairness, undue consumption of time, delay, confusion. *State v. Muhammed* (App.Div. 4/8/03).

not the new jersey way

From an April 22, 2003 *NY Times* article on the Louisiana death

penalty trial of a defendant where recent DNA tests suggest strongly his innocence:

After all the evidence was submitted, at 10 p.m. on the third day of the murder trial in 1999, the judge ordered the closing arguments to be given, despite the late hour and then, despite objections, sent the jury out to deliberate at midnight, [the defendant's attorney] said.

At 4:20 a.m., the jurors sent a note saying that they had not yet come to a verdict, but the judge ordered them to continue. At 5 a.m., they found [the defendant] guilty of murder.

Summations *and* charge took two hours, fully enough time to argue the facts *and* explain the law. Deliberations began at midnight, sort of a nice *Rocky Horror Picture Show* kind of ambience. And, sure, at 5:00 am *some* jurors would have convicted their own mothers just to get some sleep, but maybe *not all*. And at least there wasn't a rush to judgment that might have caused an unjust verdict; after all this death penalty trial took three whole days. Our lesson: dispositions *uber alles*, *heil expediency!*

criminal bar represented

With the April elections of the Bergen County Bar Association completed, criminal practitioners can hold their head high. The BCBA now has *two* officers with criminal backgrounds (was that not phrased well?) in President-Elect John L. Molinelli and Secretary Joseph P. Rem, Jr. Mr. Molinelli began his career clerking for a criminal judge, and is now the Bergen County Prosecutor. Mr. Rem similarly began his career clerking for a criminal judge, and practices criminal law full time. One must go back to before the dawn of recorded history (or at least as far back as I can remember, whichever is longer) before one can find a bar president whose sole avocation was criminal law. It is an idea, as they say, whose time has come. And it is a reflection of the increased status and respect accorded the practice of municipal court and criminal law.

Goodbye Officer Collura. And thank you.

