
CRIMINAL LAW UPDATE

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September 2003

new jersey cases

You would think that it would be important for a defendant to be able to exercise the right to be present at all stages of a trial in which his/her very liberty is at stake, but our appellate courts have sent a somewhat mixed message in two recent decisions on this issue. In *State v. Brown*, 362 N.J. Super. 180 (App. Div. 2003) the Camden County trial judge did something extraordinarily peculiar. When the jury requested a readback of certain testimony, rather than having it done in open court as, let's say, it has always been done from time immemorial, the trial judge instructed the court reporter to go into the jury deliberation room with the deliberating jurors and read back the testimony. The defense attorney alertly objected, and when that objection was overruled, requested that he and his client be allowed in the jury room to be present during the readback. As a "courtesy," the trial judge allowed the defense attorney to go into the jury room, but not his client. Denying the subsequently made motion for a mistrial, the trial judge ruled there was no requirement that anyone be present for the readback since "a readback is not part of a trial technically...." But oh, wait, it gets better. Prior to the readback, the trial judge actually went into the jury room, without the court reporter to record what was said, and without either the prosecutor or defense attorney, and had a conversation with the jurors about the "ground rules" for the readback. Need the "ground

rules" be anymore complicated than a Tarzan-Jane dialogue of "Him read. You listen"? The Appellate Division found more reasons than Carter has little liver pills to reverse, but among them was the fact that a readback *is in fact* a critical stage of the proceeding to which a defendant has a right to be present.

The Supreme Court, however, does not believe that sidebar conferences are necessarily a critical stage of the proceeding that require the presence of the defendant, *even when the defendant is representing himself pro se*. *State v. Davenport*, __ N.J. __ (July 30, 2003). If you are *pro se*, that means when you are barred from a sidebar conference, so is your attorney (who, of course, has a fool for a client). In *Davenport*, the Supreme Court wrote that there were valid security concerns in allowing the defendant to be so close to the bench, and therefore the presence of his standby attorney was sufficient. Heck, we have all been at heated sidebar conferences where the judge had far more to fear from the attorneys than from any defendant. Now it would seem that sidebar conferences, where oftentimes evidential issues are discussed and decided, issues that directly and substantially affect the outcome of the trial, would be more crucial to the defendant than listening to readback from a certified court reporter, but read in tandem, these two opinions seem to say *no*. If a *pro se* defendant need not participate in a sidebar conference, it would seem a logical extension that defendants represented by counsel would similarly not be allowed to participate in sidebar

A Publication of the Bergen County Bar Association

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conferences. Justice Albin, in dissent, wrote that defendant “was denied an inestimable right – the right to have his own voice heard at critical points of the trial” The good news for defendants is that Justice LaVecchia urged trial courts to “explore every avenue to ensure that defendants can participate in sidebars to the fullest extent possible without compromising courtroom security.” This noble sentiment, however, given the facts of *Davenport*, may be more directed at *pro se* defendants than represented ones. When a defendant’s liberty is a stake, as it is in every criminal trial, whether the infringement of that liberty be probation or imprisonment or even death itself, it would seem that the only “non-crucial” part of the trial would be the coffee break.

new but not improved legislation

The Leaving the Scene of an Accident Statute (*N.J.S.A. 39:4-129*) has just been amended, and it reflects not criminal justice concerns, but the State’s financial crisis. The fine for leaving the scene of an accident where there is injury or death has now been raised from \$500.00 to *not less than \$2,500.00*. And, if your client leaves the scene of an accident resulting in death, it is not just a motor vehicle violation (although it is that also) it is a third degree crime, and, interestingly, a third degree crime for which the presumption of non-imprisonment does *not* apply. This could be the beginning of a disturbing trend. The legislature has gone hog wild in drafting new laws calling for mandatory incarceration (distribution of drugs within 500 feet of a park, NERA, etc.) and having exhausted the pool of remaining offenses for which you can actually get probation, it is now launching a new campaign to eliminate the presumption of non-imprisonment in third degree offenses. Just watch: this will not be the last inroad into our sentencing scheme. Next up: mandatory incarceration DP’s. Oops, already happened: 3rd time shopliftings.

Revue Generators, Part Deux.
When clients come in to us with

motor vehicle problems, we find that among the serious offenses they are also charged with failure to produce certain documents, whether it is their registration, their license or their insurance card. Sometimes they forget to put the new insurance card in the car, other times their registration is found later buried in their wallet under numerous other identification cards, and they explain they just could not find it when the police officer asked for it. We usually ignore those simple documentary offenses and focus on the more serious charges, whether it be DWI, Driving While Suspended, or the like. However, as of early August, the fine for each failure to produce a document has risen from \$44.00 to \$173.00. With court costs, about \$200.00. Almost always, the client would be thrilled if that were the only offense of which they were convicted; if the trend keeps up, however, clients may be pleading to the DWI to get the Failure to Produce Documents dismissed.

truth, justice and the American way

The Bergen County Bar Association supported in word and deed Judge Bruce Gaeta in his difficulties this Spring. Not because he is a good and collegial judge (which by universal acclaim he is) but because it was the right thing to do. The Bar went to bat for both Judge Gaeta and for the continued independence of the judiciary, which suffered serious if not fatal wounds in the disciplining of Judge Gaeta. Thomas Herten, Esq., who represented both Judge Gaeta and our system of justice, deserves to be singled out for his tireless efforts. A grateful Judge Gaeta has asked that all who stood by him, who held him up in his time of need, be thanked, as the numbers of those who did so are too large to thank on an individual basis. *So it is written, so shall it be done.*

The best car safety device is a rear-view mirror with a cop in it. Dudley Moore, actor, humorist. Business note: Drivers either see the cop, or they see us.

