
CRIMINAL LAW UPDATE

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new jersey cases

Once you've been practicing for a while, you learn the primary rule of statutory construction: the statute means *exactly what it says*. Or it doesn't. Whatever. For instance, the expungement statute (N.J.S.A. 2C:52-2b) allows for the expungement of most criminal convictions, but exempts "section 2C:14-2 (Aggravated Sexual Assault)." Since N.J.S.A. 2C:14-2 defines both sexual assaults and aggravated sexual assaults, you would think that the language following the statutory cite limits the bar to aggravated sexual assaults only. Oh, you fool. The Appellate Division (*In Re Expungement of W.S.*, 367 N.J. Super. 307, 2/25/04) found that this provision in the expungement statute prohibited not only expungement of Aggravated Sexual Assault, but sexual assaults as well. Now the legislature *did not state* "sexual assault" is barred from expungement, but the Appellate Division got around it by coining a nifty little phrase. The Court concluded the specific reference to barring "aggravated sexual assault" from expungement was "descriptive only." Like "descriptive" of the legislative intent, perhaps? On the other hand, in an unpublished decision, *State v. P.L.* (App. Div. 5/20/04), the Appellate Division held that a person convicted of Possession With Intent to Distribute CDS would qualify for expungement, because the statute only barred "... Possession [of CDS] ... with Intent to Sell" The Court held that the statute clearly does not contain terms barring expungement for the intent to

distribute, merely the intent to sell. Why was this conclusion reached? "Because you have to read the statute and its literal terms" said the court. Or not. Depends on which Appellate Division panel you get. Next time your client is indicted, tell the judge that the statutory language prohibiting armed robbery is "just descriptive!" Then count the nasty letters you get from prison for the next 10-20 years.

God, will we miss her. Judge Pressler, recently retired, dealt in a recent decision with the difficulties faced by all trial attorneys: too many courts, and only one morning. Her *as* always practical opinion should be bronzed and displayed above all courtroom doors: *We fully understand the tension resulting from the frustration of trial judges who must move their calendars and, on the other hand, the demanding schedules of overworked public defenders and prosecutors who, under present circumstances, often cannot avoid conflicting obligations. They are all under strain and pressure. We do not believe, however, that that tension can be productively resolved by peremptory ultimatums from the court and sanctions imposed on lawyers who are trying to do their jobs in difficult situations. It behooves all participants in the court system, and particularly the judges and lawyers, to understand that they are not adversaries and to cooperate in attempting to reach their mutual objective of advancing the work of the criminal justice system. (In re Lynch, App. Div. 5/17/04).* And silly us: we thought the plural was *ultimatums*.

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fools, rules and a salute

Do you know what BAIID is? No, it is not your clients who are "BAIID to the bone." It is the acronym for a Breath Alcohol Ignition Interlock Device. You know, the device that makes your car like a Flintstones car: you have to keep blowing in it to keep the car running. Optional for first-time DWI offenders, it is mandatory for second and subsequent offenders unless a judge orders your client's registration revoked for two years instead. If ordered, it must be installed on every vehicle the defendant owns, leases or regularly operates for a term of one to three years. The vehicle it is installed on will not start unless the driver blows into the BAIID, and his/her BAC is less than .05% (for some manufacturers, as low as .03%). Starting the car isn't the only time the defendant has to blow into the device. Six minutes after the vehicle successfully starts there is a "rolling re-test", and thereafter there will be random tests every 15-45 minutes. Oh, that's a good idea: now defendants will have to stop changing the radio station, put down their donut, hold their mascara brush in their teeth, and cradle their cell phone on their shoulder in order to blow into this device, all the while with a BAC as high as .05%. Sounds like a recipe for fun. Or disaster. What to tell your clients: the device costs approximately \$40.00 to install, with a monthly lease of \$90.00. The installation service centers are required to inspect the devices at least once every 67 days (N.J.A.C. 13:19-6.11(7)(9)); some will do so monthly. The device is not installed until the license is restored, and the license that is issued to the defendant will contain an endorsement noting the requirement of a BAIID. A list of approved devices and installation locations is found at http://www.state.nj.us/mvc/cit_violations/d_vp_interlock.html, on the NJMC website. Oh, one last thing: have your client prepare what he is going to say to co-workers and friends to whom he gives a lift when they ask why he is bending over and blowing into his dashboard.

Among the *proposed* changes to the Part VII Municipal Court Rules are:

1. Guideline 4 to the plea bargaining rules would be amended to permit the dismissal on State's application of any Chapter 35 or 36 offense in consideration of a defendant's plea of guilty to a single drug offense arising out of the same factual transaction. The State would also be permitted to move for the dismissal of related drug offenses if the defendant is granted a conditional discharge on a drug offense arising from the same factual transaction.
2. Rule 7:2-2(a)(2) would be amended to give police the option of issuing process for DP and PDP offense on a special form of summons and complaint and releasing the defendant without effecting a custodial arrest.
3. Under an amendment to Rule 7:6-2(d)(5), municipal prosecutors would be required to personally place on the record the terms and conditions of plea agreements. Moreover, the use of *ad hoc* plea agreement forms would be eliminated. The prosecutor need not appear on the record for offenses that are set forth on the statewide violations schedule. Rather, the prosecutor may complete and sign a new standard plea form to be used statewide. The form must also be signed by the defendant.
4. The provisions of Rule 7:12-3 related to defenses by affidavit would be amended to permit defenses by certification.

Plea negotiations. A meeting of minds. A time of persistence, of diplomacy.

Three good words of advice when entering negotiations: lose the attitude. As noted by another more eloquently: *People with clenched fists can not shake hands*. Indira Nehru Gandhi (1917-84), Prime Minister of India.

June 6th. D-Day. This year is the 60th Anniversary. Last month I saw a monument dedicated to the 1st Infantry Division on Omaha Beach that bears this inscription: *No mission too difficult. No sacrifice too great. Duty First*. It may be 60 years too late, but thank you, from all of us.

