
CRIMINAL LAW UPDATE

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new jersey cases

The fact that a defendant has a prior criminal record is not admissible in a trial unless he takes the stand, and even that is subject to a *Sands/Brunson* hearing to minimize the prejudice to the testifying defendant. The above is true, unless defendant is charged with a violation of N.J.S.A. 2C:39-7b, Possession of a Weapon by a Convicted Person. The jury is to be carefully instructed that the fact that they have before them a *convicted criminal* -- and we all know how dangerous *they* are -- should play no part whatsoever in their *unbiased* deliberations as to whether defendant possessed a firearm. The defendant cannot even stipulate to his prior record to keep it from getting before the jury, as it is an element of the offense that only a jury may decide. The best a defendant can do is stipulate before the jury that he does have a prior criminal record, the nature of which will be kept from the jury. Justice Albin, lone among the jurists, felt that such a procedure "sacrifices fairness without any measurable increase in efficiency," and that a limiting instruction "simply was ineffectual." (*State v. Brown*, 180 N.J. 572, (8/5/04)) *You think?*

In *State v. Berardi* (369 N.J. Super. 445, 6/3/04), the court held that where the State enunciates a theory of culpability in an indictment, the judge should not charge the jury as to other grounds for culpability in the statute not enumerated in the indictment. However, more importantly, but buried in a single sentence near the end of the opinion, is

at judicial philosophy recognizing the substantial and draconian impact of the *No Early Release Act* on sentencing, clearly *intimating* that the impact of NERA should be considered in imposing sentence. The Appellate Division noted ". . . we are firmly convinced that in these circumstances, with a heightened sentencing impact as to the consequence of the adoption of NERA and its now-mandatory application to carjacking cases, trial courts must apply [an] even more greatly refined sensitivity...." (p. 452). Since NERA triples or quadruples the ordinary term that a defendant will serve on a custodial sentence, recognition of that fact is simply appropriate, and the courts have both implicitly and explicitly held that in recent judicial decisions,

Sigmund Freud, the father of psychoanalysis, (1856-1939), in commenting on symbolism in dreams, once wrote "sometimes a cigar is just a cigar." In 1991 the New Jersey Supreme Court, in *State v. Demeter*, said that although black plastic film canisters can contain drugs, sometimes a film canister is just a film canister. Continuing that theme, in *State v. Pineiro* (181 NJ 13, (8/2/04)) the New Jersey Supreme Court said that sometimes a cigarette pack is just a cigarette pack, even if it does occasionally contain drugs instead of just cigarettes. The bad news in *Pineiro* is that courts can *continue* to consider whether suspicious activity takes place in a "high crime area" in determining

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probable cause, or reasonable suspicion (for an investigatory stop). The good news is that there is a limit to the type of activity which will satisfy these standards. Here, a pack of cigarettes passed between a known felon and a suspected drug dealer in a high crime area. The court unfortunately ruled that such innocent conduct, under the circumstances above, was sufficient to conduct an investigatory stop (a reasonable suspicion of criminal activity), but insufficient for an actual search of the individual or the cigarette pack (a well founded suspicion of criminal conduct). Of course, the perhaps the greater societal issue is whether cigarettes are more dangerous than cocaine, and which drug kills more people each year and ruins more lives, but this was just the Supreme Court, not the court of public opinion.

Should you seek to reduce your client's speeding charge to an Unsafe Driving (*NJSA 39:4-97.2*) violation? If your client has no other points, there is no allowable insurance surcharge for a 2-point speeding (at or less than 14 mph over the limit) offense provided your client does not have a prior speeding offense in the past three years. There is, however, a \$250 surcharge imposed in municipal court for Unsafe Driving. Getting the points may actually be cheaper, and the better course of action, for a good driver without a points problem.

There are a host of consequences associated with a DWI or Refusal conviction. How about this one? Did you know that Canadian authorities will treat you as a convicted felon (even if it is just a motor vehicle offense as it is in New Jersey) and bar you from entering the country? This is something your client should know if he/she has family there, or goes there for conferences or business. Oh those wacky Canucks, eh? A real deterrent to those who cannot get enough ice hockey, beer, curling, and dog sledding. This attitude is why Canada is sometimes referred to as "Upper U.S.," a phrase better understood when pronounced out loud.

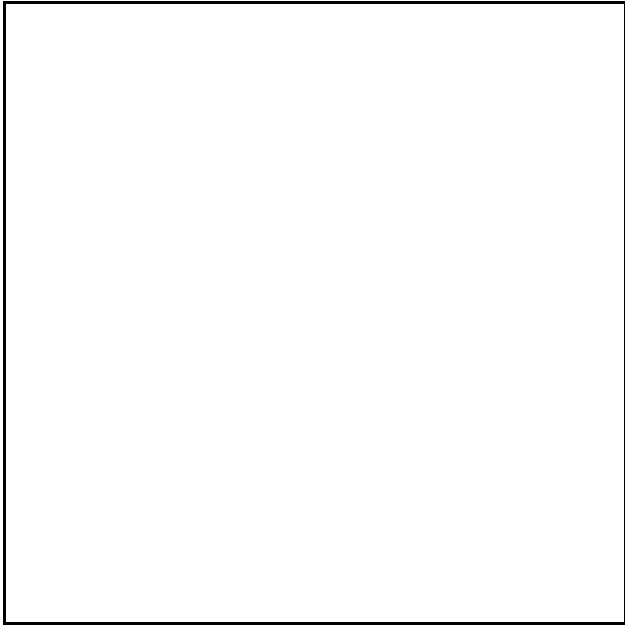
Anxious about how your summation or legal argument went? Didn't flow exactly as you had planned? Feeling inadequate? Here are some comforting words from former U.S. Solicitor General (and later U.S. Supreme Court Justice) Jackson: "I made three arguments in every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night." *Advocacy Before the Supreme Court*, 37 A. B. A. J. 801, 803 (1951). *Welcome to the club, my friend, welcome to the club.*

**Meeting of the Municipal Court
and Criminal Practice Committees
Monday November 15th, 4:00 p.m.
BCBA Building**

*Topics include case law update, new statutes, court rules and practice pointers.
Guest speaker Vicar/Judge McGeady.*

From a legal advice column in a newspaper: "I was a witness in court and got sworn in. They told me I was under oath after I was sworn in, but I never got de-oathed, or un-oathed, or whatever. My girlfriend told me they have to remove the oath before I am safe again. So am I still under oath, or does it wear off, or what?" Actual question sent to a legal advice column as reported on the *Tonight Show*, July 19, 2004. Sure, you're sitting there all smirky, feeling all high and mighty, but really, when does it wear off? Or does it wash off?

The untimely and tragic death of Assistant Prosecutor Sean Carpenter left a gaping hole in the hearts of those who knew and worked with him. His passing affirmed the adage that "only the good die young." His shy smile, work ethic, unerring sense of fairness and pride in being a prosecutor touched and affected so many. Words fail. He will be missed.



Joint Meeting