
CRIMINAL LAW UPDATE

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cases

S *State v. Eckel*, which was reported in the February *Criminal Law Update*, has been stayed by the Appellate Division. *Eckel* disallowed motor vehicle searches incident to a lawful arrest when the vehicle's occupants were no longer near the vehicle. The holding was rooted both in strong constitutional precedent and the logic underlying this exception to the Constitution's requirement of a search warrant. Defense attorneys should advise their clients that since the holding has been stayed, their constitutional right to privacy and to be free from this type of unreasonable warrantless search has been temporarily suspended.

P *Practice Tip:* Oftentimes our clients fail to show up for court dates, causing a bench warrant to be issued. On those rare occasions when we can actually find the client, and persuade the client to turn himself in, we often call the judge, have the client appear in court, and have the judge rescind the bench warrant. The problem is, unless we also advise the Office of the Bergen County Prosecutor to be present, and somehow insure that the Fugitive Squad is present or advised, the people actually in charge of finding and bringing our fugitive clients to the hallowed halls of justice remain ignorant of the warrant's recall, and continue their efforts to track down, arrest, and bring into court in handcuffs these absent-minded miscreants we represent. Let the Prosecutor's

Office know what you are doing, and follow-up to insure that word has reached the Fugitive Squad.

It seems so simple, really. It is a commonly charged statute, Receiving Stolen Property (*N.J.S.A. 2C:20-7a*).

Too often defense counsel, in strategizing defenses, get lost in the *mens rea* element that the State must prove the defendant knew the item he possessed had been stolen, or believed it was probably stolen. Sometimes overlooked is what *also* must be proven: that the item actually was *stolen*. Although it seems obvious that to prove someone is in possession of stolen property you should have to prove it was in fact stolen, both the trial court and Appellate Division in *State v. Hodde*, 184 N.J. 376, 9/04 ruled that was not a necessary element. The defense benefit is obvious: all too often, victims have been compensated for the loss, or live out of state, and are not interested in testifying. In that case, without proof the item had in fact been purloined, the defendant goes free. And what is up with the *mens rea* of this offense? It is not just *knowingly*, perhaps the most common *mens rea* element in our criminal statutes. It is sufficient to convict if the defendant "believed it was probably stolen." So, if the Appellate Division decision had been allowed to stand, would a person who received a legitimately purchased gift from a crooked friend, which he *incorrectly* believed was

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probably stolen, be guilty of an offense? Without needing proof it really was a stolen item, his mistaken belief would probably suffice for conviction. *Scary*.

If your client gets into a struggle with the arresting police officer, he is pretty much dead meat at the assault trial. *Foshizzle*. But all hope is not lost. Police officers are human too; sometimes they have bad days, and like the population in general, some have anger management problems or a low boiling point. And for any of these reasons sometimes a police officer will use unlawfully excessive force in effecting an arrest. When that is the case, *a defendant is entitled to resort to self-defense*. *State v. Sims*, 369 N.J.Super. 466 (7/04). It is well settled that an officer effecting an arrest may use only such force as is reasonable under the circumstances, and that if he uses excessive or unnecessary force, the citizen may counter with the use of reasonable force to protect himself. Selling the facts to a jury, of course, may be a different case entirely. What is uniquely interesting about this decision is that it perhaps can be read to hold that jurors should be told of the consequences of their verdict, that is, depending on how they balance the elements of the offense and self-defense claim, the defendant may be either acquitted, convicted merely of a disorderly persons offense, or convicted of a crime. The potential for a just, result-oriented verdict is staggering. Given the role of the jury as the conscience of the community, perhaps jurors should be told in all cases the level of seriousness of each of the offenses charged.

The United States Supreme Court on January 12th, decided *United States v. Booker* (125 S.Ct. 738) holding that the Federal Sentencing Guidelines were unconstitutional, in that they required judges to find facts at sentencing hearings that exposed defendants to sentences in excess of what would be allowed based on the jury verdict alone. Judges were, in essence, usurping the jury's role, denying defendants their 6th Amendment right to a jury trial. The solution? Invalidate the statutory provision

making sentencing under guidelines mandatory, thus rendering them advisory only. The U.S. Attorney's Office will probably now fill their indictments with every fact necessary to sustain the highest sentence, thereby putting those facts before a jury for determination, satisfying the constitutional objection to the Guidelines.

The Office of the Attorney General has issued its guidelines for prosecuting DWI cases. The AG Guidelines read more like a propaganda piece for conviction than a balanced prosecutorial approach, although in fairness they do recite the mandate that a prosecutor's job is to do justice, not merely to obtain convictions. The Administrative Office of the Courts has issued proposed revisions to its Guidelines for Operation of Plea Agreements in the Municipal Court. Those revisions prohibit amending, without cause, a DWI >.10% to a DWI <10%, thereby sentencing a first offender to a 3-month license suspension. They also propose banning the prior practice of dismissing a Refusal charge in return for a DWI plea for a first time offender, although allowing it for subsequent offenses. *Currently such a plea bargain is still permissible*.

Finding humor in the everyday occurrences in our criminal practices is not to be confused with taking our client's situation lightly. In fact, so-called "gallows humor" is a necessary relief valve for the extraordinary strain we find ourselves under in holding, to some degree, our client's future in our hands. Abraham Lincoln, who held the future of our nation in his hands as it teetered on self-destruction, felt the same. *With the fearful strain that is on me night and day, if I did not laugh I should die*.

He that would govern others, first should be master of himself. Philip Massinger (1583-1640).

