
CRIMINAL LAW UPDATE

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new jersey cases

Welcome to *Can You Say This?*, the game show designed to test attorneys on their knowledge of evidence law. Today's question: you hear it so often asked in court, but *Can You Say This?* "So basically you want this jury to believe that everything that the officers came in here and testified to is untrue?" Tick...tick...tick...whoops, time is up! The answer is – no! For those of you getting the answer wrong, we have a conviction for your client and some nice parting gifts. For those of you who got it right, you know that "the assessment of another witnesses's credibility is prohibited." (*State v. Bunch*, 180 N.J. 534 (8/3/04)). Thank you, and tune in tomorrow.

In a case whose name is easy to remember because it trips so mellifluously off the tongue (*State v. Chirokovskic*, 373 N.J. Super. 125, App.Div., 11/24/04), the Appellate Division reaffirmed the 2003 decision of *State v. Patton* (362 N.J. Super. 16, App.Div., 2003) holding that any confession elicited as the result of fabricated tangible evidence by the interrogating police officers is inadmissible. Why? It is a violation of defendant's due process right to fundamental fairness, as well as evidence that the waiver of the accused's privilege against self-incrimination was neither knowing, intelligent or voluntary. Score one for justice. However, the Appellate Division hand that giveth also taketh away. The court reaffirmed the right of the police, during

interrogation, to the use of "trickery and deceit." The critical difference between these fabrications is...err...okay, you got me. The court contends the difference is that tangible evidence may make its way into the trial and might later be introduced into evidence, and as such could taint the trial process. What really may be afoot here is that the courts of this state, having been bound by precedent in allowing police deceit and trickery (in the words of the Appellate Division, not approving such practices but being forced to "tolerate" them) now looked for and found an artifice to prevent the this unsavory rule from being further extended. Pure speculation, to be sure.

As defense attorneys we like to argue that the evidence should be excluded because it is prejudicial to our client. What we *mean* to say is that it is substantially more prejudicial than probative (*E.R.* 403). A nice rule of thumb to keep in mind when evaluating whether evidence is unduly prejudicial is found in *U.S. v. Gilliam*, 994 F.2d 97 (2d Cir.): "evidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond attempting to prove the fact or issue that justified its admission into evidence." *Gilliam* is cited in *State v. Brown*, 180 N.J. 572 (8/5/04) where the court ruled that it is not prejudicial to advise a jury in the case where defendant is charged with Possession of a Weapon by a Felon, *N.J.S.A. 2C:39-7b*, (or as the *NJ Code of Criminal Justice* ever so politely entitles it,

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“Certain Persons Not to Have Weapons”) that the defendant has a prior indictable conviction. (The rational solution is to have the jury decide the possession issue first, which is almost always the *only* issue, and after that verdict is returned, continue the case on the prior conviction issue). The Supreme Court reasoning is that it is inconceivable that a jury would factor in its decision-making process the fact that the defendant is a CONVICTED CRIMINAL, ruling that curative instructions were more than sufficient to keep the jury from considering the fact that the accused is a DEMONSTRATED MENACE TO SOCIETY. In any event, keep in mind when opposing the introduction of prejudicial evidence into a case which the court intends to cure by jury instruction the words of Justice Brennan in *Bruton v. United States* that “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and the human limitations of the jury system cannot be ignored.” 391 U.S. 135 (1968).

The Appellate Division has upped the ante in consent searches, holding that police cannot even *request* consent to search a home unless they have a reasonable suspicion of criminality. This extends the holding in *State v. Carty, 170 NJ 632 (2002)* which applied this standard to motor vehicle searches. Now, to be sure, suspicion is the lowest standard in our criminal law firmament; nonetheless, this case does represent a growing trend toward recognition that even a request by a police officer can be traumatizing to law-abiding citizens (“Oh my god, they think I’m a criminal!” “No, mom, they don’t.”), and the right to do so should be limited. *State v. Domicz* (App. Div. 5/23/05).

Mopeds. A lot of kids want them, some have them. But warn your adult clients that motorized skateboards or scooters can be used only on private property, *not public streets and sidewalks*. That’s because their motors are too small to be registered as vehicles and lack state-mandated safety equipment.

the higher good and irrelevancies

Requests have been made for *pro bono* counsel to assist the up to 600 prisoners at Guantanamo Bay. These detainees have been allegedly been held virtually incommunicado, without charge, without counsel, and without access to the United States courts, sometimes for years. If you are interested in volunteering to represent one of these prisoners and would like to know about how to obtain training and to begin your representation, contact Tina Foster at the Center For Constitutional Rights at (212) 614-6455 or at tfoster@crr-ny.org to discuss your interest. You will work with an experienced mentor attorney who will provide guidance and advice. Your representation may include, at your own personal expense, travel to Guantanamo Bay and perhaps foreign countries. As the litigation progresses, you will apply for and hopefully receive security clearances necessary to complete the task. *It’s not just a job, it’s an adventure.*

Clients frequently ask about the chances of success of various trial and litigation strategies. Ethically, we are required to give our clients our advice and opinion on such matters. Invariably, no amount of caveats and disclaimers will dissuade the client who ultimately loses from remembering the informed guesstimate as a failed guarantee. Such is our plight. When called upon to do so, remind clients of the words of legendary atomic physicist Neils Bohr: *“Prediction is very difficult, especially if it’s about the future.”*

Question of the day: if drinking and driving is illegal, then why do all bars have parking lots?

There comes a time when summer asks what you have been doing all winter. (Author unknown)
Enjoy the summer respite from the battering storms of law. The recipe, my colleagues, as always: laugh, love, live.

