
CRIMINAL LAW UPDATE

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new jersey cases

The Appellate Division is really cracking down. In *State v. Basit* (378 N.J.Super. 125 (6/9/05)) the court held that trial judges are not allowed to randomly roam into jury rooms and converse with deliberating jurors off the record. Go figure. In fairness to the trial judge, both the prosecutor and defense counsel concurred in allowing the judge to communicate with the deliberating jurors to give brief answers to their two questions. Nonetheless, since it was not stenographically recorded, a reviewing court cannot say with certainty exactly what the judge said, whether there was any response from the jurors, or even a continuing dialogue. The great unasked question is why the judge did not simply bring the jurors back into the court room to answer their questions on the record. Addressing the dangers inherent in such an *ex parte* communication, the court noted that "it is difficult to contain, much less to anticipate, the direction the conversation will take... ." Heck, that sounds like many direct examinations. The court characterized the State's request that the error be treated as harmless as a "*laissez-faire* approach." Ouch.

In *State v. Torres* (183 N.J. 554 (6/16/05)) the issue was whether the State could present expert testimony as to the hierarchy, organization and discipline in a street gang. The Latino gang was known as "MS-13" (isn't that one of the worst gang names you've ever heard? In a field dominated

by such great monikers as the Mafia, the Bloods, the Crips, and the Latin Kings, such a lame gang name does a disservice to all great ruthless street gangs). The court examined *N.J.R.E. 702*, and noted that expert testimony may be admitted where (1) the intended testimony concerns a subject matter that is beyond the ken of the average juror ("ken"? couldn't the court say "knowledge"? have you ever seen ken used in a sentence without the word "barbie"?), (2) the subject must be at a state of the art that an expert's testimony could be sufficiently reliable, and (3) the witness must have sufficient expertise to offer the intended testimony. The court admitted the testimony in this case, but with two important caveats. The first applies where the expert witness is also an investigating officer on the case. The fact that the court has deemed him an "expert" may significantly prejudice the jury with respect to weighing his fact testimony. Secondly, the court must give a limiting instruction "that conveys to the jury its absolute prerogative to reject both the expert's opinion and the version of the facts consistent with that opinion" Strong language for the charge, good grist for the summation.

It is evidence that enters the trial on little cat's feet so quietly that defense counsel may never hear it coming, and not even be aware it has arrived. Police officers may, and often do, testify in

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conclusory fashion that based on their investigation they were able to discredit facts crucial to the defense, disprove statements made to them by the defendant, or interviewed a defense witness, but did not find him/her credible. *State v. R.B.* (183 N.J. 308 (5/23/05)) is yet a further example of this insidious, yet subtle, method of impermissibly bolstering or attacking credibility. In *R.B.* the prosecutor commented in summation that the key State's witness, the alleged child sexual assault victim whose credibility was crucial to the State's case, must have been telling the truth *because family members and members of the Prosecutor's Office seemingly believed her.* Defense counsel quickly objected, and the court gave a curative instruction. The Supreme Court affirmed the verdict. Justice Albin dissented, noting that the prosecutor's summation comment was not supported by evidence in the record, and indeed, no one bolstered the alleged victim's credibility in the manner the prosecutor suggested. *But even if someone had, it would have been improper.* You cannot, Justice Albin argued, transform the Prosecutor's Office or other witnesses into "infallible lie detectors." Trial counsel, both prosecutors and defense, must be aware that neither trial attorney may personally vouch for a witness, nor refer to evidence beyond the record to support a witnesses credibility, because the courts do not allow one witness to vouch for the testimonial account of another witness. The jury has the exclusive domain over determining credibility. Justice Albin cited *State v. Frisby* (174 N.J. at 587) in which there was a pitched credibility battle between the defendant and the child's father over responsibility for the care of the child victim at the time of the child's death. At trial, police testified that they had "substantiated" the father's account of his whereabouts after speaking with other witnesses, and further testified it was their opinion that there was "not enough information for us to charge [the father] with anything." They compounded the error by testifying that they "didn't feel there was enough evidence" against the father, and that the father was "more credible than [the defendant]...." In other words, in a trial where culpability lay either at the feet of the defendant or the child's father, the police

opined under oath that they believed the father. Under the law of the excluded middle, that left only one person who could be guilty. In *Frisby*, the Supreme Court held that "there is no provision in our legal system for a 'truth-teller' who is authorized to advise the jury on the basis of *ex parte* investigation what the facts are and that the defendant's story is a lie." Critically, the *R.B.* court reminds us both in the majority and dissenting opinions that *it is improper for a prosecutor to argue in summation that the police officer should be believed because he has no motive to lie*, an argument all too common in criminal cases. Courts have denounced such comments as "egregious," "wholly inappropriate," and "obviously improper." Indeed, it may be reversible error for a prosecutor to comment that the testimony of police officers should be accepted "not because of its believability but because the witnesses were policemen." Lastly, this case is a reminder that defense counsel should never allow the prosecutor, the police, nor the judge in summation comments or the jury charge to refer to the alleged victim simply as "the victim" or in appropriate cases, "the child victim." It is an appellation that carries great weight and is less a characterization than an opinion, a devastating opinion no one at trial is permitted to offer.

School zone penalties are designed to deter drug dealers and intoxicated drivers from harming children. But do they? At 4:00 a.m.? In August? Are there kindergartners hanging out on street corners at that hour?

"Whoa, dude, It's 4:00 a.m. Time to get home. Barney goes on in 2 hours."

"No, dawg, I'm down with Cookie Monster. Barney is so yesterday. Anyway, I like it here by the school, where I'm safe."

Laws that restrict our freedom must advance a governmental interest. That is our societal contract. Application of school zone laws at all hours of the day, even on school recesses, are a breach of that solemn contract, an abomination. But because they are "criminals," we all look the other way. Shame on our lawmakers; shame on our courts; shame on us. This is a call to courage.

The government is not allowed to search those areas or things in which you have a legitimate expectation of privacy. Clearly your person and house fall into those categories. What about records created by corporations and utilities about you? Do you have a legitimate expectation of privacy in such records sufficient to require the government to get a search warrant in order to obtain them? Would such a search be "unreasonable"? Is the Fourth Amendment alive and well? Answer: the Fourth Amendment is well, and lives to fight another day. In *State v. Domicz* (377 N.J.Super. 515 App.Div. 5/23/05)) the court held that records of your electrical usage held by utility are indeed private; in *State v. McAllister* (184 N.J. 17, 6/20/05) that you have a reasonable expectation of privacy in your bank records; and in *State v. Hunt*, 91 N.J. 338 (1982) that indeed your telephone records are private, even when calling from a hotel room telephone (*State v. Mollica*, 114 N.J. 329 (1989); even your garbage in opaque containers is subject to a reasonable expectation of privacy (thank you Lord) *State v. Hemptele*, 120 N.J. 182 (1990). All of the above searches would be allowed by the Federal Constitution, but not by the New Jersey State Constitution. Why do our courts go further in protecting citizens from unreasonable searches? Because New Jersey courts have historically sought "through the application of the State Constitution, the full realization of our liberties...." God bless America, God bless New Jersey. Article I, p.7.

Hold the presses! As you know, our courts have previously held that lie detector tests are always admissible at criminal jury trials. (No actually, that is a lie. Couldn't you tell?) The truth is, lie detector tests given to defendants to judge their credibility are admissible in non-jury trials. (Actually, until May of this year, that also would have been a lie. *But it is a lie no longer.*) In *State v. Domicz* (377 N.J.Super. 515 (5/23/05)) the Appellate Division held that lie detector tests have reached a recognized degree of reliability that they may be used in criminal proceedings, except when the trier of fact is a jury, as a

jury may tend to be confused or misled by its admission. This concern, however, "is not presented when the judge is the fact-finder." The case concerned only the admissibility of the polygraph test of the defendant (since defense counsel sought to admit the test, one must presume it was favorable to the defendant) on a motion to suppress where the rules of evidence do not strictly apply, but the essence of the holding should allow its admissibility on all non-jury hearings and cases (pretrial motions, municipal court trials). Although the ruling is limited to its admissibility in such a pretrial hearing, the court did dispose of all of the arguments which seemingly would preclude its use at trial. Such evidence is relevant (Rule 401), it is not barred because it usurps the judge's function as the fact finder because it embraces the ultimate issue (Rule 704 specifically permits this), and unless barred by Rule 403(b) that its probative value would be substantially outweighed by the risk of it being too time consuming, there would appear to be no further evidential objections. This holding represents a *sea change*. Its tsunami-like effect on the conduct of trials as we previously knew them cannot be underestimated. And all of this in a case which pretended to be primarily about the privacy of electrical usage records. Fasten your seatbelts; with judges married to the concept that polygraph tests are always inadmissible, defense counsel are going to have a bumpy ride in their drive for admissibility.

