
CRIMINAL LAW UPDATE

EDITED AND AUTHORED BY JOSEPH P. REM, JR.

ALL COMMENTS AND SUBMISSIONS, 201- 488-1234; FAX 487-8030; E-MAIL JREM@REMZELLER.COM

October 2005

new jersey cases

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 concerning 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. Hempele*, 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. God bless the NJ Constitution, Article I, par. 7.

Hold the presses, holy moley, and jumpin' jehosephat! As you know, lie detector tests are inadmissible in court. Hah! That's a *lie*! Well, now at least. The truth is that polygraph tests *used* to be inadmissible. But today the world as we knew it is no more. In *State v. Domicz* (377 N.J.Super. 515 (5/23/05)) the Appellate Division confirmed that lie detector tests have reached a *recognized degree of reliability* such that they may be used in criminal and municipal court cases. Two caveats: they are not admissible before a jury, and only on NJRE 104(a) hearings, such as motions to suppress evidence or confessions. The prior prohibition as to their use was because jurors may have been confused or misled by their admission. This concern, however, "is not presented when the judge is the fact-finder." *Domicz* concerned only the admissibility of the polygraph test of the defendant in support of his credibility on a motion to suppress where the rules of evidence do not strictly apply. But the essence of the holding suggests polygraphs should be admissible in *all non-jury matters* (pretrial motions, municipal court trials, etc.). 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

A Publication of the Bergen County Bar Association

The comments contained in this publication are not necessarily those of the Bergen County Bar Association; if you disagree with them, they are not even necessarily those of the author.

relevant (*NJRE* 401), it is not barred because it may embrace the ultimate issue (*NJRE* 704 specifically permits this), and unless barred by *NJRE* 403(b) (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, washing away decades of "well established" case law and notions of unreliability, cannot be underestimated. And all of this in a case which pretended to be primarily about the privacy of (yawn) electrical usage records (zzz). Fasten your seatbelts; judges are married to the concept that polygraph tests are always inadmissible. Defense counsel are going to have a bumpy but oh so fun ride.

seriously miscellaneous

Bergen County Prosecutor John L. Molinelli has been sworn in as chairman of the County Prosecutors Association of New Jersey. He is the past president of this bar association. His selection will only enhance the image of Bergen County statewide. *Kudos*.

Advice from a public defender to her clients (as found on the Internet):

You have the right to remain silent. So SHUT THE F--- UP. Those cops are completely serious when they say your statements can and will be used against you. They are just pretending to like and be interested in you.

When you come to court, consider your dress. If you're charged with a DWI, don't wear a Budweiser shirt. If you have a drug charge, think twice about clothing with a marijuana leaf on it or a T-shirt with "UniBonger" on it. Long sleeves are very nice for covering tattoos and track marks. Try not to be visibly drunk when you show up.

For the morons: Your second grade teacher was right - neatness counts. Just clean up! When you rob the store, don't leave your wallet. When you drive into the front of the bank, don't leave the front license plate. When you rape/assault/rob a woman on the street, don't leave behind your cell phone.

After you abuse your girlfriend, don't leave a note saying that you're sorry.

Don't be offended and say you were harassed because the security was following you all over the store. Girl, you were wearing an electronic ankle bracelet with your miniskirt. And you were stealing. That's not harassment, that's good store security.

I'm a lawyer, not your fairy godmother. I probably won't find a loophole or technicality for you, so don't be pissed off. I didn't beat up your girlfriend, steal that car, rob that liquor store, sell that crystal meth, or rape that 13 year old. By the time we meet, much of your fate has been sealed, so don't be too surprised by your limited options and that I'm the one telling you about them.

"I didn't put it all the way in." Not a defense.

"All the money is gone now." Not a defense.

"The bitch deserved it." Not a defense.

"She didn't look thirteen." Not a defense.

"She didn't look six." Never a defense; you need to die.

Got county jail time? Want SLAP? 14 days or less only. Want home confinement, a/k/a electronic bracelet? Live in the county. Want to serve your time in the courtroom on court nights? Not technically permissible, but....

Is plea bargaining any different? *The ability to get to the verge without getting into the war is the necessary art. If you try to run away from it, if you are scared to go to the brink, you are lost. John Foster Dulles, US Secretary of State.*

As seen on a T-shirt: *There are 24 hours in a day, and 24 beers in a case. Coincidence?*

The Alcotest 7110 is coming to Bergen County in October 2006. We will be the last county to get it. All Breathalyzer case law goes out the window along with the Breathalyzer. A clean slate upon which to write new law. *Tabula rasa*. Let's do it right this time.

