
CRIMINAL LAW UPDATE

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If a police officer pulls you over in your car, and it is later determined that the basis for his belief that your committing an offense was erroneous, what effect will that have on the admissibility of any contraband found during this stop? The answer is a lot - - and none at all (hey, this is law! there is never just a simple, single "answer." sheesh). If the officer correctly perceives the facts, but misunderstands the law, and as such believes those facts constitute an offense when they do not, then anything found during the subsequent stop and search will be suppressed. However, where the officer erroneously believes certain facts to be true, and effects a stop based on that misimpression, the search will be deemed constitutional. In short, a *mistake of fact* (*State v. Pitcher* 379 N.J. Super. 308, 7/22/05) will not serve to suppress the results of a search, whereas a *mistake of law* will (*State v. Puzio*, 379 N.J. Super. at 378, 8/1/05). The more troubling case is *Pitcher*, where the defendant was pulled over because DMV mistakenly listed the driver as having been suspended when he was not. The police relied on the MVC database in effecting the stop which ultimately led to the DWI observations. The court indicated that the MVC database was simply a fact upon which the officer relied, and a mistake of fact will not invalidate a search or seizure. However, in *Pitcher*, the *State itself* created the very mistake of fact upon which it relied in supporting the search. This is the ultimate in boot-strapping. The court ruled, in essence, that it was reasonable for the

State to rely on the erroneous information which the State itself had created. ("I thought the butt of the gun was sticking out from under your seat, but it turns out it was securely hidden, out of sight. Oops, my bad. You are now under arrest: you have the right to remain silent....") Remember, however, to distinguish this scenario from that where one officer conveys information that a second officer relies upon in effecting a motor vehicle stop or a seizure, the issue is not whether the arresting officer was justified in relying on the information; the issue is whether the officer who gathered and transmitted the information made valid assessments amounting to probable cause (or a reasonable, articulable suspicion).

The New Jersey Supreme Court, by order dated 1/10/06 suspended the application of both the Federal and New Jersey State Constitutions as they apply to DWI prosecutions in which the new breath testing device called the Alcotest is utilized. (The Alcotest, already in use in half of the state's counties, will be coming to Bergen County by November of this year.) First, the court ordered all cases involving the use of the Alcotest to go forward, and at the same time *barred accuseds from challenging the reliability of the machine*, a machine which is only now the subject of a Supreme Court ordered plenary review: "... [A]ll requests for a reliability hearing in respect of Alcotest devices are stayed pending the filing of the Court's final decision herein, at which all

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pending challenges to an Alcotest device's reliability shall be decided consistent with the court's disposition....” For repeat offenders, in which the suspensions would necessarily be longer, the Court ordered that no sentences be carried out where the conviction is based solely on the results of the yet-to-be-examined Alcotest. However, with respect to *first offenders*, the stay of the sentence, in order to allow the Supreme Court to issue a decision on the reliability of the Alcotest, is not mandatory, but rather *elective*, and the municipal court is ordered to “consider the severity of the incident and the prior record of the defendant” in deciding whether “the public interest requires the immediate execution of the sentence” The Supreme Court has *mandated* that first time DWI defendants proceed to trial with a new and untested device which is the subject of a Supreme Court inquiry into its reliability, banned those defendants from challenging the accuracy and reliability of that machine, and ordered that they serve their sentence, complete with license suspension, even when that conviction is based not on observations but solely on the result of untested and unrulud upon Alcotest readings. Presumably, should the court find the Alcotest not to be sufficiently reliable, or impose conditions on its use, those defendants who were barred from challenging the reliability of the machine and who have served their full and complete sentences, will undoubtedly receive a personal, handwritten letter of apology from the court signed by Justice *Per Curiam*. Up next: the right to cross-examination suspended in DWI cases as it interferes with the securing of convictions. Stay tuned.

A number of towns have appointed new municipal court judges this year (see below). Most have either been judges before, or municipal prosecutors. Next month we will list the new prosecutors.

Bergenfield. Lynn Muller
 Central Municipal. Nicholas Nasarenko
 Englewood Cliffs. Marc Saperstein
 Fairlawn. David Lafferty
 Hasbrouck Heights. Joseph Jones
 Hillsdale. Lawrence Meyerson
 Norwood. Robert Solomon

Old Tappan. Warren Clark
 Saddle River. Philip Sheridan
 Wallington. Casmir Sondey
 Westwood. Robert Alan Karch

dwi did'ja knows?

In *State v. Ebert*, the Appellate Division ruled that even where there was no observation as to any abberational operation, or, for that matter, any driving at all, the mere fact that someone had been driving with a blood alcohol count above the legal limit will serve not only to underpin a conviction for DWI, *but also* for Reckless Driving. (377 N.J.Super.1 (2005)). *Sure, it is not as if the legislature already addressed this scenario in the DWI statute.*

The offense of DWI in a School Zone (39:4-50(g)) contains no 10-year sentencing step down provision?

In October of last year, the MVC penalty table for holders of a commercial driver's license (CDL) changed. Any CDL holder will lose his/her CDL for *life* upon second DWI conviction, whether committed in a commercial vehicle *or* a personal automobile. If a CDL holder has previously been convicted, while in a commercial vehicle, of Leaving the Scene of an Accident or Driving on the Revoked List , *even a first DWI* will cause a lifetime loss of the CDL.

SAN DIEGO (AP) (3/30/05) - The hunt is on for a turd burglar. Police in San Diego are searching for a gunman who swiped a bag of poop from a woman out walking her dog. The woman told police that she was out walking her dog, Misty, when a man in his 20s ran up behind her and grabbed the bag she was holding.

When the gunman discovered what was in it, he threw it down in disgust, pointed his gun at the 32-year-old woman and demanded money.

He then aimed his .22-caliber semiautomatic at Misty and pulled the trigger twice but the gun didn't fire.

After the misfire, Misty presumably then gave yet another fecal sample.

