
CRIMINAL LAW UPDATE

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cases

It used to be that you needed a real weapon to be convicted of armed robbery. Makes sense, doesn't it, as "armed" sort of implies, oh...a weapon? Then the law "evolved," and you didn't actually need a "real" weapon, only something tangible, like a popsicle stick in your pocket, that made the victim believe you have a weapon. Next, courts began allowing convictions where there were no weapons or tangible objects, only mere statements that the robber possessed a weapon and a gesture that implied the presence of a weapon. Now, the Supreme Court has taken the next evolutionary step and ruled that you can be convicted of first-degree armed robbery if you have no weapon, no tangible object pretending to be a weapon, and do not even say you have a weapon. You just have to gesture in a manner that suggests that you are reaching for a weapon while saying "give me your pocketbook, bitch." The court was clear that a feigned gesture towards an imaginary weapon will result in real time. Then again, it could be that the "bitch" comment was just so over the top.... *State v. Chapland* 187 N.J. 275 ((7/13/06).

In the *Matter of T.T.*, 10/3/06, the Supreme Court disapproved recent Appellate Division decisions on the application of Megan's Law. In *T.T.*, the juvenile pled guilty to aggravated sexual assault and was required to register under Megan's Law. The charges stemmed from an incident when he was 12 and inserted a douche into the anus of a six-year old boy, and then did the same to himself. When asked why he did it, he responded, "I don't know." *Oh, these kids and their crazy games....* At the Megan's law tier hearing, the juvenile

presented expert testimony of a doctor that there was no sexual motivation behind the offense. Nonetheless, the trial judge found that Megan's Law applied because of the nature of the offense and classified the juvenile as a sex offender under Tier Two. The Appellate Division reversed, finding that the State did not prove by clear and convincing evidence that the act was sexual in nature. The Supreme Court unanimously reversed, finding that Megan's Law by its very terms extends beyond purely sexual offenses and includes "offenders who commit other predatory acts against children," noting the charge was a Megan's Law predicate offense. *N.J.S.A. 2C:7-1*. Simply put, motive is irrelevant in determining the application of Megan's Law. So, while it may be acceptable for kids to call each other douchebags....

Cross-examination. Guaranteed by both the federal and state constitutions. Its purpose is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding. It has been described as the "greatest legal engine ever invented for the discovery of truth." But what do you do when that almost sacred constitutional guarantee comes into conflict with the rules of evidence? Answer: argue that the constitutional rights of the defendant trump rules and statutes; tell the judge to weigh the interest sought to be protected by the rule of evidence against the defendant's right of confrontation. To be sure, the right of confrontation is not absolute; however, when the mechanistic application of the state's rules of evidence or procedure would undermine the truthfinding function by excluding relevant evidence necessary to a defendant's ability to

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defend against the charges, the Confrontation Clause must prevail. Judges are going to have to do a gut-check, deciding to toss out application of an evidence rule printed in black and white in an evidence book sitting before them on their bench, based solely on the judge's subjective evaluation of fundamental fairness. But, hey, that's why they get paid the big money. Well, sort of big money. (But with lots of holidays.) *State v. Castagna*, 187 NJ 293 (7/17/06). *Castagna* also has good news for trial attorneys. When a post-conviction relief application alleging ineffective assistance of counsel is filed (rule: whenever a defendant, formerly your best friend and biggest fan, loses his case), the Court reaffirmed that there is a strong presumption that the attorney's conduct fell within the *wide range* of reasonable professional assistance. The PCR court must judge the reasonableness of the attorney's challenged conduct on the facts of the particular case viewed as of the time he or she made those decisions or strategy calls, not in hindsight, and convictions will not be overturned merely because the defendant is dissatisfied with the attorney's exercise of judgment during the trial. The attorney's performance will be assessed not on the facts relating to a single issue, but on the *totality of the attorney's performance* in combating the state's evidence. Indeed, strategies are often created or modified on-the-fly during trials, and neither strategic miscalculations nor trial mistakes are sufficient to warrant reversal except in rare instances where they were of such a magnitude as to thwart the fundamental guarantee to a fair trial. As the courts have so often said in the past, a defendant is only guaranteed a fair trial, not a perfect one.

miscellaneous

Judge Moses has eliminated the existing practice of consolidating related cases in different municipal courts by having the respective prosecutors sign off on a letter giving their consent, and instead employ the procedure set forth in *Rule 7:8-4*. Prosecutors in each of the towns would implicitly consent to the application upon their being served with the motion and not opposing it.

Criminal Motion Seminar

Thursday November 9th

John A. Conte, JSC, Retired

4:30 p.m.-6:45 pm.

Judge Moses' Courtroom

Refreshments

Bonus! A free copy of the Judge's voluminous motion book!

BCBA Members: \$40

Non-members, door registrants:\$50

Reservations: 201-488-0032

The Mercer County Bar Association is presenting a series of seminars on Wednesday, November 29th, including NJ Arrest, Search & Seizure Annual Review-2006; Demystifying the Drama of a Domestic Violence Case; Alcotest 7110: Defects, Discovery And Defense; and a Criminal Law Review. Attend one, attend all! For information and registration, go to www.XtremeCLE.com.

No attorney wants a post-conviction relief application filed against him/her. The most common PCR ground being filed by prisoners today is "I don't want to go to jail and I will do or say anything to avoid it." Second to that is the failure of the attorney to properly advise the client as to the deportation consequences. Judge Roma advises attorneys to tell each client that the offense to which they are pleading guilty *will* result in their deportation. If they are not deported, there is no harm in being more cautious. If the client balks at the plea because of the deportation consequences, the attorney should hire a criminal/immigration attorney to advise whether the offense would result in deportation eligibility. In actuality, caution in this area is well warranted: it is one thing to lose a few years of freedom in jail; it is quite another to be sentenced to banishment *for life* to a country that may be both foreign and cruel.

Only two things are infinite, the universe and human stupidity. And I'm not sure about the former. Albert Einstein, mathematician, physicist, philosopher.