
CRIMINAL LAW UPDATE

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cases

Our Appellate Courts and legislature have eliminated every possible defense to NJSA 39:4-50 (DWI), including, arguably, actual innocence. Having done so, those venerable institutions have set their sights on DWI sentencing. In January, 2004, the passage of *Michael's Law* amended NJSA 39:4-51, eliminating a sentence of work release and community service as options to satisfy the mandatory 180-day jail sentence. Earlier this year the Appellate Division weighed-in with *State v. Luthé*, 383 N.J.Super. 512 (AppDiv 2006) interpreting these amendments to bar any form of non-custodial sentences such as SLAP, electronic home detention, or similar programs that do not require defendants to sit their gluteus maximus (maximi?) in a jail cell. Not satisfied that having the legislature and the courts gang up on DWI defendants was intimidating enough, the Administrative Office of the Courts decreed a few weeks ago that DWI defendants convicted of a 3rd offense had to leave the courtroom in handcuffs. They do not pass *Go*, they do not collect \$200, nor do they *first* get to go to an inpatient alcohol program (which still satisfies up to 90 days of the 180-day sentence). But what about weekend jail sentences? Are they still allowed for DWI? "Periodic service of imprisonment" is indeed allowed in Municipal Courts by authority of NJSA 2B:12-22. *State v. Grabowski*, 388 N.J.Super. 431 (6/26/06). Nothing in *Michael's Law* nor *Luthé* seemingly commands differently, the AOC memo being the sole bar. When an AOC memo and a statute butt heads, the winner is.... the statute. See *Booker v. N.J. State Parole Board*, 265 NJ Super 191 (App.Div.1993) and *State v. Cannon*, 128 N.J. 546 (1992). Sufficiently confused, dismayed, disheartened, disillusioned and disoriented? Well,

then, add this to your plate: the Bergen County Prosecutor's Office is gearing up to oppose periodic DWI imprisonment. The question can be fairly debated as to whether the potential danger posed by drunk drivers has created a *Salem Witch Trial* atmosphere, or is simply a measured response to curb the occasional but deadly carnage.

Is character evidence limited to an accused's credibility? Thankfully, no. NJRE 404 generally bans character evidence as a form of evidence to prove that a litigant acted in conformance with his/her character trait, except in criminal cases as it pertains to the character traits of the accused. The importance of such evidence is highlighted both by a jury charge which informs jurors they may find reasonable doubt based on evidence of the accused's character alone, and by that same evidence rule which prohibits a court from limiting the number of character witnesses. If the accused testifies, his credibility may be the subject of such evidence, be it by personal opinion of someone who knows him, and/or by evidence of his reputation in the community for that trait. If it is a theft case, an accused's reputation for honesty, trustworthiness and integrity may be introduced. In an assault case, likely the defendant's reputation for peacefulness, non-violence and being law-abiding could likewise come into play. A foundation must be established that the witness has known defendant well enough to offer such opinions or observations. While specific instances of good works by a defendant, such as working at a charitable soup kitchen, may not be introduced as being irrelevant, if that is the only way the character witness knows defendant.... *State v. Mahoney*, 188 N.J. 359

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(4/19/06).

Police had a valid arrest warrant for homicide suspect Mr. Bell. They went to his residence, but he was not home. They then went to his aunt's house where he frequently stays, entered her home without a search warrant, and found Mr. Bell hiding in the attic. He was arrested and soon confessed. Although the warrantless search was invalid, the Court held that the confession *cannot* be suppressed as fruit of the poisonous tree because the arrest was the product of a valid arrest warrant. Thus, suppression of the confession is not the proper remedy. If, however, the police had found contraband in the house, which had no connection to the his arrest (for instance, Auntie Bell's water bong and hydroponic marijuana basement farm), then that evidence would be suppressed due to the illegal search. The case provides an excellent analysis of U.S. Supreme Court cases on home search and seizure law. *State v. Bell* (App. Div. 11/17/06). In this vein, see *Hudson v. Michigan*, 126 S.Ct. 2159 (2006) a recent U.S. Supreme Court case that denied suppression as the penalty for a violation of the "no-knock" search warrant rule, leaving that defendant to a civil remedy only. When the constitutional violation does not give the police any unfair advantage in what they are trying to accomplish, then the court will not put the defendant in a better position than that in which he would have been had the police acted correctly.

miscellaneous

Apparently someone has figured out the Amaze we call the Bergen County Court House and found the cheese at the end. The courthouse "complex," as it is aptly called, is a jumble of buildings interconnected at various and odd floors, replete with secret stairways, a very real but non-existent 5th floor, and sequentially numbered court rooms that...are in different buildings, requiring you to leave that floor, find the correct connecting floor, go up (or down) stairs, and then back to your original floor, albeit in another building. The punishment for someone having solved this puzzle is that the cheese has been moved, and the level of difficulty has now

been increased for those of us who have difficulty in learning new things by the renumbering of the various rooms. For criminal practitioners advising clients where to go (no, not in that sense), note that Criminal Case Management is now room 124, not 134; Judge Lipton's court room is no longer 303 but 304, Roma is 406, Meehan 306, and Venezia is 311. Consistent with the above, Mickey Mantle is no longer "7", but "6".

Pursuant to the September 27th Notice to the Bar, motions for consolidation of municipal court cases should be noticed to The Honorable Sybil R. Moses, A.J.S.C. as well as the applicable municipal prosecutors. You must include a Certification regarding the detailed specifics of the cases and the basis for the consolidation request. The cover letter, motion, certification and any supporting documents should be mailed for filing to Brendis Montijo-Wrigley, Bergen County Justice Center, Municipal Division, 10 Main Street, Suite 309, Hackensack, NJ 07601. Presumably the court will prepare the order.

A recent study has shown that more than half of DWI offenders suffer from at least one mental illness, in addition to any drug or alcohol disorders. When there are two or more convictions, the study found the likelihood of mental illness was 60%. For those who believe that the problem of drunk driving can be solved through harsher penalties, the study can only be described as... sobering. Harsher penalties satisfy the blood lust for revenge, for a sense of vindication, for justice, but they may not have the power to address the real problem, or to do as much to eradicate DWI as our legislators believe.

Consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution. Thomas Jefferson.

The reason for a well-planned trial strategy: *You've got to be very careful if you don't know where you're going, because you might not get there.* Yogi Berra.

There comes a time each year to lay
down the burdens of our clients, and
focus on...nothing. May your holidays be
filled with meaning and...blissful oblivion.