
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

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nj cases

When defendants have been convicted of a *Megan's Law* offense, they are required, before moving to a new address, to notify the local law enforcement agency with which they are currently registered about the move, and then register with the law enforcement agency in the area to which they are moving. When defendants only notify one of these agencies, they maybe prosecuted pursuant *N.J.S.A. 2C:7-2(d)*, even though the statute would, on its face, arguably make it an offense only if the registrant failed to make *both* notifications. Despite its subject matter, *Megan's Law* is a penal statute, not a penile statute, and should be strictly construed. Not so here. *State v. Leahy* 381 N.J.Super 106, (App.Div. 2005

Once a deliberating jury announces that it is hung, alternate jurors may no longer be substituted. Jurors may be removed during deliberations because of illness or other inability to continue, but never for reasons related to the "deliberative process." *State v. Banks*, 395 N.J. Super. 205 (7/26/07). The reasoning is that once a jury is hung, individual jurors have already reached positions--likely firm positions--that will not be changed by the introduction of a new juror. Thus, the sole remedy, once the jury announces it is hopelessly deadlocked and thereafter a juror needs to be removed, is to declare a mistrial.

When the plaintiff/alleged victim of domestic violence seeking a final restraining order cannot prevail by

a preponderance of the evidence in the FRO hearing, resulting in the dismissal of the domestic violence complaint, can the State thereafter charge the defendant with those same allegations in a criminal action? Would such a prosecution be barred by the doctrine of collateral estoppel? By the due process application of fundamental fairness? Well, yes, no and no. In *State v. Brown*, 394 N.J. Super. 492 (7/11/07) the Appellate Division ruled that the *Prevention of Domestic Violence Act* and a criminal prosecution are "quite different" from each other, and that barring a criminal charge would be inconsistent with the policy underlying domestic violence actions, and not required as a matter of constitutional law. While citing to other reasons, such as the fact that a ruling in favor of defendants in these matters might lead victims not to pursue restraining orders that might hinder criminal prosecution, the practical reason is that an untrained alleged victim, frequently unrepresented by counsel, simply does not have the trial skills or savvy to effectively prosecute in the domestic violence arena, and the people of the State of New Jersey should not be denied the fair application of the criminal code based on the *pro se's* ineptitude (do you remember your first trial? and you had, what, 3 years of law school?). That is not to say, however, that where a plaintiff cannot even convince a judge by a preponderance of the evidence to issue a DV FRO that the result may not be persuasive to prosecuting authorities on the issue of bringing charges.

miscellaneous

The "Baby DWI" statute, *N.J.S.A.*

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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.

39:4-50.14, punishes those under age 21 who drive with any measurable alcohol level. The statute mandates suspension of driving privileges for up to 90 days, along with community service and other conditions. The statute does *not* set forth a fine schedule, and in February 2004, Acting Administrative Director of the Courts Richard Williams circulated a statewide memo affirming that *no monetary fines or surcharges are to be assessed against drivers found guilty solely under this statute*. Still, many judges around the state continue to improperly and illegally assess the ordinary DWI monetary penalties.

In late September, new plea forms were provided to the Superior Court for all criminal cases. These new forms sport two significant changes. On the first page where the rights the defendant is giving up by entering the guilty plea are listed, the new forms now advise defendants that by pleading guilty they are *not* waiving their right to appeal the denial of a motion to suppress physical evidence or the denial of acceptance into PTI (Question 4(d)). There is also a second additional question (4(e)) which asks: "Do you further understand that by pleading guilty you are waiving your right to appeal the denial of all other pretrial motions except the following:" where the defendant specifically list the issues preserved on appeal.

Chun trundles on. Special Master Judge Michael King has ruled on the latest challenge to the Alcotest 7110 following revealing hearings which, among other things, disclosed literally thousands of errors in the source programming code which runs the computer-based device. King ruled the Alcotest results admissible subject to certain requirements, among them:

- Alcotest 7110 instruments in use should be re-certified every six months instead of yearly, as is now the practice;
- As a result of certain software errors, evidence from a third breath test should not now be utilized;

- A portion of the programming code which was designed to spot certain errors but which had been "turned off" should be reprogrammed to be turned back on.
- If any of the categories on the Alcohol Influence Report are incomplete or missing, no portion of the report may be used in evidence. In such cases no blood alcohol readings would be admissible at trial;
- Foundational documents must be provided to the defense as discovery in all cases, regardless of whether the defendant is being represented by an attorney;
- Written notice of any software changes must be given to the N.J. State Bar Association for dissemination.

The matter is set for final(?) argument before the N.J. Supreme Court on January 7th. Judge King's report is simply a compilation of his findings of facts and conclusions, recommendations which the Supreme Court will accept in whole or in part, or reject. The State was gratified that King found the machine to be scientifically reliable; the defense was satisfied that the admitted sources of error provide a veritable on-going cornucopia of challenges.

In response to Attorney General Law Enforcement Directive 2007-003 regarding the procedures to be utilized by police in arrests of illegal immigrants on criminal and DWI offenses, the Administrative Director of the Courts released Directive 11-07 which notes that law enforcement officials will supply courts with stickers which indicate the officer's belief that the defendant is an illegal immigrant. Judges may take such information into account in setting bail.

Ppeace on earth, and mercy mild, God and sinner reconciled. From *Hark, the Herald Angels Sing*. Isn't that

the true goal of our criminal justice system?
Remember too that the defendants we deal
with are for the most part scared. A little
understanding and compassion go a long way.
It is the holiday spirit practiced year round.

Aren't we forgetting the true
meaning of Christmas? You know,
the birth of Santa? *The Simpsons*.