
CRIMINAL LAW UPDATE

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nj cases

When a narcotics detective testifies as an expert witness in a distribution case, he or she cannot give an opinion about the guilt of the defendant on trial. The prosecutor can only pose questions in the form of *hypotheticals* in order to elicit the expert opinion. In *State v. Amat*, (App. Div., 12/20/07) the defendant's conviction was reversed because the expert witness rendered an opinion that Amat intended to distribute the drugs found in the vehicle based on the specific facts of his case. (It is judicial tradition to allow the *jury* to decide issues of guilt or innocence.) The detective further erred by stating he was 100% certain that *all of the individuals* in the car were in some way involved in the drug transaction. The Appellate Division reiterated the Supreme Court's holding in *State v. Odum* that *only* hypothetical questions may be used when questioning the expert witness, in order to minimize the risk of the jury interpreting the opinion as indicating the *specific* defendant on trial is guilty. Of course, the defense can call their own expert witness in narcotics, whether it be a former user or a retired detective, to rebut the State expert's opinion as to whether the facts show an intent to distribute. The thought of using a former junkie as an expert witness is delicious, is it not? "Whoa, dude, like, you know, no." Anyway, for many of our clients, 10 kilos of coke is not intent to distribute-it's just a really fun weekend.

Because it has been the traditional practice, too many attorneys assume their client has no right to

be present at sidebars during jury selection, or indeed, sidebars during the trial itself. While the traditional thinking, it is erroneous. The Supreme Court in *State v. W.A.*, 184 NJ 45 (2005) ruled that indeed defendants *did* have the right to be present at all portions of their trial, including sidebar conferences. In *State v. Colbert*, 190 N.J. 14, (2007), the Supreme Court had the opportunity to refine the issues raised, ruling that defendant's physical presence is not required, although it is the first alternative that should be considered when the defendant makes such an application. However, if because of security reasons that option is not deemed feasible (as courts frown upon allowing defendants proximity to jurors whom they might strangle or pummel), then the court may utilize other methods to insure the defendant an equivalent situation, such as positioning the defendant so that he can see the faces of the prospective jurors at sidebar, while listening electronically to what is being said. Remember, knowing the words that are spoken at sidebar alone is insufficient, especially during jury selection, where a juror's inflection, body language, or facial expressions may well tell a much different story than what he/she verbalizes.

Neither federal law nor state constitutions prohibit *all* searches; the only proscription is "unreasonable searches." As such, the touchstone for all searches, both as to the reason, scope, and manner of the search is *reasonableness*. It is a simple phrase and a simple test. Once you learn it, you know all you need to know about search and seizure

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law. Case in point: when an officer stops a motor vehicle for a specific reason (i.e., a motor vehicle offense, or probable cause that it is contraband or was used in a crime, etc) the police may detain the vehicle only as long as is *reasonably* necessary. Where the original reason for the stop is a motor vehicle offense, but during the stop suspicious circumstances arise, it may not be "*unreasonable*" to extend the original detention further to satisfy the *reasonable* concerns of the officers. The officer may make inquiries, even asking questions that are accusatory and meant to elicit incriminating responses. Under these circumstances, the officer has to pursue the investigation in a manner that is "likely to confirm or dispel" the suspicions quickly. Indeed, if the officer detains the vehicle *unreasonably* long (i.e., longer than necessary), it may well amount to an illegal arrest. Indeed, a justified investigative stop escalates into a custodial arrest when the officers conduct is more intrusive than required for investigative purposes, regardless of the length of the stop. Why? Because it would be *unreasonable*. *State v. Baum*, 393 N.J.Super. 275 (5/30/07). In a related issue, the court concluded that the questions asked of the driver Ms. Baum were not a "custodial interrogation" that required *Miranda* warnings, because although the driver had been isolated from the others, she was within view of her vehicle, the others could see her, and she was not handcuffed, searched humiliated or confined in the police car.

When the state fails to produce a witness who is likely to give evidence supporting the state on an important issue, the defendant may request an instruction, under *State v. Clawans*, 38 NJ 162 (1962) instructing the jury that it may draw an adverse inference based on the state's failure to call that witness. Such a failure "raises a natural inference" that the state fears that the witness, instead of supporting its theory of criminal culpability, will expose facts unfavorable to the state. But can that same theory be used against a

defendant? Remember, defendants have no obligation to present a defense, no obligation to prove their innocence, and may rely simply upon the presumption of innocence. In *State v. Velasquez* (3/21/07) the Appellate Division clarifies the delicate balancing process. The State is entitled to a *Clawans* adverse inference against the defendant only when it is "reasonable to do so" (*State v. Carter*, 91 NJ 86, 1982) and only when the defendant has injected an issue such as an alibi, or asserted a separate defense; even then, only when the uncalled witness would be important and not merely corroborative. (There are, by the way, separate standards as to when counsel can comment on the failure of the other party to present an apparently favorable witness, and when a court can go further and give instruction to the jury allowing it to draw an adverse inference if it wishes.) As a practical matter, frequently both the State and the defense in a trial will argue that the other should have called the witness. The Appellate Division suggested that courts sidestep such "chess playing," inferring that it is more gamesmanship than a true issue.

miscellaneous

The 9th Circuit Court of Appeals, in *U.S. v. Betts*, discussed whether a condition of probation requiring a non-alcoholic defendant to abstain from alcohol was legal, and in more general terms, the test to be used in scrutinizing the appropriateness of *any* condition of probation: "A condition of supervised release was only permissible if it was reasonably related to deterrence, public protection, or rehabilitation, and did not involve a deprivation of liberty greater than that reasonably necessary for the purposes of the release...such a condition must be individualized based on the nature and circumstances of the offense, and the history and characteristics of the defendant." <http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D42FB6D0D43A560E882573B00080>

Next to a circus, there ain't nothing that packs up and tears out faster

than the Christmas spirit. Kim Hubbard (1868-1930)