
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

June 2007

nj cases

Alcotest Update. The *Chun* litigation rolls on. On May 22nd the Supreme Court told both the defendants and Draeger that each may hire an expert to examine the computer source code (the Alcotest is a scientific instrument run by a computer). The cost of the examination may reach six figures, yet neither the manufacturer nor the State, each with deep pockets, is required to fund it, the burden falling to the few clients chosen to represent all accused DWI drivers. The experts must submit a report within 90 days of May 29th to Judge King, the Special Master. If Judge King elects to conduct a testimonial hearing on the issue, he shall do so no later than 45 days after the receipt of those reports. Fourteen days thereafter he must issue his findings and conclusions regarding the accuracy of the Alcotest's computer instructions. The Supreme Court, having already heard the final arguments on the Alcotest, will almost certainly await Judge King's findings and conclusions before rendering its decision on all the issues. If the litigation goes to the full limits of these time limitations, the Supreme Court will only get Judge King's report in late October or November. The court will obviously need time to assimilate it, mesh these new findings with the testimony and legal arguments already presented, and then issue its decision. With the Thanksgiving holiday break immediately thereafter, and Christmas right around the next corner, it is not inconceivable there will be no 2007 decision on the Alcotest. The Breathalyzer lives on to

fight another day. As Sonny and Cher might have noted... "the beat goes on, and the beat goes on...." ("Drums keep pounding a rhythm to the brain" is omitted as not here relevant.)

Caveat emptor! Defense attorneys shopping for pleas for clients accused of drug distribution should not wait for the clearance sale because prices are only going up. When negotiating plea deals pursuant to *N.J.S.A. 2C:35-12* and the *Brimage* Guidelines, prosecutors can employ an escalating plea offer policy in which the plea offer goes up as the case progresses, and the sentencing judge is *bound by the negotiated plea deal*. In *State v. Thomas* (4/17/07), the Appellate Division reversed the trial judge's sentence of five years with 30-months parole ineligibility, the deal offered by the State prior to the suppression hearing. The defendant had pursued a suppression motion and lost; he then accepted a conditional plea that included a 33-month period of parole ineligibility, the amount calculated on the prosecutor's *Brimage* worksheet. The judge imposed 30 months instead of the 33 months because he deemed it unfair to penalize the defendant for exercising his constitutional right to a suppression hearing. This righteous and well-principled gesture was nonetheless reversed by the Appellate Division because of *Brimage* and the clear language in 2C:35-12 ("...the court...shall not impose a lesser term of imprisonment [or] parole ineligibility...than that expressly provided for under the terms of the plea agreement."). The Appellate Division reasoned that "[p]rosecutors may reasonably consider the early disposition of cases as an important law

A Publication of the Bergen County Bar Association

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.

enforcement objective when entering into plea agreements with defendants." Such policies do not violate the principles of either *Blakely v. Washington* and *State v. Natale*.

Plea bargains are contracts. When a prosecutor makes a plea bargain offer, even if not in writing, and the defendant acts to his substantial detriment in reliance thereon, the plea bargain offer is binding. *State v. Rosario*, 391 N.J. Super. 1 (2/27/07) washes away the mystique of plea bargains and reduces them to what they are: agreements, contracts, meetings of the mind. Understanding that, one can usually discern the proper resolution of plea bargain disputes by the simple and fair application of well established law. Remember, however, that even if a defendant detrimentally relies on the plea bargain offer, the prosecutor cannot guarantee that either the judge will accept it or that the defendant's factual basis would be sufficient to support the plea. So, to some extent, all defendants take risks that after having done their part in meeting their obligations under the plea, their expectations may still not be met.

miscellaneous

June is usually the month for weddings; this year it is the month for retirements. Our venerable Presiding Judge of the Criminal Division, **Judge Meehan**, will be feted on Wednesday, June 20th at the Venetian, 546 River Drive in Garfield, at 6:00 p.m. Reservations are \$70.00; contact Frank O'Marra, 201-488-0044. Checks should be made payable to "Judge Meehan, Retirement." Also celebrating her retirement this month is the storied former head of the Child Abuse and Sex Crimes Unit, **Patricia Baglivi**. Her dinner will be on Thursday, June 14th, 6:00 p.m. at the Stoney Hill Inn, Polifly Road, Hackensack. Tickets are \$75.00, should be made payable to "Retirement Dinner for Patricia Baglivi," and

sent to Lisa Friscia, A.P. at the BCPO (lfriscia@bcpo.net).

Did you know that any employer who requests an employee or prospective employee to submit to a lie detector test as a condition of employment or continued employment commits a disorderly persons offense? *N.J.S.A. 2C:40A-1*.

NJ Driving Rules:

The morning rush hour is from 5:00 a.m. to noon. The evening rush hour is from noon to 7:00 p.m. Friday's rush hour starts on Thursday morning.

2. The minimum acceptable speed on the Turnpike is 85 mph. On the Parkway it's 105--maybe 110. Anything less is considered "wussy."

3. If you actually stop at a yellow light, you will be rear-ended, cursed out, and possibly shot.

4. Detour barrels are moved around during the middle of the night to confuse drivers and amuse construction workers.

5. Mapquest does not work in New Jersey -- none of the roads are officially named what we actually call them.

6. If someone actually signals prior to turning, report him to authorities. Fortunately, this is highly unlikely to ever occur.

7. If you are in the left lane and only driving 70 in a 55 mph zone, you are considered a road hazard and will be "flipped off" accordingly. If you return the bird, you will be shot.

Ironic, isn't it? Because our system of justice is usually so accurate, it is easier to convict the innocent. *"Paradoxically, the system's overall accuracy makes defending the truly innocent all the harder. While knowing that mistakes do happen, the accuracy of the system leads everyone, including defense*

lawyers, to assume that anyone who is charged is probably guilty. After all, they usually are. Notwithstanding the legal 'presumption of innocence,' in a system that generally gets it right, there is a pragmatic presumption of guilt. Consequently, effectively defending the innocent usually requires the ability to prove your client's innocence. And that's not easy. Three Cheers for Lawyers by Randy E. Barnett, (former criminal prosecutor with the Cook County State's Attorney's Office in Chicago) *Wall Street Journal*, April 17, 2007.

A *hh, Summer. Too many behind us, too few ahead. Grab it with gusto.*