
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

March 2007

chun update

Special Master Judge King, P.J.A.D., has issued his report in the *State v. Chun* case regarding the Alcotest 7110, the new breath testing device utilized in most of counties (Bergen being one of the exceptions). After defense attorneys brief their response to his findings and conclusions this week, the matter will be scheduled for oral argument and decision before the NJ Supreme Court. Among his findings:

- the Alcotest is scientifically accurate and evidential when accompanied by "appropriate foundational proofs" but only if the testing protocol is "meticulously followed" (if any deviation from the protocol or instructions, "the BAC readings must be rejected as evidence");
- the absence of a breath test reading for a defendant from the device is not a *per se* refusal; the Alcohol Influence Report must state why there is no reading (i.e., insufficient breath sample of < 1.5 liters (1.2 liters for women over 60), or too short a blowing time of < 4.5 seconds);
- defense attorneys are shall be provided in discovery in digital format the history of the particular Alcotest device on which the Accused was tested;
- the State shall provide, "regular, continuing and meaningful training for attorneys and their experts consistent with that provided for certification of breath test operators...and coordinator instructors;"
- Draeger (the manufacturer) agrees to

- sell machines to defense attorneys, to train them (for a fee), and to submit all future software revisions for independent verification at its cost;
- each machine should have a thermometer to test the motorists' actual breath temperature and factor that into the results, or else all readings should be reduced by 6.58%;
- all walkie-talkies (did you ever stop to think how silly that name is?) *and cell phones* should not be "used or stored in the area where the test is administered;"
- each breath result reading must be within .005 (or 5%, whichever is greater) of the average of the four readings (there being two reading—infrared and electrochemical—from each breath sample)
- note is made of the physiological variability in motorists which contribute to imprecision in the readings, and at the critical BAC levels of .04 (for CDL), .08 and .10 (for higher first time offender penalties) care and attention must be paid to the physical manifestations of intoxication (suggestive of a relaxation of the strict *per se* rule at those readings).

pti cases

Illegal alien status is not, in and of itself, a bar to the admission of a defendant into the Pretrial Intervention Program. It may, however, be a relevant factor. In *State v. Liviaz*, 389 N.J. Super.

A Publication of the Bergen County Bar Association

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401(App.Div. 1/10/07) the Appellate Division found the defendant's illegal immigration status, along with other factors, justified the prosecutor's rejection of the PTI application. The Appellate Division decision unfortunately does not challenge the PTI prosecutor's assertion that defendant was "committing a criminal act everyday that he remain[ed] in this country illegally," as remaining in this country illegally is a violation of civil law, not a crime. Lest the result be miscited for the proposition that being an illegal alien is a *per se* PTI disqualifier, note that Liviaz had a host of PTI-disqualifying factors, including repeated failures to appear in court, the nature of the crimes in which he was charged (creating false documentation) and a long history of anti-social behavior.

Mr. Watkins, living large on purloined funds, was indicted for Theft by Deception and an Unsworn Falsification to Authorities arising from his receipt over four months of \$5,670.00 in unemployment benefits from the New Jersey Department of Labor. He had falsely certified biweekly that he remained unemployed. He was rejected for PTI on two bases, including Guideline 3(i)(2), involvement in a "continuing criminal enterprise." The Appellate Division found that the prosecutor's reliance on that factor was misplaced and remanded for reconsideration. The Appellate Division concluded that a series of unlawful acts for profit do not automatically equate to a "criminal enterprise", and that four months do not necessarily constitute the required "extended period." Unspoken was whether the prosecutor was improperly influenced by this recently seen bumper sticker wisdom: "Don't steal. The government hates competition." *State v. Watkins*, (App.Div., 2/5/07).

miscellaneous

The attorney's entrance to the Bergen County courthouse is between the buildings, under the overhang on what is called Creek Place, the street that looks like a street and has a name of a street, but is not really a street. Use it. It is a joy, with no lines and friendly officers who usher

you right through. The Bergen County Bar Association worked hard to secure this time-saving and stress-relieving privilege for all hard-working attorneys. Enjoy its benefits. To that end, get your new statewide attorney identification card from the Bergen County Sheriff to ease access into courthouses around the state.

Chuck Noll, great head coach of the Pittsburgh Steelers, lecturing to football coaches, players and trial attorneys: *Pressure is something you feel only when you don't know what you are doing.* If you are prepared, the pressure is only your client's.

Those who do DWI defense work frequently hear clients complain that the arresting officers were "staking out" their favorite bar, lying in wait for its patrons. For all of those clients, this story, said to be true, and coming from a state where drinking is a cherished sport, should be gratifying:

A police car parked outside a bar in Paris, Tennessee, observing patrons as they left. After last call the officer noticed a man leaving the bar, barely able to walk. The man stumbled around the parking lot for a few minutes. He tried his keys on five different vehicles, finally managing to find his car and fall into it. He sat there for a few minutes as other patrons left the bar and drove off. Finally he started the car, switched both his blinkers and the wipers on and off although it was a dry summer night, honked the horn and then switched on his lights. He moved the vehicle forward a few inches, reversed a little and then remained still for a few more minutes as other patrons' vehicles left. When his was the only car left in the parking lot, he pulled out and drove slowly down the road. The police officer quickly followed, pulled the man over, and administered a portable breath test. To his amazement, the breathalyzer showed a zero reading. Dumbfounded, the officer said, "I'll have to ask you to accompany me to the police station. This breathalyzer equipment must be broken." "I doubt it," said the proud patron. "Tonight I'm the designated decoy."

When preparing your seemingly unwinnable case, undertake Albert Einstein's approach to analyzing the task at hand:

1. *Out of clutter, find simplicity.*
2. *From discord, find harmony.*
3. *In the middle of difficulty, there is opportunity.*

Granted, he was no rocket scientist—no, wait, he was. But there is much *Zen* in what he proposes, and with it, he unlocked the secrets of the universe.