
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

October 2007

nj cases

At the end of a grueling trial, or perhaps after a guilty plea, your DWI client is about to be sentenced. The state has the obligation by statute of proving any prior convictions by producing your client's MVC driving abstract (*N.J.S.A.* 2B-25-5.1). The judge, however, will often also turn to the defendant and ask directly whether he/she has any prior convictions. Can your client maintain his/her silence in the face of such a direct inquiry? In *Mitchell v. United States*, 526 U.S. 3/14 (1999), the United States Supreme Court ruled that neither a defendant's guilty plea, nor testimony at trial where no issues regarding a prior offense were raised, can rob the accused of the right to remain silent regarding facts or factors which could enhance the punishment. "Where a sentence has yet to be imposed, this Court has already rejected the proposition that incrimination is complete once guilt has been adjudicated.... To maintain that sentencing proceedings are not part of any criminal case is contrary to...common sense." Nor is a failure to respond to the question misleading, as silence will be read accurately by the court as being nothing more than that, neither an admission nor a denial of guilt. The Fifth Amendment by its terms prevents a person from being "compelled in any criminal case to be a witness against himself." Understanding that even judges may fall prey to the notion that silence equates to the existence of a prior conviction, the Court noted that "too many, even those who should be better advised, view this privilege as a shelter for wrongdoers.

They too readily assume that those who invoke it are either guilty of crime or committing perjury in claiming the privilege." Requiring the state to bear its burden of proof at a sentencing proceeding is not deception nor chicanery; it is our jurisprudential tradition, and a precious constitutional right.

Motor vehicle tickets must be issued, for the most part, within 30 days from the commission of the offense. *N.J.S.A.* 39:5-3. There are some exceptions, including DWI, Driving on the Revoked List, and Leaving the Scene of an Accident. It has long been a tactic of motorists involved in automobile accidents to wait until the 30th day to file a traffic summons against the other driver, and then sit back happily knowing that by the time the summons is served, the other driver will be out of time to file a cross-complaint. The timing of that strategy, if not the strategy itself, has been altered by the Appellate Division in *State v. Buczkowski* (39 N.J. Super 40, 7/18/07). The Appellate Division there mandated that not only must the traffic ticket be filed within that time, it must also be served on the defendant within the 30 day period. Understanding that the complainant must account for the time delay for the probable cause determination to be made approving the filing of the complaint, and also for its service on the defendant, waiting until the 30th day no longer cuts the mustard, rocks the baby or walks the dog. And, do you know what? Good riddance. It is a sneaky and underhanded way to pervert the criminal justice system for selfish purposes.

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.

You've heard the term, but do you know what a "net opinion" is, and why it runs afoul of *N.J.R.E. 703 (Bases of Opinions, Expert Testimony)*? A net opinion is one given by a proposed expert which lacks any ascertainable methodology or scientific process by which the expert reached his opinion. Expert testimony must have the ring of science, rather than mere speculation. An expert must state the "why and wherefore" of his opinion. The expert must also give his opinion in terms of probabilities, opining that the result was "most likely" the case or that a process was the "probable cause" of the outcome. A "best guess" amounts to little more than guesswork, because it fails to give probabilities, and is inadmissible. You didn't ask, but now you know. *State v. Sharp*, 395 N.J.Super. 175 (Law Div., 12/5/06).

In *State v. McCann* (391 N.J. Super 542, App.Div. 2007) the Appellate Division rejected defendant's assertion that the evidence seized from him in a search warrant case be suppressed because the warrant was issued by a judge who had a previous long-term attorney/client relationship with the defendant as well as other members of his family. The court ruled that this defendant had not shown any actual bias, other than the fact that his home had been searched based on a procedurally defective warrant issued by other than a constitutionally mandated "neutral and detached magistrate." These constitutional mandates are really, what? "Technicalities?" Really, who actually needs a *fair and unbiased judge* to rule on whether the police can invade the sanctity of your home, your proverbial castle? This defendant's pains were not for naught, however, as his travails served to establish a prospective "bright-line" rule that where defendants make a particularized and credible assertion of facts which objectively suggest an appearance of partiality on the part of the judge, a search warrant issued by that magistrate will be invalidated. *Gee, thanks,*

Mr. McCann for this great new rule, although, err, it sucks for you.

miscellaneous

Whether you are a defense attorney being urged by your client to do something less than honorable, or a prosecutor being asked for a reasonable plea bargain where political forces, within or without the office, are pressing for a harsher result for unholy reasons, it is good to remember this recent advice given to the intelligence community: *"It is the job of a good lawyer to say "yes." It is as much the job of a good lawyer to say "no." "No" is much, much harder. "No" must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. "No" is often the undoing of a career. And often, "no" must be spoken in competition with the voices of other lawyers who do not have the courage to echo it. For all those reasons, it takes far more than a sharp legal mind to say "no" when it matters most. It takes moral character. It takes an ability to see the future. It takes an appreciation of the damage that will flow from an unjustified "yes." It takes...understanding.* Published speech by former Deputy Attorney General James B. Comey, as reported by the Washington Post, 9/25/07.

**Ike Gavzy is retiring
from the BCPO!**

A loss for his office, and for all in the defense bar who dealt with him. Celebrate his retirement with his legions of friends, family and fans.

**Wednesday, November 28th
Seasons Restaurant, 6-10pm**

\$58 per person includes an open bar, cocktail reception, and buffet dinner.

Mail checks payable to "Ike Retirement 2007" to Jeff Ziegelheim at the BCPO.