NJSBA Trustee Update

If It Isn't Broken...

By Arnold Fishman

While a prosecutor can plea-bargain a murder indictment, she cannot in any way compromise a traffic ticket alleging drunk driving (NJSA 39:4-50). As a municipal court practitioner specializing in defending persons accused of that heinous offense, that prohibition looms large in my life. On the other hand, it is unethical for a prosecutor to try a case that the State cannot win. This conundrum leads to some bizarre results. Historically, the way cases, unwinnable by the State, would be resolved, was through the entry of a plea of guilty to the charge of reckless driving (NJSA 39:4-96). This disposition invariably included some period of driver's license suspension.

The problem is that the sentencing alternatives included in the reckless driving statute do not include a period of suspension. This technicality was easily overcome by NJSA 39:5-31. That law invests municipal court judges with the authority to suspend the driver's license of any defendant convicted of a "willful" violation. Since the charge of reckless driving contains the element of willfulness, there was a logical connection that justified the imposition of the D/L suspension. Therefore, a suspension for driving recklessly has some intellectual honesty.

Recently, a defendant charged with reckless driving, who clearly drove recklessly, had her D/L suspended. In her trial there was no hint or allegation of intoxication. As to the suspension, her attorney claimed, *inter alia*, that this unlimited legislative grant of authority was unconstitutional. There is nothing in the statute to guide a sentencing court as to the length of the suspension once the finding of "willful" has been made. Consider that Title 39, the Motor Vehicle Code, says that a third or subsequent DWI and refusal in a school zone requires a suspension of forty years, and a second leaving the scene of an accident (NJSA 39:4-129) resulting in personal injury requires a permanent forfeiture of the driving privilege. It appears the range is anywhere between zero and infinity.

Our Supreme Court preserved the constitutionality of the statute by remanding the case for resentencing under factors established within its opinion.

These factors include:

1. the nature and circumstances of the defendant's conduct, including whether the conduct posed a high risk of danger to the public or caused physical harm or property damage;
2. the defendant's driving record, including the defendant's age and length of time as a licensed driver, and the number, seriousness, and frequency of prior infractions;
3. whether the defendant was infraction-free for a substantial period before the most recent violation;
4. whether the nature and extent of the defendant's driving record indicates that there is a substantial risk that he or she will commit another violation;
5. whether the character and attitude of the defendant indicate that he or she is likely or unlikely to commit another violation;
6. whether the defendant's conduct was the result of circumstances unlikely to recur;
7. whether a license suspension would cause excessive hardship to the defendant and/or dependants;
8. comparisons to other motor vehicle statutes that impose mandatory license suspensions;
9. the need for personal deterrence; and
10. any other relevant aggravating or mitigating factor(s) clearly identified by the court.

In weighing and evaluating the foregoing, it is not necessarily the number of factors that apply but the weight to be attributed by the sentencing court to a factor or combination of factors. A Superior Court judge sentencing under a municipal appeal must articulate the reasons for imposing a period of license suspension. State v. Moran, ___ N.J. ___ (2010).

Keep in mind that before the Moran factors can be applied, there must be a finding of willfulness. I concede there are other violations of Title 39 upon which a court can predicate a finding of willfulness. Racing (NJSA 39:4-52) and tailgating (NJSA 39: 4-89) are excellent candidates. Certainly a person doing 125 MPH in a residential (25 MPH) zone cannot credibly claim he didn't know he was speeding. However, there are also some Title 39 violations for which the issue of willfulness is inappropriate. Would the question of intent be appropriate to a prosecution for failure to exhibit a driver's license in violation of NJSA 39:3-29?

Some time ago I defended a young man with a good driving record who was charged with careless driving as a result of an accident in which the other driver was killed. No alcohol was involved. At the scene he freely admitted he hadn't noticed the stop

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sign, so there was very little hope of an acquittal. I convinced my client to permit me to plead him guilty and concentrate on saving his license from suspension. The Court agreed with my argument that, since suspension was not mentioned in the careless driving statute and there were no facts upon which a finding of willfulness could be predicated, no D/L suspension could be imposed.

I recently tried a case where the DWI was accompanied by a summons for careless (NJSA 39:4-97) rather than reckless driving. Here too—without an accident let alone a death—there was no evidence of willful conduct. The only thing that could possibly qualify as willful was his consumption of some alcohol. Remember the law of the State of NJ is not don't drink and drive, but know your limits. For an adult it is perfectly legal to drive after having consumed alcohol so long as you are not under its influence and don't have a prohibited BAC. The Court was unable to find that the state had met its burden as to the DWI, but was prepared to convict the defendant of willfully having driven carelessly.

This convoluted logic was required in order to put the Court in a position to punish the defendant through a D/L suspension for the charge of which he was just found not guilty. This added penalty was for being negligent after having done a legal act with no provable connection between the two. My crystal ball (read my cynical nature) tells me that the Moran factors enunciated by Justice Albin, in an effort to protect our citizens from arbitrarily long suspensions, will be subverted to impose D/L suspensions in cases way outside the expressed intent of the legislature.

Although invited to do so, the NJSBA chose not to get involved in the Moran case. We were satisfied with the existing situation. It was a no win situation to those of us heavily involved in the municipal courts. If the statute was unconstitutional, and Courts were not permitted to suspend for reckless driving, how would we get rid of our DWIs? And if the statute together with the Moran yardstick is the law, won't Courts be tempted to seize the opportunity to accomplish their agenda of punishing those who have driven after drinking—even those not guilty of drunk driving?

And what about poor Mrs. Moran? She awaits resentencing in the municipal court. Once again, my crystal ball tells me that the Moran factors will be used to justify the same 45-day suspension as previously imposed. Cases such as this reinforce the advice I have been giving for years. Be careful about taking appeals. If it isn't broken, don't fix it!

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