

Preface

The New Jersey statutory scheme for combating the evils of drunk driving has as its foundation the establishment of several distinct courses of conduct which, when proved in court, will constitute a violation of the law. The statute, N.J.S.A. 39:4-50, is broad in its reach and vague as to the precise definition of the elements of each of the offenses set forth in the law. Accordingly, in order to properly understand and utilize the statute, it is essential that practitioners read it only in conjunction with the many cases which have interpreted it. Indeed, one of the chief purposes of the following sections is to provide a useful guide to understanding the practical workings of N.J.S.A. 39:4-50 in the context of the hundreds of reported decisions that have interpreted and modified it for decades.

In general, the statute prohibits the follow specific courses of conduct:

- 1. The per se violation.** It is a violation to operate a motor vehicle in New Jersey with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood. As seen in the following sections, evidence of a blood alcohol level of 0.08% or more taken within a reasonable period of time after operation of a motor vehicle is sufficient evidence by itself to constitute a violation of the statute. This is true even though a given defendant with the prohibited level of blood alcohol may not be under the influence of alcohol.
- 2. Operating while under the influence of intoxicating liquor.** Although the statute prohibits this conduct, it does not define the concept of "under the influence of intoxicating liquor." As seen in the following sections, that definition has been developed through the case law and corresponds to a state where the defendant's mental faculties or physical coordination are so deleteriously affected by the consumption of alcohol that it is improper for him or her to operate a motor vehicle. Ironically, this offenses is not logically related to the per se violation as described above. A given defendant who is an inexperienced drinker may have a blood alcohol concentration substantially below the prohibited 0.08% level and yet be profoundly intoxicated. Such a defendant would be not guilty of the per se violation but guilty of the under the influence portion of the statute. On the other hand, an experienced, inveterate drinker may have a blood alcohol level substantially above the 0.08% level and yet not be under the influ-

ence of alcohol. Such a defendant would be guilty of the per se violation and not guilty of being under the influence. As a result of the foregoing, prosecutors will typically prosecute both the per se violation and the under the influence violation during the presentation of the State's proofs, with the idea that if the proofs fail on one type of prohibited conduct, they may be successful on the other. As seen in the following sections, the case law encourages this method of prosecution and expects judges to make findings of facts on both offenses.¹

3. **Operating while under the influence of drugs.** The statute generally prohibits the operation of a motor vehicle while the defendant is under the influence of three types of drugs: narcotics, hallucinogenic substances and habit producing drugs. The case law has further expanded this general prohibition to include any substance that produces in the user a narcotic effect.² The statute does not require that the particular narcotic be identified. It is enough if, from the subject's conduct, physical and mental condition and the symptoms displayed, a qualified expert can determine that he or she is "under the influence" of a narcotic. This broad category of substances covers thousands of drugs, legal and otherwise. It is not the medical purpose or legality of the substance, but rather the effect it has on the operator of a motor vehicle that counts. A defendant who operates while under the influence of any of the above substances is guilty of violating the statute. But what is the definition of operating while under the influence of narcotic, hallucinogenic or habit producing drug? It is not defined in the statute. Is it the same as operating under the influence of intoxicating liquor? Does the mere presence of a prohibited substance in the defendant's blood stream or urine constitute a per se violation of the statute? Can the State prove this offense in the absence of expert testimony? The following sections discuss these and other vital issues related to this part of the statute.
4. **Operating under the influence of intoxicating vapors.** A new addition to the statute³ outlaws operation of a motor vehicle when the defendant is under the influence of an intoxicant which has been inhaled. This practice, commonly known as "huffing" occurs when a defendant operates a motor vehicle after having inhaled (or while inhaling) chemical vapors which are capable of inducing a state of intoxication. The statute lists a number of prohibited inhalants that include, among other things, glue, cement and the dangerous chemicals that they

¹ State v. Sisti, 209 N.J. Super. 148, 151, 506 A.2d 1307, 1308 (App. Div. 1986).

² State v. DiCarlo, 67 N.J. 321, 328, 338 A.2d 809 (1975), Accord State v. Tamburro, 68 N.J. 414, 346 A.2d 401 (1975).

³ N.J.S.A. 39:4-50(a)(3).

contain. The statute does not define the “under the influence” element of this violation. Nor does it provide guidance as to how a prosecutor is required to prove the offense. The following sections provide practical advice on how to resolve these issues.

- 5. Allowing.** The statute creates a separate offense targeted at owners or responsible custodians who permit the operation of their motor vehicle by drivers who are under the influence of alcohol or drugs. A motor vehicle owner or custodian can also be convicted of the allowing offense when he or she permits operation by a person who has a blood alcohol concentration of 0.08% or more by weight of alcohol in the operator’s blood. How the owner or custodian would ever know this in the absence of some mechanism for measuring blood alcohol concentration of the driver in advance of operation is not discussed in the law. Moreover, the statute does not require a culpability state and a literal reading of the elements appears to make it a strict liability offense. However, as seen in the following sections, the case law has interpreted this particular violation in such a way as to require proof of knowing conduct by the defendant as an element to be proved by the prosecution at trial.

The sections that follow also explore numerous collateral issues related to the offenses contained in N.J.S.A. 39:4-50. Concepts such as operation of a motor vehicle, blood testing, breath testing and numerous technical issues are explored. Procedural issues such as discovery, right to a jury trial, case disposition and special evidential rules pertaining to driving under the influence are discussed. The sections also detail the various offenses that are typically charged as companion to the driving under the influence charge, such as refusal to submit to a breath test. Finally, the myriad and highly complex issues related to sentencing under the statute are treated in exhaustive detail.

In essence, by using the following sections, a practitioner who is preparing a driving under the influence case will be able to explore virtually every issue that he or she may encounter during the case and will be able to properly prepare for court.

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