



## NEW JERSEY LAW REVISION COMMISSION

### **Revised Draft Tentative Report to Clarify N.J.S. 2C:40-26(b) so an Individual Who Operates a Motor Vehicle Beyond the Determinate Sentence of Suspension, but Before Reinstatement, is Charged Under N.J.S. 39:3-40**

**February 05, 2018**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **April 06, 2018**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Executive Summary

In *State v. Torella*,<sup>1</sup> the Appellate Division considered the proper interpretation of N.J.S. 2C:40-26, regarding the criminality of driving with a license between a period of suspension and reinstatement.

The Court determined that driving under such circumstances does not constitute criminal conduct, relying upon the decision in *State v. Perry*, which states that the statute “criminalizes the operation of a motor vehicle only during the court-ordered period of suspension, not thereafter.”<sup>2</sup>

## Background

The case of *State v. Torella* examined whether an individual may be found criminally liable for driving with a license that had been suspended, after the period of suspension had ended but before the licensed had been formally reinstated by the Motor Vehicle Commission.<sup>3</sup> The defendant in *Torella* had previously been convicted of a series of driving while intoxicated (DWI) offenses in 2001 and 2002, leading to a suspension of his license.<sup>4</sup> He failed to restore his license with the Motor Vehicle Commission (MVC) after the suspension ended, and was arrested twice in 2012 for driving with a suspended license.<sup>5</sup> Torella was also charged by the arresting office with a violation of N.J.S. 2C:40-26(b).<sup>6</sup>

The criminal statute, N.J.S. 2C:40-26(b), reads as follows:

It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of R.S.39:3-40, if the actor’s license was suspended or revoked for a second or subsequent violation of R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a). A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.<sup>7</sup>

The Appellate Division in *State v. Torella*, relying upon the holding in *State v. Perry*, explained that “[t]he statute is silent as to those driving without reinstatement beyond the court-imposed term of suspension” and that “[h]ad the Legislature intended to include those persons, the necessary language could have easily been included in both sections of the law.”<sup>8</sup> The Court

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<sup>1</sup> 2015 WL 11391309 (N.J. App. Div. 2016).

<sup>2</sup> *State v. Perry*, 439 N.J. Super. 514, 519 (App. Div.), *certif. denied* 222 N.J. 306 (2015).

<sup>3</sup> This period is commonly referred to as “gap time.”

<sup>4</sup> 2015 WL 11391309 at \*1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> N.J.S. 2C:40-26(b).

<sup>8</sup> *State v. Torella*, 2015 WL 11391309 at \*3.

went on to hold that the statute does not criminalize Torella's conduct. In addition, the Court determined that finding otherwise "would [...] engraft additional terms onto the statute that the Legislature did not intend to include and to expand the list of potential prosecutions beyond the scope of the plain language."<sup>9</sup>

### Discussion

Staff was authorized to review N.J.S. 2C:40-26 to determine whether it was possible to clarify this statute. As part of this process Staff reviewed the current case law and statutes. In addition, Staff conducted outreach to various stakeholders and asked them whether they believed that the statute could be further clarified to prevent arrest of individuals who operate a motor vehicle after the court ordered suspension has passed but before their driving privileges are restored by the Motor Vehicle Commission (MVC). The result of Staff's research and outreach follows.

#### *State v. Fletcher*<sup>10</sup>

In addition to *State v. Perry*<sup>11</sup> and *State v. Torella*,<sup>12</sup> the Appellate Division recently commented on the clarity of N.J.S. 2C:40-26 in the August 2017 case of *State v. Fletcher*.<sup>13</sup> In *Fletcher*, after being found guilty of driving while intoxicated for a second time, the defendant was sentenced as a first offender and his license was suspended.<sup>14</sup> Eight days later, Fletcher was arrested for operating a motor vehicle with a suspended license.<sup>15</sup> He was subsequently indicted for fourth-degree operating a motor vehicle during a period of license suspension pursuant to N.J.S. 2C:40-26(b).<sup>16</sup> The trial court judge dismissed the defendant's motion to dismiss the indictment. The defendant appealed his conviction.<sup>17</sup>

In *Fletcher*, the Appellate Division was asked to consider the application of N.J.S. 2C:40-26(b) and N.J.S. 39:4-50(a). The Court began its opinion by noting, "[t]he plain, statutory language is the best indicator of legislative intent."<sup>18</sup> The Court continued, "[i]n cases where a plain reading of the statute leads to a clear and unambiguous result, then the interpretive process

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<sup>9</sup> *Id.* at \*3 (citing *Perry*, 439 N.J. Super. at 525–26).

<sup>10</sup> *State v. Fletcher*, 2017 WL 3495783 (App. Div. 2017).

<sup>11</sup> *State v. Perry*, 439 N.J. Super. 514 (App. Div. 2015).

<sup>12</sup> *State v. Torella*, 2015 WL 11391309 (N.J. App. Div. 2016).

<sup>13</sup> *State v. Fletcher*, 2017 WL 3495783 (App. Div. 2017).

<sup>14</sup> *Id.* at \*1. The defendant had been convicted of driving while intoxicated in 1996. The trial court elected to treat the defendant as a first offender after taking into consideration the amount of time that had passed between his first and second conviction. *See also N.J.S. 39:4-50(a)(3) – leniency afforded to second time DWI offenders “for sentencing purposes only.”*

<sup>15</sup> *Id.* at \*1.

<sup>16</sup> *Id.* at \*1.

<sup>17</sup> *State v. Fletcher*, 2017 WL 3495783 (App. Div. 2017). at \*1, the defendant entered a conditional guilty plea, reserving his right to appeal the trial court's denial of his motion to dismiss the indictment.

<sup>18</sup> *Id.* at 2 citing *State v. Perry*, 439 N.J. Super. 514, 523 (App. Div. 2015).

should end, without resort to extrinsic sources.”<sup>19</sup> The Court found, “[h]ere, we consider two statutes, neither of which is ambiguous.”<sup>20</sup> The Court, in affirming the defendant’s conviction, held that N.J.S. 2C:40-26(b) applies to those instances where individuals drive **during** the period of license suspension.<sup>21</sup>

Admittedly, *State v. Fletcher* presented the Court with circumstances different from those in both *State v. Perry* or *State v. Torella*. In *State v. Fletcher*, the defendant operated his vehicle during the court imposed license suspension period. This case brings into specific relief the fact that the judiciary appreciates the scope of N.J.S. 2C:40-26(b). Clearly, individuals similarly situated to *Perry* or *Torella* should not be charged under the criminal statute. This conclusion should not, however, end the inquiry.

### *Title 39*

There is, within New Jersey’s Motor Vehicle statutes, a more appropriate statute to charge those who operate a motor vehicle after the court imposed suspension period has expired and before having their driving privileges restored by the MVC.

Penalties for driving with a suspended license are found in N.J.S. 39:3-40. Entitled “penalties for driving while license suspended” this statute provides:

No person to whom a driver’s license has been refused or whose driver’s licenses or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver’s license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition....

Applying the reasoning set forth by the Court in *Perry*, *Torella*, and *Fletcher*, an individual who operates a motor vehicle beyond the determinate sentenced term of suspension, but before reinstatement, while still under administrative suspension would properly be charged with N.J.S. 39:3-40 and not N.J.S. 2C:40-26(b). This is so because, according to a certified municipal court practitioner<sup>22</sup>, an individual will remain “suspended” indefinitely until they have satisfied the surcharges associated with the underlying suspension.

### *Outreach*

Considering the foregoing, Staff engaged in outreach to determine why individuals such as *Perry* and *Torella* were arrested and charged under N.J.S. 2C:40-26(b). A certified municipal

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<sup>19</sup> *Id.* at \*2.

<sup>20</sup> *Id.* at \*2.

<sup>21</sup> *Id.* at \*2 (*Emphasis added*).

<sup>22</sup> *See* n.23 *infra*.

court law attorney and representatives from the New Jersey Police Traffic Officer's Association (NJPTOA) provided insight into this issue.

*Mr. Vercammen*

Staff spoke with Kenneth Vercammen, Esq.,<sup>23</sup> concerning the issues that arose in both *State v. Perry* and *State v. Torella*. Mr. Vercammen advised Staff that it is his belief that the statutory language of N.J.S. 2C:40-26(b) is clear. He observed that the statute is designed to punish those who operate a motor vehicle during the period of license suspension if the individual's license was suspended or revoked for a second or subsequent offense of driving while intoxicated (DWI). Mr. Vercammen commented that the criminal penalty set forth in N.J.S. 2C:40-26(b) was not meant to be imposed upon those who were arrested while operating a motor vehicle during the "gap time." In his opinion, individuals who operate a motor vehicle during this "gap time" and are charged with N.J.S. 2C:40-26(b) are being "overcharged". Mr. Vercammen also stated that it was the duty of the Prosecutor to ensure that officers understood this section of the law.

In New Jersey, each prosecutor functions as the chief law enforcement officer of their vicinage. The prosecutor is required to use all reasonable diligence to detect, arrest, indict, and convict those who violate the criminal laws of New Jersey. Additionally, the duty of the prosecutor is to seek justice in a criminal case, not merely to convict.<sup>24</sup> Thus, if a prosecutor were to receive a case with facts like those in *Torella*, absent extraordinary circumstances, it would be incumbent upon the prosecutor to request the dismissal of the indictment against the defendant. Finally, Mr. Vercammen noted that as the chief law enforcement officer in his vicinage, the prosecutor would be duty bound to educate officers on the law as set forth in *Perry* and its progeny.

*New Jersey Police Traffic Officers' Association*

Laura Tharney attended the New Jersey Police Traffic Officers' Association (NJPTOA) and briefly discussed with its members the operation of a motor vehicle after the period of suspension, but before reinstatement of one's driving privileges. During that discussion, several officers noted that in some municipalities a driver may not be charged "at the scene" with a violation of N.J.S. 2C:40-26(b). In those vicinages, the officers will wait until they have had the opportunity to review the offending driver's abstract. If the officer believes that the driver of the vehicle was driving in violation of N.J.S. 2C:40-26(b), the officer will then issue a complaint-warrant. Other officers indicated that they can use their on-board computer systems and make a determination whether the driver is currently driving during the suspension period, in violation of

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<sup>23</sup> Kenneth Vercammen, Esq. is: Municipal Public Defender in the Borough of Metuchen; the Past President of the Middlesex County Municipal Prosecutor's Association; and, a Certified Municipal Court Law Attorney.

<sup>24</sup> See *Berger v. United States*, (U.S. 1935); American Bar Association Standard 1.1(c), The Prosecution Function (1971); Comment, R.P.C. 3.8; EC 7-13

N.J.S. 2C:40-26(b); or, whether they are driving during the “gap time”, although not every officer is trained to conduct a “real-time” computer examination. The consensus of the NJPTOA is that the reading and interpretation of the statute is “training issue” and not an issue that requires an amendment to the current statute.

The difficulty with cases such as *Perry* and *Torella* is that prosecutorial review and judicial determinations to amend or dismiss a complaint frequently come at a cost. The cost involved in later determining that a defendant has been charged under the wrong statute is the deprivation of the accused’s liberty and freedom.

### *Impact of Criminal Justice Reform*

Effective January 1, 2017, the New Jersey Constitution was amended to permit pretrial detention. Article I, section 11 of the New Jersey Constitution now provides:

...Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.<sup>25</sup>

New Jersey Statute 2A:162-16 also became effective on January 1, 2017. Section a. of this statute provides, in relevant part:

An eligible defendant, following the issuance of a complaint-warrant...shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions of release... and for the court to issue a pretrial release decision.

A court is required to make a pretrial decision for an eligible defendant without unnecessary delay.<sup>26</sup> This decision, however, may be rendered 48 hours after the defendant’s commitment to jail.<sup>27</sup> During this period of confinement, the pre-trial services program has an

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<sup>25</sup> N.J. Const. art. I, § 11.

<sup>26</sup> N.J.S. 2A:162-17.

<sup>27</sup> N.J.S. 2A:162-16(a).

opportunity to prepare a recommendation to the court regarding appropriate conditions of pretrial release and the level of monitoring that the court should impose upon the defendant.

Individuals charged with a complaint-warrant rather than a traffic summons are required to undergo a “risk assessment” before being released from custody. Under the present system, even those who are “wrongly” charged under N.J.S. 2C:40-26(b), may be incarcerated for up to 48 hours.

Research and outreach supports the position that individuals who operate a motor vehicle during “gap time” should not be charged with a violation of N.J.S. 2C:40-26(b). Individuals who operate a motor vehicle during “gap time” should not have to spend up to 48 hours in jail, or longer if they are not deemed eligible for pre-trial release, only to later have the charges amended or dismissed entirely.

### **Conclusion**

It appears that the language of N.J.S. 2C:40-26 is clear to the judiciary. It further appears that the language of the statute is clear to most police officers. Cases such as *Perry* and *Torella*, however, bring to the fore the realistic possibility that a motor vehicle stop may result in the driver being charged with a violation of a criminal statute rather than a motor vehicle statute. After being charged, this individual will remain incarcerated while they await the prosecutorial review of their case or a risk assessment hearing before the judiciary.

Since it appears that the addition of a single sentence that reflects the consensus of opinion on this issue can prevent a person from spending 48 hours in jail unnecessarily, the Commission proposes the following in an effort to effectuate that result.<sup>28</sup>

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<sup>28</sup> New Jersey Law Revision Commission, Minutes of the Meeting of December 17, 2017, p.5.

## Appendix

The full text of N.J.S. 2C:40-26(b), including proposed addition (shown with underscore), is as follows:

It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of R.S.39:3-40, if the actor's license was suspended or revoked for a second or subsequent violation of R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a). A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment. A person who operates a motor vehicle beyond the determinate sentence of suspension for a violation of R.S. 39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a), but before reinstatement of their license, shall be charged with a violation of R.S. 39:3-40.