

To: New Jersey Law Revision Commission
From: Timothy J. Prol
Re: Out of State DWI
Date: March 5, 2018

MEMORANDUM

Executive Summary

In July, 2016, Staff presented a memorandum regarding the question of whether a conviction for driving while intoxicated (DWI) in another state qualifies as a predicate conviction that can support an in-state conviction for driving during a second license suspension for DWI under N.J.S. 2C:40-26.¹ The project arose out of the Court's decision in the case of *State v. Luzhak*, an Appellate Division case which held that a conviction for DWI in another state qualifies as a predicate conviction that can support an in-state conviction for driving during a second license suspension for DWI.²

Assembly Bill 2491, which has been introduced in the 2018-2019 Legislative session, would clarify that a conviction for DWI in another state qualifies as a predicate conviction that can support an in-state conviction under N.J.S. 2C:40-26 for driving during a second license suspension for DWI.³ Since the Legislature is currently pursuing action directly in the area addressed by this project, it is recommended that no further action be taken on this project by the Commission at this time.

Background

I. Statutory Overview

N.J.S. 2C:40-26(b)

New Jersey's motor vehicle statute contains prohibitions and penalties related to operating a motor vehicle on the roadways of New Jersey while the driver's license is suspended.⁴ Additionally, New Jersey has enacted a statute which created criminal penalties for drivers who are driving while their license is suspended as the result of one or more DWI offenses. N.J.S. 2C:40-26(b) addresses second or subsequent instances of driving with a suspended license as the result of a DWI and provides in relevant part:

b. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [N.J.S. 39:3-40], if the actor's license was suspended or revoked for a second or subsequent violation of [N.J.S. 39:4-50]. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.⁵

¹ Memorandum from Lauren B. Jones, to the New Jersey Law Revision Commission re: *State v. Luzhak* (July 19, 2017)(on file with the Commission).

² *State v. Luzhak*, 445 N.J. Super. 241 (App. Div. 2016).

³ A2491, 218th Leg., Reg. Sess. (NJ. 2018).

⁴ N.J.S. 39:3-40. "No person to whom a driver's license has been refused or whose driver's license 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..."

⁵ N.J.S. 2C:40-26(b).

N.J.S. 2C:40-26 as it currently appears does not currently explicitly indicate that out-of-state convictions for DWI or substantially similar offenses qualify as predicate offenses for the purposes of enforcement.

Driver License Compact

New Jersey is also a member state in the Driver License Compact, an interstate compact which provides for the sharing of data between states regarding motor vehicle offenses and provides for reciprocity of driving privileges among the member states.⁶ The DLC states in part:

It is the policy of each of the party States to:

- (1) Promote compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such operators drive motor vehicles.
- (2) Make the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the over-all compliance with motor vehicle laws, ordinances and administrative rules and regulations as a condition precedent to the continuance or issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party States.⁷

While the Compact bears on the issue of recognizing DWI or substantially similar convictions from other states for purposes of N.J.S. 2C:40-26, the Legislature has also indicated that New Jersey recognizes the motor vehicle laws of other states in the area of drunk driving, regardless of whether they are members of the DLC. Following the Court's decision to recognize an out-of-state DWI from New York State as a prior offense for enhanced sentencing purposes on a subsequent DWI conviction in New Jersey,⁸ the Legislature amended N.J.S. 39:4-50(a)(3), part of New Jersey's DWI statute, to read as follows:

A conviction of a violation of a law of a substantially similar nature in another jurisdiction, regardless of whether that jurisdiction is a signatory to the [DLC] ... shall constitute a prior conviction under this subsection...⁹

The Compact evidences the Legislature's policy intention that out-of-state DWI or substantially similar offenses should be treated as prior offenses within New Jersey for purposes of enforcement and sentencing, but in addition, the policy consideration against DWI offenses in New Jersey is so strong that even violations occurring in a state which is not a member of the DLC are considered for purposes of DWI enforcement actions under New Jersey's DWI statute, N.J.S. 39:4-50 *et. seq.*

II. Case Law Response

State v. Luzhak

⁶ N.J.S. 39:5D-1 to -14.

⁷ N.J.S. 39:5D-1(b).

⁸ *See State v. Regan*, 209 N.J.Super. 596 at 604, (App.Div.1986).

⁹ N.J.S. 39:4-50(a)(3).

In *Luzhak*, the defendant was issued a motor vehicle summons in Woodbridge for driving with a suspended license in violation of N.J.S. 39:3–40, following a minor car accident in a parking lot.¹⁰ At the time, defendant had two prior DWI convictions: a March 2013 conviction in Maryland, and an April 2010 conviction in New Jersey.¹¹ Subsequently, defendant was indicted by a Middlesex County Grand Jury for fourth-degree operating a motor vehicle during a second license suspension stemming from a DWI, in violation of N.J.S. 2C:40–26(b).¹² Defendant filed a motion to dismiss the indictment, arguing the March 2013 conviction in Maryland did not qualify as a predicate DWI conviction pursuant to N.J.S. 2C:40–26(b).¹³ The motion was denied.¹⁴ Defendant then pled guilty to the motor vehicle offenses and to violating N.J.S. 2C:40–26(b) by driving during a second license suspension for DWI, with the Maryland conviction serving as the predicate offense under N.J.S. 2C:40–26(b).¹⁵

During the appeal that followed, the defendant again contended that, since N.J.S. 2C:40–26(b) specifically references violations of N.J.S. 39:4-50, his Maryland conviction should not have qualified as a predicate offense.¹⁶ The Court first looked to statutory interpretation to ascertain Legislative intent, since the language of N.J.S. 2C:40–26(b) does not specifically reference out-of-state DWI convictions.¹⁷ The Court noted that the legislation was “prompted, at least in part, by reports of fatal or serious accidents that had been caused by recidivist offenders with multiple prior DWI violations, who nevertheless were driving with a suspended license.”¹⁸ The Court also discussed the reciprocity provisions of the DLC as bolstering the conclusion that an out-of-state DWI qualifies as a predicate offense for N.J.S. 2C:40-26(b).¹⁹ In addition, the Court examined several cases which held that the Legislature intended an out-of-state conviction for an offense equivalent to a DWI to be considered as a prior offense for enhanced sentencing purposes on a subsequent DWI conviction under N.J.S. 39:4–50(a)(3) and enhanced penalties under N.J.S. 39:3-40 due to a DWI conviction in another state, ultimately concluding that defendant’s Maryland conviction served as a predicate offense under N.J.S. 2C:40–26(b).²⁰

Cases Concurring with *Luzhak*

Six subsequent Appellate Division cases cite the *Luzhak* decision, however four of the cases address issues unrelated to this project. The two cases which deal with the issue of out-of-state DWI or substantially similar convictions qualifying as predicate offenses under N.J.S. 2C:40-26(b) both follow the decision in *Luzhak*.²¹ Both of the cases, however, are unreported in A.3d.

¹⁰ *Luzhak*, 445 N.J. Super. at 243.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 244-245.

¹⁷ *Id.*

¹⁸ *Id.* (citing *State v. Carrigan*, 428 N.J. Super. 609 at 614 (App.Div.2012).

¹⁹ *Id.* at 246.

²⁰ *Id.* at 247–248 (discussing *Regan*, *supra*, 209 N.J. Super. at 604, 508 A.2d 1149, *State v. Cromwell*, 194 N.J. Super. 519, 520–22 (App.Div.1984), *State v. Colley*, 397 N.J. Super. 214 at 218–20 (App.Div.2007).

²¹ *State v. Burns*, No. A-0923-15T3, 2017 WL 2535901 (N.J. Super. Ct. App. Div. June 12, 2017), *State v. Spears*, No. A-4839-14T1, 2017 WL 632441 (N.J. Super. Ct. App. Div. Feb. 16, 2017).

III. Current and Ongoing Legislative Action in This Area

In keeping with New Jersey's strong policy against DWI offenses, including out-of-state offenses, Assembly Bill 2491 has been introduced in the 2018-2019 Legislative session. A2491, if enacted, would clarify that a conviction for DWI in another state qualifies as a predicate conviction that can support an in-state conviction under N.J.S. 2C:40-26 for driving during a second license suspension for DWI.²² The bill reads in relevant part:

1. Section 1 of P.L.2009, c.333 (C.2C:40-26) is amended to read as follows:

...

b. 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), or the provisions of a substantially similar statute under the laws of another state or another country. A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.

...

d. As used in this section, "state" means a state of the United States, the District of Columbia, the United States Territories of American Samoa, Guam, Puerto Rico, or the United States Virgin Islands.²³

This is the third consecutive Legislative session in which a version of this bill has been introduced. The initial introduction of this legislation was in the 2014-2015 Legislative session by Senator Christopher "Kip" Bateman.²⁴ Senator Bateman also introduced the bill during the 2016-2017 Legislative session.²⁵ Assemblywoman Nancy F. Muñoz, the sponsor of A2491 in the current Legislative session, initially introduced this legislation in the Assembly in the 2016-2017 session.²⁶ The current Assembly version of the bill is identical to the original Senate version introduced in the 2014-2015 Legislative session. The bill has yet to be heard by Committee in either the Assembly or Senate.

As is our practice, Staff reached out to Assemblywoman Muñoz's office regarding whether the Assemblywoman required any additional information or support with this issue. Asw. Muñoz's Staff indicated that nothing further was required from the Commission at this time.

Conclusion

Since the Legislature is currently pursuing action directly in the area covered by this project, and in an effort to refrain from duplicating the efforts of the Legislature in this area, it is recommended that no further action be taken on this project by the Commission at this time.

²² A2491, 218th Leg., Reg. Sess. (NJ. 2018).

²³ *Id.* Bracketed text indicates language which would be omitted from the statute if the bill is enacted. Underlined text would be added to the statute if the bill is enacted.

²⁴ S2179, 216th Leg., Reg. Sess. (NJ. 2014).

²⁵ S175, 217th Leg., Reg. Sess. (NJ. 2016).

²⁶ A3595, 217th Leg., Reg. Sess. (NJ. 2016).