NEW JERSEY LAW REVISION COMMISSION

Final Report
Relating to Bail Jumping in New Jersey's Code of Criminal Justice (N.J.S. 2C:29-7).

December 19, 2019

The work of the New Jersey Law Revision Commission is only a recommendation until enacted. Please consult the New Jersey statutes in order to determine the law of the State.

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Executive Summary

A person set at liberty by court order who, without lawful excuse, fails to appear in court on the date and time specified by the judiciary in connection with any offense or any violation of law punishable by a period of incarceration commits an offense.[1] When a person fails to appear in court under such circumstances, they may be charged with bail jumping.[2] It is currently an affirmative defense for the defendant to prove, by preponderance of the evidence, that he did not knowingly fail to appear in court.[3]

In its current form, New Jersey's Bail Jumping statute brings to the fore two specific issues. Initially, in *State v. Emmons*[4], the defendant argued that the affirmative defense in the bail jumping statute required proof of the same fact the State is required to prove as an element of the offense – knowingly -- and was therefore unconstitutional.[5] Subsequently, in *State v. Morris*[6], the Appellate Division addressed whether a defendant should be convicted of bail jumping if he appears in court on the date and time specified but leaves the courthouse before his matter has been addressed by the court.

The Commission proposes modifications to the current bail jumping statute that expressly modify the statute to eliminate the constitutional infirmity associated with the affirmative defense contained therein and to clarify the consequences for leaving the courthouse before a matter has been addressed by the Court.

Statute

N.J.S. 2C:29-7. Bail Jumping; Default in required appearance

> *A person* set at liberty by court order, with or without bail, or who has been issued a summons, upon condition that he will subsequently appear at a specified time and place in connection with any offense or any violation of law punishable by a period of incarceration, *commits an offense if, without lawful excuse, he fails to appear at that time and place. It is an affirmative defense for the defendant to prove, by a preponderance of evidence, that he did not knowingly fail to appear.* The offense constitutes a crime of the third degree where the required appearance was to answer to a charge of a crime of the third degree or greater, or for disposition of any such charge and the actor took flight or went into hiding to avoid apprehension, trial or punishment. The offense constitutes a crime

[1] N.J.S. 2C:29-7.
[2] *Id.*
[3] *Id.*
[4] 397 N.J. Super. 112 (App. Div. 2007).
[5] *Id.* at 120.
[6] 2018 WL 4701675 (App. Div. 2018).

> of the fourth degree where the required appearance was otherwise to answer to a charge of crime or for disposition of such charge. The offense constitutes a disorderly persons offense or a petty disorderly persons offense, respectively, when the required appearance was to answer a charge of such an offense or for disposition of any such charge. Where the bail imposed or summons issued is in connection with any other violation of law, the failure to appear shall be a disorderly persons offense.
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> This section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole. *Nothing herein shall interfere with or prevent the exercise by any court of this State of its power to punish for contempt.*[7]

Background

• *State v. Emmons*[8]

After being charged with aggravated assault, and various other offenses, the defendant failed to appear in court on day his trial was scheduled to commence.[9] The defendant, who was a fugitive for one year, was subsequently indicted for bail jumping, in violation of N.J.S. 2C:29-7.

The defendant was found guilty of aggravated assault and pleaded guilty, by way of an agreement with the State, to the failure to appear charge.[10] The defendant's conviction for aggravated assault was affirmed on appeal.[11] The Appellate Division reversed the defendant's conviction for bail jumping and remanded that issue to the trial court.[12]

On remand, defendant moved to dismiss the bail jumping indictment.[13] The defendant proffered several arguments in support of his motion to dismiss the indictment.[14] Among the arguments proffered by the defendant was that N.J.S. 2C:29-7 was unconstitutional because it shifted the burden of proving the "knowing" element of culpability of the offense to the defendant.[15] The trial court agreed with this argument.[16]

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[7] N.J.S. 29-7. *Emphasis added.*
[8] 397 N.J. Super 112 (App. Div. 2007).
[9] *Id.* at 115.
[10] *Id.*
[11] *Id.* at 116. *See State v. Emmons*, No. A-0706-04, 2005 WL 3525959 (App. Div. Dec. 27, 2005).
[12] *Id.* at 116.
[13] *Id.*
[14] *Id.*
[15] *Id.* The defendant also argued that the evidence presented to the grand jury was insufficient to support the indictment and that N.J.S. 2C:29-7 is unconstitutional because it also shifts the burden of proving the "without lawful excuse" element of the offense to the defendant. At oral argument, the trial court also questioned whether the statute was unconstitutionally vague because it did not define the term "without lawful excuse."
[16] *Id.*

In an oral opinion, the trial court analyzed what it considered to be an impermissible inferenced that the statute places upon a criminal defendant.[17] The trial court opined, "… what we are doing in the body of the statute is we are creating an inference that a defendant must say what his lawful excuse was [for his non-appearance]. Otherwise, he is going to be found guilty. And that… runs afoul of the Constitution."

The State appealed the dismissal of the indictment.[18] Almost a decade later, the clarity of the statute would be raised on appeal.

• *State v. Morris*[19]

On May 13, 2015, the defendant appeared in court having previously been released on bail.[20] The defendant was required to appear during the court's afternoon session regarding a number of indictable offenses and a violation of probation.[21] The defendant was ordered, by the judge, to be drug tested by his probation officer that afternoon and then return to court right after the testing.[22]

Following the drug test, the defendant's probation officer appeared in court; the defendant, however, did not.[23] The probation officer reported that the defendant tested positive for controlled dangerous substances and "shortly after finding out the results…, left the area and has not been seen since."[24] No explanation for the defendant's failure to appear was proffered by the defendant's attorney.[25] Therefore, the judge issued a bench warrant for the defendant's arrest.[26] The defendant was subsequently arrested on the open bench warrant and the matter set down for a trial.[27]

On the morning of the trial, a second judge – became involved in this case.[28] This judge, who had heretofore not been involved in any pretrial proceedings, *sua sponte* raised the issue of whether the defendant's conduct constituted bail jumping.[29] In dismissing the indictment, the second judge found as a matter of law that "when a defendant appears in court and then fails to remain and leaves… that does not constitute bail jumping."[30]

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[17] *Id.*
[18] *Id.* at 117.
[19] *State v. Morris,* 2018 WL 4701675 (App. Div. 2018).
[20] *Id.* at *1.
[21] *Id.* The defendant was charged with controlled dangerous substance offenses of the third- and fourth-degree.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at *1. It is unclear from the procedural history how, or why, the second judge became involved in the case.
[29] *Id.*
[30] *Id.*

Subsequently, the trial court denied the State's motion for reconsideration.[31] The court found, in relevant part:

> It's clear that the plain language of the statute makes it a crime where the defendant fails to appear at a specific time and place. However, nothing in the statute or … case law indicates that failing to appear is synonymous with failing to remain, return or reappear once the defendant has met his duty to appear at a specific time and place….[32]

The state appealed the judge's dismissal of the indictment maintaining that the dismissal was predicated upon unreasonable interpretation of the statute.[33]

Analysis

In *State v. Emmons*[34] the Appellate Division was asked to determine the constitutionality of a statute that proscribes a defendant's failure to appear in court on a specified date and at a specified time.[35] As a preliminary matter, the Court observed that the statute "does not expressly indicate what culpable mental state is required for the commission of this offense."[36] The Court further recognized that the affirmative defense set forth in the second sentence of N.J.S. 2C:29-7 requires proof of the same fact that the State is required to prove as an element of the offense – that the failure to appear was "knowing."[37]

Absent from N.J.S. 2C:29-7 is the "culpable mental state" required for the commission of the offense of bail jumping. The New Jersey Code of Criminal Justice provides for the construction of statutes that do not specify a culpability requirement.[38] When read in conjunction with N.J.S. 2C:2-2(b)(2), the *Emmons* Court concluded that the bail jumping statute requires the State to prove beyond a reasonable doubt that a defendant knowingly failed to appear in court.[39] The absence of the culpability requirement is not an impediment to the constitutionality of the statute. The constitutional infirmity if the statute becomes evident when viewed in conjunction with the affirmative defense set forth in the same statute.

The Legislature has provided a defendant with the ability to proffer an affirmative defense to the crime of bail jumping.[40] To successfully establish such a defense, a defendant must prove by a preponderance of the evidence that he did *not knowingly* fail to appear in

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[31] *Id.*
[32] *Id.* at 2.
[33] *Id.*
[34] *State v. Emmons*, 397 N.J. Super. 112 (App. Div. 2007).
[35] *Id.* at 114.
[36] *Id.* at 118.
[37] *Id.* at 120.
[38] N.J.S. 2C:2-2(c)(3)
[39] *State v. Emmons*, 397 N.J. Super. at 118.
[40] N.J.S. 2C:29-7.

court.[41] One of the elements that the State must prove beyond a reasonable doubt is that the defendant *knowingly* failed to appear in court. The presence of this mental element in both the offense and the affirmative defense gave the *Emmons* Court pause to consider its effect on the State's burden of proof.

In *Emmons*, the Appellate Division examined the impact that same mental element for the offense and the affirmative defense would have on the defendant's constitutional right to due process.[42] The Court opined,

> …[I]f a trial court first instructs the jury that the State has the burden to prove, beyond a reasonable doubt, that the defendant's failure to appear was "knowing," but then instructs the jury that defendant has the burden to prove, by a preponderance of the evidence, that the failure to appear was "not knowingly," the predictable result would be not merely jury confusion, but the likelihood that "rational" jurors would conclude that defendant had some kind of burden of proof with respect to the "knowing" element of this offense."[43]

Such a dilution of the State's burden to prove every element of the offense beyond a reasonable doubt is, according to the Court, constitutionally impermissible.[44] To preserve the statute's constitutionality, the Court forbade future trial courts from charging the jury with the statutory language provided in the second sentence of N.J.S. 2C:29-7.[45]

Almost a decade later, the Appellate Division was again asked to examine New Jersey's bail jumping statute in the context of a defendant who initial appeared in court and did not return after taking a court ordered drug test.[46] In *State v. Morris*, the trial court dismissed the defendant's bail jumping indictment, and denied the State's motion for reconsideration, finding that nothing in the statute "indicates that failing to appear is synonymous with failing to remain, return or reappear once the defendant has met his [initial] duty to appear [in court]…."[47] The State appealed the denial of their motion.

Appellate Division disagreed with this analysis conducted by the trial court. In reversing the decision of the trial court, the Appellate Division found, "…**the defendant appeared for his VOP hearing**, but did not return to court following his drug testing as required by the VOP judge."[48] The court continued, "[t]o conclude that [the] defendant did not jump bail as defined by

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[41] *Id.*
[42] The Court's analysis is based upon the opinion delivered by the Court in *Humanik v. Beyer*, 871 F.2d 432 (3d Cir. 1989), *cert. denied*, 493 U.S. 812 (1989).
[43] *State v. Emmons*, 397 N.J. Super. at 122.
[44] *Id.*
[45] *Id.* at 123. *See also* N.J. Std. Jury Instr. (Crim.) Bail Jumping.
[46] *State v. Morris*, 2018 WL 4701675 (App. Div. 2018).
[47] *Id.* at *2.
[48] *Id.* at 3. *Emphasis added.*

the statute because he initially appeared but failed to return creates a fiction that undermines the statute's clear intent – a defendant must appear in court when ordered."[49] The Court commented that, "the judge's restrictive view that the statute does not apply because the defendant initially appeared for his **VOP hearing**, belies a common sense interpretation of the statute."[50]

The Appellate Division also relied on its holding in *State v. Emmons.*[51] In passing upon the clarity of the statute, the court found that:

> [t]he basic prohibition of N.J.S. 2C:29-7 is perfectly clear. A criminal defendant who has been directed to "appear at a specified time and place" is prohibited from "failing to appear at that time and place." No "person of ordinary intelligence" would have any difficulty "know[ing] what is prohibited… so that he may act accordingly."[52]

While the "basic prohibitions" of the statute may have been perfectly clear to the court, such a statement necessitates an examination of the last paragraph of the statute.

In the final paragraph of New Jersey's bail jumping statute the Legislature enumerated three categories of individuals who could not be charged with bail jumping. The statute provides that "[t]his section **does not apply to obligations to appear incident to release** under suspended sentence or **on probation** or parole."[53]

The statutory language indicates that a defendant charged with a VOP who does not appear, or re-appear, in court cannot be charged with bail jumping. For just such instances, the statute provides that, "[n]othing herein shall interfere with or prevent the exercise by any court of this State of its power to punish for contempt."[54]

The clarity of the statute may wane when contemplating a matter involving individuals charged with both indictable offenses and those required to appear incident to release for a suspended sentence, probation violation or parole violation.

Outreach

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These stakeholders included: the Attorney General of New Jersey; the New Jersey Administrative Office of the Courts; the New Jersey State Municipal Prosecutors Association; each of the twenty-one County Prosecutors; the New Jersey County Prosecutors Association; the New Jersey Office of the Public Defender; the New Jersey Association of

[49] *Id.*
[50] *Id. Emphasis added.*
[51] *State v. Emmons*, 397 N.J. Super. at 112.
[52] *Id.* at 125 (citations omitted).
[53] N.J.S. 2C:29-7. *Emphasis added.*
[54] *Id.*

Criminal Defense Lawyers; the leadership of the Criminal Practice Section of the New Jersey State Bar Association; several criminal defense attorneys; the New Jersey State League of Municipalities; the New Jersey Association of Counties; the New Jersey State Association of Chiefs of Police; the New Jersey Police Traffic Officers Association.

The County Prosecutors Association of New Jersey conveyed several comments regarding the proposed statutory modifications set forth in this Report.

• *Language*

The County Prosecutor's Association of New Jersey ("CPANJ") has no objection to the proposed substitution of the term "individual" for the term "person" within proposed subsection a. of N.J.S. 2C:29-7.[55] Further, the CPANJ does not object to the replacement of the phrase "any offense" with the term "the underlying offense."[56]

• *The Affirmative Defense*

The CPANJ agrees with the proposed removal of the language that relates to the affirmative defense through proof beyond a preponderance of the evidence that the defendant did not knowingly fail to appear. [57] According to the CPANJ, this revision "…conforms with the Emmons court's holding that the affirmative defense unconstitutionally imposes a burden on the defendant to prove that he or she did not knowingly fail to appear in court. Accordingly, that portion of the affirmative defense should be removed as suggested"[58]

The proposed modifications would establish an affirmative defense where the defendant "had a lawful excuse for his or her failure to appear."[59] The CPANJ expressed concern that the proposed affirmative defense would resurrect the same issues that the court sought to correct in *Emmons* concerning the unconstitutional inferences raised by such a language.[60] Furthermore, the CPANJ acknowledges the that "[t]he State has the burden to present sufficient evidence to establish [the without lawful excuse element, and that if it fails to do so, the charge must be dismissed."[61] The CPANJ therefore recommends that "…the proposed affirmative defense, as

[55] Letter from Angelo J. Onofri, 1st Vice Pres., Cnty Pros. Ass'n of NJ to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission *2-3 (Nov. 21, 2019) (on file with the NJLRC).
[56] *Id.* at *3.
[57] *Id.* at *4.
[58] *Id. See also State v. Emmons*, 397 N.J. Super. at 120-22.
[59] *See* Appendix I, subsection b.
[60] Letter from Angelo J. Onofri, at *4-5. *See also State v. Emmons*, 397 N.J. Super. at 122 (stressing that the predictable result would be not merely jury confusion but the likelihood that rational jurors would conclude that the defendant had some kind of burden of proof with respect to the "without lawful excuse" element of this offense." [citations omitted].
[61] *Id.*

well as the entirety of the proposed subsection b. of N.J.S.[ ] 2A:29-7, should be excised" and that the "without lawful excuse" element remain in the proposed subsection a.[62]

• *Time and Place*

When an individual set at liberty by court order fails to appear at a specified time and place in connection with the underlying offense, he or she is guilty of bail jumping.[63] The CPANJ believes that this language "… adequately encompasses the two additional elements proposed in subsections a(2) and (3)."[64] The language contained in subsections a(2) and (3), according to the CPANJ, should therefore be removed.[65]

• *Structure*

The proposed formatting changes to N.J.S. 2C:29-7 that remain after consideration of the CPANJ comments are acceptable to that association.

Conclusion

The proposed modifications to the current bail jumping statute to eliminate the constitutional infirmity associated with the affirmative defense contained therein and to clarify the consequences of leaving the courthouse before a criminal matter has been addressed by the Court are set forth in the Appendix that follows.

[62] Letter from Angelo J. Onofri, 1st Vice Pres., Cnty Pros. Ass'n of NJ to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission *4 (Nov. 21, 2019) (on file with the NJLRC).
[63] *See generally* N.J.S. 2C:29-7.
[64] Letter from Angelo J. Onofri, at *5.
[65] *Id.*

Appendix

The proposed modifications to **N.J.S. 2C:29-7** (Bail Jumping; Default in Required Appearance) are shown with underlining and ~~strikethrough~~ are as follows:

N.J.S. 2C:29-7. Bail Jumping; Default in required appearance

a. An ~~person~~ individual set at liberty by court order, with or without bail, or who has been issued a summons, upon condition that the individual will subsequently appear at a specified time and place in connection with ~~any~~ the underlying offense or any violation of law punishable by a period of incarceration, commits an offense if~~, without lawful excuse,~~ he or she:

(1) fails to appear at that time and place;

(2) fails to remain to satisfy the purpose of the court appearance; or,

(3) takes leave of court without having been dismissed by the judge.

b. It is an affirmative defense ~~for the defendant to prove, by a preponderance of evidence,~~ that ~~he did not knowingly fail~~ the defendant had a lawful excuse for his or her failure to ~~appear.~~ comply with the requirements of subsection a.

c. The offense constitutes a crime of the third degree where the required appearance was to answer to a charge of a crime of the third degree or greater, or for disposition of any such charge and the actor took flight or went into hiding to avoid apprehension, trial or punishment. The offense constitutes a crime of the fourth degree where the required appearance was otherwise to answer to a charge of crime or for disposition of such charge. The offense constitutes a disorderly persons offense or a petty disorderly persons offense, respectively, when the required appearance was to answer a charge of such an offense or for disposition of any such charge. Where the bail imposed or summons issued is in connection with any other violation of law, the failure to appear shall be a disorderly persons offense.

This section does not apply to obligations to appear incident to release under suspended sentence or on probation or parole. Nothing herein shall interfere with or prevent the exercise by any court of this State of its power to punish for contempt.