

MINUTES OF COMMISSION MEETING

February 21, 2019

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi Jr.; Commissioner Andrew O. Bunn; Commissioner Virginia Long (via telephone); Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang.

Preliminary Matters

Katherine DeMottie, a student intern from the New Jersey Institute of Technology, was introduced to the Commission. Chairman Gagliardi, on behalf of the Commission, welcomed Ms. DeMottie and advised her that the Commission looks forward to reviewing and discussing her work.

Minutes

With the correction of two typographical errors and the addition of language reflecting Commissioner Bell's suggestion that deference be given to the Government Records Council (GRC) in the context of Open Public Records requests, the Minutes of the January 18, 2019 Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Cornwell.

Misdemeanor

Samuel Silver discussed with the Commission a Draft Final Report on a project that originated after Staff undertook a review of the Model Entity Transaction Act (META) to determine whether it would be useful to incorporate provisions of the Act into existing New Jersey law. As part of the META project, Staff discovered that it is presently a "misdemeanor" for a partnership to conduct business in New Jersey if the members of the entity have not filed the required paperwork with the County Clerk's Office.

An in-depth search of the New Jersey statutes confirmed the prevalence of the term misdemeanor outside of the Code of Criminal Justice (the "Code"). For individuals unfamiliar with the Code, references to "misdemeanors" and "high misdemeanors" in non-Code statutes serve only to complicate the law contained in each statutory title.

Mr. Silver explained that Staff undertook a revision of the Code to eliminate virtually all references to the term "misdemeanor" and replace it, in most instances, with its contemporary,

Code-based equivalent. Staff also eliminated statutes containing the word misdemeanor that duplicate a crime enumerated in the Code or are archaic by virtue of the subject matter expressed therein. The Commission recognized, however, that certain references to the term misdemeanor, such as those discussing out-of-state criminal activity, are necessary and should therefore remain part of the Code.

The Code classifies a crime, for the purpose of sentence, into one of four degrees. The statute, N.J.S. 2C:43-1(a), grades crimes as those of the first degree, second degree, third degree, and fourth degree. Crimes defined by the Code are no longer classified as misdemeanors or high misdemeanors. An individual convicted of a crime set forth in the Code may be sentenced to imprisonment in accordance with the statutory scheme set forth in the Code, for a term ranging from eighteen months to life imprisonment. The Code, however, is not the only statutory title in New Jersey that contains and defines criminal offenses.

Mr. Silver explained that the Code recognizes that other statutory titles define criminal activity, and that crimes set forth in other statutes may not follow the scheme set forth in N.J.S. 2C:43-1(a). Nevertheless, the Code is responsible for enumerating the penalties and sentences for criminal behavior set forth in other statutes.

In connection with this Report Staff sought, and received, comments from a number of knowledgeable individuals and organizations. According to Mr. Silver, each response was placed into one of six categories. These categories included: “objection to the proposed changes”; “no comment”; “no objection”; “support for the proposed, statutory modification”; “adoption of stakeholders recommendation”; and, “other.”

Mr. Silver explained that the Division of Alcoholic Beverage Control was unable to submit comments within the comment period, but did wish to provide comments on the proposed changes that impacted the statutes with which they are concerned. Their comments were received on February 20, 2019 and, while the ABC does not take issue with most of the 20 recommended changes to statutes that are of interest to them, there were six on which they provided feedback in response to the proposed changes that require additional Staff research and analysis.

Commissioner Bell inquired whether there were any additional stakeholders that may potentially comment on this project. Laura Tharney stated that Staff had engaged in a series of inquiries and reminders to the stakeholders regarding the end date of the comment period and that Staff had not received any indication that other comments would be forthcoming.

Commissioner Bunn recommended that Staff take an opportunity to thoroughly review the comments from the ABC. Thereafter, he suggested that Staff prepare a Revised Draft Final Report that incorporates an analysis of the ABC comments. Chairman Gagliardi concurred with Commissioner Bunn’s recommendation. He noted the thoroughness of the outreach conducted by Staff and requested that the New Jersey Chiefs of Police and the New Jersey Police Traffic Officers Association also be sent a copy of the Draft Final Report for their review.

Hearsay

John Cannel presented a Draft Tentative Report proposing clarification of hearsay evidentiary issues concerning child abuse and neglect proceedings. In it, he discussed the determination of the Appellate Division in *New Jersey Division of Child Protection and Permanency v. T.U.B.*, that hearsay exception regarding the admission of certain hearsay statements by children about allegations of abuse and neglect under N.J.S. 9:6-8.46(a)(4) only applied to those proceedings, not the termination of parental rights under Title 30.

Mr. Cannel recommended amending the language of N.J.S. 9:6-8.46 and the Commission's 2014 Report on Children at N.J.S. 9:27-26 to clarify that these sections only apply to child abuse and neglect proceedings. The Report also recommends replacing recitations of the business records exception in each statute with references to N.J.R.E. 803(c)(6).

Mr. Cannel asked whether the Commission preferred applying N.J.R.E. 803(c)(27) to both child abuse and neglect in Title 9 as well as termination of parental rights in Title 30 or to make it clear that hearsay statements by children concerning allegations of abuse and neglect only apply to Title 9 proceedings. The Commission supported limiting 803(c)(27) to Title 9 cases.

Commissioner Bunn asked Mr. Cannel if child abuse and neglect issues and terminations of parental rights are ever addressed in the same proceedings. Mr. Cannel replied that they are not. Commissioner Long expressed concern over whether the proposed revisions would provide greater clarity. Commissioner Bunn recommended inserting an "a" in front of "child in need of services" in N.J.S. 9:27-26 to have it read a little better.

On the motion of Commissioner Cornwell, which was seconded by Commissioner Bell, the Commission unanimously voted to release the Report as a Tentative Report.

Imputed Negligence

Jennifer Weitz presented a Memorandum requesting authorization to expand the scope of a project previously authorized harmonizing the Local Public Contracts Law with N.J.S. 2A:58B-3. The question of imputing negligence to a public entity arose in a 2017 Appellate Division case in which a municipal construction project promptly ran into trouble and contractors tried to expand their possible remedies. The Court considered whether an agent or independent contractor's negligence could be imputed to a contracting unit, i.e., a public entity, when an exculpatory clause limited damages to an extension of time for performance. Noting the Legislature's intent not to broaden a public entity's liability, and in the absence of negligence on the party of the public entity, the Court ruled that the exculpatory clause was enforceable.

The original authorization concerned harmonizing the LPCL with N.J.S. 2A:58B-3, on which it was modeled, and which contains explicit language disallowing imputed negligence.

After conducting outreach, Ms. Weitz was informed by Edward Buzak, past Chairman of the Legislative Committee of the Association of Environmental Authorities, that the education law contracting statute (N.J.S. 18A: 18A-41) should also be brought into conformity with N.J.S. 2A: 58B-3.

The Commission unanimously agreed to expand authorization for this project to include the education law contracting statute.

Harassment

John Cannel presented a Memorandum providing updated information and proposed language for the use of the term “harassment” as it appears in N.J.S. 2C:33-4, and sought the Commission’s input regarding a Draft Tentative Report for this project.

Commissioner Bell pointed out that the current definition of harassment is unconstitutional. He noted that a small amount of substantially overbroad language can be excised as long as the body of the statute is valid. He also observed that situations which might be considered harassment are very difficult to define. Commissioner Cornwell likened the ambiguity of harassing situations to those involving tumultuous behavior. Commissioner Bell noted that coarse language, such as “f—k the draft,” is constitutionally protected per *Cohen v. California*, but if such language is directed towards an individual, it might not be covered. Commissioner Bunn noted that proximity and volume may be determinative in analyzing whether spoken language is harassing. Mr. Cannel added that repetition is another consideration.

Mr. Cannel suggested copying the language of N.J.S. 2C:33-4.1, the cyber-harassment statute, regarding inclusion of the phrase “without legitimate purpose.” Chairman Gagliardi and Commissioner Long asked if this language would survive judicial scrutiny. Commissioner Bunn pointed out that the *mens rea* of the statute is to harass. Chairman Gagliardi asked Commissioner Bell for feedback regarding the *mens rea*. Commissioner Bell replied that a substantial overbreadth standard should be applied to this statute, and that there was a likelihood that it would be upheld as constitutional because it focuses on core conduct. Professor Cornwell referenced the US Supreme Court case *Elonis*, in which the ex-husband made threatening posts about his ex-wife. (The ex-husband’s conviction was reversed because the jury that convicted him received instructions that used a negligence rather than intent standard.)

The Commission agreed that borrowing the definition of cyber-harassment—knowing with purpose to harass—is acceptable. Mr. Cannel suggested that the language for harassment could be modeled after that contained in the cyber-harassment statute and indicated that he will prepare a Draft Tentative Report for Commission review.

Commissioner Long asked about the *RG* and *JD* cases on page three of the Memorandum. Commissioner Bunn suggested that intent is the key issue. Commissioner Bell said that even if an individual has a legitimate purpose, harassment may still be found. He gave

as an example the collecting of a debt, where the purpose is legitimate, but the behavior is often harassing. The proposed statutory language does not include the term “legitimate purpose.” Commissioner Bunn asked about using the phrase “clearly excessive.” Commissioner Bell suggested language such as “with the purpose to harass another or in a clearly excessive manner without a legitimate purpose.” He will provide proposed language for consideration and incorporation as appropriate. Mr. Cannel noted the challenges associated with the fact that many, though not all, of these cases are heard in municipal court.

Widow

John Cannel presented a memo initially prepared by former Legislative Law Clerk Rachael Segal at the October 2018 meeting. Mr. Cannel offered proposed alternatives for statutory language regarding defining the terms “widow” and “widower” as used in N.J.S. 54:4-3.30. The absence of these statutory definitions was at issue in *Prudent-Stevens v. Twp. of Tom’s River*, the case which formed the basis for this project. In *Prudent-Stevens*, a military widow who later remarried was denied a property tax exemption. The basis for this denial, as argued by the municipality, was that the Plaintiff lost her status as a widow when she remarried. After examining common law definitions, brochures issued by the State, and previous definitions of “widow” promulgated by the New Jersey Legislature, the Appellate Division held that that an individual remains a widow of her husband even after she remarries.

Mr. Cannel noted that the two proposed versions are reliant on context and implement a constitutional provision, so there is less drafting leeway. He raised the question of whether one is a widow forever, or whether one can forfeit one’s widowhood. The Court’s decision noted that the terms “widow” and “widower” refer to a person, not a marital status. Therefore, remarriage does not nullify widowhood.

Commissioner Long asked if the Commission is making a substantive law determination. In response, the Commission considered that even though this case represents only one decision by the Tax Court, it has the potential to recur. Commissioner Cornwell asked if constitutional construction is beyond the Commission’s mandate. Chairman Gagliardi briefly discussed the parameters of the Commission’s work, noting that it is within the statutory scope to clarify a decision of the Appellate Division. Commissioner Long also asked if the Commission would report that the constitutional provision regarding widowhood is vague, and Laura Tharney noted that the Commission would not look to decide the issue, but instead would report the results of its research to the Legislature.

Commissioner Bunn wanted to know about the federal government’s work in this area and the actions taken by other states, to ensure that any approach recommended by the Commission was not out-of-step with other work done in this area. Chairman Gagliardi pointed out that, in the absence of guidance, we might provide the initial statutory guidance.

Commissioner Cornwell noted that this issue is likely to come before the courts again, and cautioned that the Commission be mindful of the work of others in this area.

Commissioner Long agreed that this issue will continue to occur and we shouldn't leave it alone. She suggested we could issue a report to the Legislature regarding this ambiguity and various ways of resolving it. However, she also said that she would like to see more research. Commissioner Bell suggested, in addition, researching the legislative history to determine the legislative intent behind the ambiguous language. Staff will conduct additional research and provide it to the Commission at an upcoming meeting.

Bail Jumping

Samuel Silver discussed with the Commission his Memorandum concerning 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. When a person fails to appear in court under such circumstances, they may be charged with bail jumping. 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.

Mr. Silver stated that in its current form, New Jersey's Bail Jumping statute raises two specific issues. Initially, in *State v. Emmons*, 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. Subsequently, in *State v. Morris*, 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.

In *State v. Emmons* 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. 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. The defendant's conviction for aggravated assault was affirmed on appeal. The Appellate Division reversed the defendant's conviction for bail jumping and remanded that issue to the trial court. On remand, defendant moved to dismiss the bail jumping indictment. 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. The trial court agreed with this argument.

In *State v. Morris*, the defendant appeared in court after having previously been released on bail. The defendant was required to appear during the court's afternoon session regarding a number of indictable offenses and a violation of probation. 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.

Following the drug test, the defendant's probation officer appeared in court; the defendant, however, did not. 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." No explanation for the defendant's failure to appear was proffered by the defendant's attorney. Therefore, the judge issued a bench warrant for the defendant's arrest. The defendant was subsequently arrested on the open bench warrant and the matter set down for a trial.

In *State v. Emmons* the Court observed that the statute "does not expressly indicate what culpable mental state is required for the commission of this offense." 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." The Legislature has provided a defendant with the ability to proffer an affirmative defense to the crime of bail jumping. 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 court. 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.

Almost a decade later, 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]..." The State appealed the denial of their motion.

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." 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."

Mr. Silver expressed concern that the statute may not be as clear as it could be in circumstances involving a matter in which individuals charged with both indictable offenses and those required to appear incident to release for a suspended sentence, probation violation, or parole violation.

Commissioner Bunn stated that this is a project worth doing research on. Commissioner Long commented that she believed that an examination of the unconstitutional aspect of the statute formed the basis of a good project, noting that she thought the Appellate Division's decision in *State v. Emmons* was correct regarding the application of the bail jumping statute to individuals who appear in court but do not remain. Staff was authorized by the Commission to engage in additional research and outreach.

Willfully

Joseph Pistritto presented a Memorandum prepared by former Legislative Law Clerk Wendy Llewellyn in which she discussed whether the trial court's failure to charge the jury with the implied culpability requirement of "knowingly" in N.J.S. 9:6-8.10b was a mistake as a matter of law that warranted a reversal of defendant's conviction.

The defendant in *State v. Gross*, was a clerk-typist who was responsible for filing reports that substantiated findings of child abuse that were sent by the local police to the Division of Youth and Family Services (DYFS). She provided the mayor with confidential documents regarding the individual who was running against him in the next election. These documents were then distributed to others. The defendant was convicted of the unlawful release of confidential DYFS records in violation of N.J.S. 9:6-8.1b and appealed.

To be found guilty of N.J.S. 9:6-8.10b, the statute requires that a defendant "willfully" release the protected documents but does not describe the applicable degree of culpability. The Appellate Division held that in the absence of a specified statutory mental state, the statute must be construed as incorporating "knowingly" as its culpability requirement. According to Mr. Pistritto, the term "willful" or "willfully" appears nine times in the statutory language of the Code of Criminal Justice, but it was not defined.

In reversing the defendant's conviction, the court opined that acting under a "mistake of law" would negate the requisite culpable mental state of "knowingly," and the State would then have had the burden of disproving that defense beyond a reasonable doubt. Had the jury accepted that defendant acted under the mistaken belief that the mayor was entitled to the documents, thereby negating the required culpability of "knowingly," the omission of an instruction on the legal significance of a mistake of law had the clear capacity to bring about an unjust result, which was exacerbated by the failure to charge the jury on 'knowingly.'

Laura Tharney said that it was of concern to Staff that the case law is not consistent in construing the definition of willfully and knowingly. Commissioner Cornwell stated that the term "willfully" is used in the federal code in cases involving tax evasion. In New Jersey, he continued, "knowingly" is the default mental element for the Code of Criminal Justice. Commissioner Long stated that when the mental element of an offense is not explicitly stated in the statute, the "gap filler" statutes, N.J.S. 2C:2-2(c)(3) and N.J.S. 2C:2-2(b)(2), are employed to identify the requisite mental element.

Commissioner Bunn stated that this case presents a matter in which the defendant was wrongfully convicted and should never have been charged with a crime. In passing upon the divergence of statutory definitions in the context of “knowingly” and “willfully” he stated that there should be uniformity of meaning in the Code of Criminal Justice. Commissioner Bunn further stated that the focus of the instant project should be on the criminal code because in the civil context the word “willfully” has a specialized meaning.

Staff was authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to the statute.

Miscellaneous

Laura Tharney advised the Commission that Staff has commenced interviews for Legislative Law Clerks who will join the Commission during the summer of 2019.

The Equine Activity Act is scheduled to be voted upon by the Assembly during the last week of February 2019, and Staff will continue to monitor the progress and report the status to the Commission. Ms. Tharney also advised the Commission that on January 28, 2019, the Uniform Fraudulent Transfer Act was reported out of Assembly Committee after its second reading. Staff continues to work with the Assemblyman McKeon’s Chief of Staff regarding the legislation.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell, seconded by Commissioner Bunn. The next Commission meeting is scheduled to be held on March 21, 2019, at 4:30 p.m.