

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Dep. Director
Re: Applicability of the Driving While Intoxicated Statute, N.J.S. 39:4-50, to bicyclists as discussed in *State v. Tehan*, 190 N.J. Super. 348 (Law Div. 1982) and *State v. Johnson*, 203 N.J. Super. 436 (Law Div. 1985)
Date: October 10, 2023

UPDATE MEMORANDUM

Project Summary

On July 27, 2022, a member of the public requested that Staff examine whether an intoxicated individual operating a bicycle propelled by muscular power was subject to the State's driving while intoxicated statute.¹ In response to this request, Staff examined New Jersey's common law and the decisions of the State's trial courts.²

On November 17, 2022, the Commission authorized Staff to undertake additional research in this area.³ Thereafter, Staff examined the common law to ascertain the present state of the law. Additionally, Staff reviewed comments forwarded to the Commission by the New Jersey State Bar Association (NJSBA) in connection with this project.

The following pages set forth Staff's findings regarding this legal issue. Staff seeks guidance from the Commission on whether to conclude work on this subject or proceed with the issuance of a final report to bring this issue to the attention of the Legislature.

Statute Considered

N.J.S. 39:4-50, entitled "Driving while intoxicated" states, in relevant part:

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle the person owns or which is in the person's custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood shall be subject: [to the penalties set forth in this section].

¹ E-mail from SFC David Guinan #6266, New Jersey State Police, Unit Head, Safe Corridor Unit to Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm'n (July 27, 2022, 12:24 PM EST) (on file with the NJLRC).

² See Memorandum from Samuel M. Silver, Dep. Dir., N.J. Law Rev. Comm'n on the 'Applicability of the Driving While Intoxicated Statute, N.J.S. 39:4-50, to Bicyclists' to New Jersey Law Rev. Comm'n (Nov. 07, 2022) (on file with the NJLRC and at njlrc.org).

³ *Minutes* N.J. LAW REVISION COMM'N Meeting 17 Nov. 2022, 'Applicability of the Driving While Intoxicated Statute, N.J.S. 39:4-50, to Bicyclists' at *8 [hereinafter *Minutes*] (authorizing Staff to engage in further research on this subject), www.njlrc.org, (last visited Sept. 27, 2023).

* * *

N.J.S. 39:1-1, entitled “Definitions” provides:

* * *

“Motor vehicle” includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks, low-speed electric bicycles, low-speed electric scooters, and motorized bicycles.

* * *

“Vehicle” means every device in, upon or by which a person or property is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks or low-speed electric bicycles, low-speed electric scooters, or motorized bicycles.

Background & Analysis⁴

- *State v. Tehan*

The issue of whether New Jersey’s driving while intoxicated statute applies to operators of bicycles was raised for the first time in *State v. Tehan*.⁵ In *Teahan*, the defendant left work and visited a bar where he proceeded to drink until he was admittedly legally intoxicated.⁶ The defendant left the bar on a bicycle and attracted the attention of the police after he kicked over some traffic cones.⁷ He was arrested and charged with disorderly conduct and driving while under the influence of alcohol, a violation of N.J.S. 39:4-50.⁸ After entering pleas of guilty to disorderly conduct and resisting arrest, the defendant was found guilty of driving under the influence.⁹ He was fined \$250 for driving under the influence and his driving privileges were revoked for nine months.¹⁰ The defendant appealed his conviction to the Superior Court, Law Division, in Somerset County, sitting as an appellate court, in a trial de novo.¹¹

In this case of first impression, the *Teahan* Court examined the statutory definitions of motor vehicles and bicycles.¹² The Court noted that a “motor vehicle” is defined as “all vehicles propelled otherwise than by muscular power.”¹³ Similarly, a “vehicle” includes “every device, in, upon or by which a person...may be transported upon a highway, excepting devices moved by human

⁴ The background and analysis of the cases discussed are so intertwined that they are presented in one section for the convenience of the reader.

⁵ *State v. Tehan*, 190 N.J. Super. 348, 349, 350 (Law Div. 1982).

⁶ *Id.* at 350.

⁷ *Id.*

⁸ *Id.* The defendant was also charged with simple assault and resisting arrest.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 350-351 (citing N.J.S. 39:1-1).

power....”¹⁴ The Court then noted that bicyclists are afforded all of the “rights and shall be subject to all of the duties applicable to the driver of a vehicle...”¹⁵ on a roadway.¹⁶ The Court reasoned that the driving under the influence statute imposed a duty upon persons to refrain from operating on the roadways while they were intoxicated.¹⁷ Finding that “the drunken operator of a bicycle may create situations endangering both himself and others on the road” the Court held that the operator of a bicycle was under the same obligation to stay off the roads when intoxicated.¹⁸

- *State v. Johnson*

Almost a year after the *Tehan* decision, the defendant in *State v. Johnson* “was stopped by a New Jersey State Trooper and issued a summons for operating a motor vehicle while under the influence of an intoxicating liquor in violation of N.J.S.A. 39:4-50.”¹⁹ The defendant was operating a “non-motorized” “pedal-type” bicycle at the time of the stop.²⁰ He was found guilty and required to serve a ninety day jail sentence and perform ninety days of community service.²¹ The defendant appealed his municipal conviction to the Superior Court, Law Division, in Cumberland County.²²

On appeal, the State maintained that the operator of a bicycle may be charged with a violation of N.J.S. 39:4-50 and cited to *State v. Tehan*.²³ Although the defendant admitted his intoxication, he argued that he was not operating a motor vehicle and therefore could not be found guilty of violating the driving while intoxicated statute.²⁴ The Court “scrutinized the detailed and technical definitions applicable to vehicles of all classes and has found it to be clearly apparent from the plain language of the statute that the muscular powered bicycle is not included [in N.J.S. 39:4-50].”²⁵

The *Johnson* Court, considering the decision in *Tehan*, said that “courts of this State have consistently held that it is not the role of the judiciary to extend the language of a statute beyond that which has been legislated” and that the “need to restrict the judicial branch of government from engaging in legislating has existed since the founding of this nation.”²⁶ The Court noted that “[t]he Legislature has at length, differentiated between various types of vehicles.”²⁷ Further, the Court stated that “[i]t is not the function of this Court to supplement or amend that which the Legislature has taken great pains to formulate.”²⁸ The *Johnson* Court noted that N.J.S. 39:4-50 had been amended several times and that none of the Legislature’s modifications extended the statute

¹⁴ *Id.* at 351.

¹⁵ *Id.* (citing N.J.S. 39:4-14.1).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 352.

¹⁹ *State v. Johnson*, 203 N.J. Super. 436, 438 (Law Div. 1985).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 439.

²⁶ *Id.* at 441.

²⁷ *Id.* at 440.

²⁸ *Id.*

to include persons operating bicycles.²⁹ Finally, the Court stated that “[i]f it is the intention of the Legislature that a bicycle be included as a motor vehicle and its operator subject to the penalties for driving while intoxicated, then it is also the responsibility of the Legislature to make that clear.”³⁰

To this time, whether or not an intoxicated individual will be charged with a violation of New Jersey’s DWI statute depends upon which decision the court elects to follow because the case law on this subject is divided. Conflicting trial court opinions mean that the statute is subject to competing interpretations regarding whether bicyclists can be charged with a violation of N.J.S. 39:4-50.³¹

Additional Research

To this time, there is only one published post-*Johnson* opinion that addresses whether the operator of a pedal bicycle is subject to New Jersey’s driving while intoxicated statute.³² In *State v. Machuzak*, the defendant was found guilty of operating a nonmotorized pedal bicycle while under the influence of alcohol.³³ The defendant appealed his conviction.³⁴

During his trial de novo in the Law Division, the defendant did not deny his intoxication.³⁵ The sole issue raised on appeal was “whether the operator of a pedal bicycle falls within the purview of N.J.S. 39:4-50.”³⁶ In its appellate capacity, the Superior “Court [was] faced with two conflicting Law Division cases [*Tehan* and *Johnson*] which [had] not been resolved by any Appellate authority.”³⁷

The *Machuzak* Court concurred with the *Johnson* Court and determined that New Jersey’s Driving While Intoxicated (DWI) statute does not apply to persons operating bicycles.³⁸ The Court reasoned that N.J.S. 39:4-50 “specifically and unambiguously applies to motorized vehicles only.”³⁹ The Court emphasized that the term “motor vehicle” is defined as “all vehicles propelled otherwise than by muscular power...”⁴⁰ Similarly, the court noted that “the term ‘vehicle’ is

²⁹ *Id.* at 441-42.

³⁰ *Id.* at 442.

³¹ *But see* discussion *infra* *State v. Machuzak*, 227 N.J. Super. 279, 283 (Law Div. 1988) (concurring with the *Johnson* Court and determining that New Jersey’s Driving While Intoxicated (DWI) statute does not apply to persons operating bicycles).

³² *Machuzak*, 227 N.J. Super. at 279.

³³ *Id.* at 280.

³⁴ *Id.*

³⁵ *Id.* at 281.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 282-83.

³⁹ *Id.* at 282.

⁴⁰ *Id.* See N.J.S. 39:1-1 (excepting from the definition of motor vehicle “such vehicles as run only upon rail or tracks, low-speed electric bicycles, low-speed electric scooters, and motorized bicycles.”). See N.J.S. 39:1-1 (defining “low-speed electric bicycles” as “a two or three-wheeled vehicle with fully operable pedals and an electric motor of less than 750 watts, that meets the requirements of one of the following classifications: “class 1 low-speed electric bicycle” which means a low-speed electric bicycle equipped with a motor that provides assistance only when the rider is pedaling, and that ceases to provide assistance when the bicycle reaches the speed of 20 miles per hour; or “class 2

defined to mean ‘every device in, upon or by which a person or property is or may be transported upon a highway, excepting devices moved by human power....’” By contrast, the Court stated that the statutory definitions of “motorcycle”⁴¹ and “motorized bicycle”⁴² supported the conclusion that “non-motorized bicycles were not intended by the Legislature to fall within the ambit of N.J.S. 39:4-50.” Ultimately, the Court concluded that “[i]t is abundantly clear to this court that the pertinent definitions found within N.J.S.A. 39:1–1 and used in the drunken driving statute were not intended to apply to non-motorized pedal-type bicycles.”⁴³

The Court emphasized that “[i]t is the Legislature’s function, not the Court’s, to expand the scope of the Statute beyond the plainly expressed legislative intent.”⁴⁴ The Court reiterated the *Johnson* Court’s sentiment that if the Legislature intended to classify a bicycle as a motor vehicle and subject its operator to penalties for driving while intoxicated, such intent must be clearly and unambiguously articulated by the Legislature.⁴⁵

Outreach

The NJSBA provided the Commission with written comments on this subject.⁴⁶ The Bar Association communicated to Staff that “the law on the issue of driving while intoxicated as it relates to bicyclists is unambiguous and therefore there is no need to amend N.J.S. 39:4-50.”⁴⁷ In addition, the NJSBA indicated that its members who specialize in this field of law concluded that “N.J.S. 39:4-50 as intended by the Legislature unequivocally excludes conveyances powered by

low-speed electric bicycle” which means a low-speed electric bicycle equipped with a motor that may be used exclusively to propel the bicycle, and that is not capable of providing assistance when the bicycle reaches the speed of 20 miles per hour.”); (defining low speed electric scooter as “a scooter with a floorboard that can be stood upon by the operator, with handlebars, and an electric motor that is capable of propelling the device with or without human propulsion at a maximum speed of less than 19 miles per hour.”) and (defining motorized bicycle as a pedal bicycle having a helper motor characterized in that either the maximum piston displacement is less than 50 cc. or said motor is rated at no more than 1.5 brake horsepower or is powered by an electric drive motor and said bicycle is capable of a maximum speed of no more than 25 miles per hour on a flat surface or a pedal bicycle having an electric motor that is capable of propelling the bicycle in excess of 20 miles per hour with a maximum motor-powered speed of no more than 28 miles per hour on a flat surface. This term shall not include a low-speed electric bicycle or low-speed electric scooter as defined in this section.”).

⁴¹ *Id.* (citing N.J.S. 39:1-1 which defines motorcycle to include motorcycles, motor bikes, bicycles with motors attached and all motor-operated vehicles of the bicycle or tricycle type).

⁴² *Id.* (citing N.J.S. 39:101 which defines motorized bicycle as a pedal bicycle having a motor).

⁴³ *Id.*

⁴⁴ *Id.* at 283.

⁴⁵ *Id.* at 282 *See* N.J.S. 39:4-50 (noting that the following sixteen statutory amendments have been made to the statute since 1988: L.1993, c. 296, § 6; L.1994, c. 184, § 1, eff. Dec. 23, 1994; L.1995, c. 243, § 1, eff. April 1, 1996; L.1997, c. 277, § 1, eff. Dec. 30, 1997; L.1999, c. 185, § 4; L.1999, c. 417, § 7; L.2000, c. 83, § 1, eff. Sept. 30, 2000; L.2000, c. 117, § 1, eff. Sept. 13, 2000; L.2001, c. 12, § 1; L.2002, c. 34, § 17, eff. July 1, 2002; L.2003, c. 314, § 2, eff. Jan. 20, 2004; L.2003, c. 315, § 2, eff. Jan. 20, 2004; L.2004, c. 8, § 2, eff. April 26, 2004; L.2009, c. 201, § 1, eff. Jan. 14, 2010; L.2014, c. 54, § 2, eff. March 1, 2015; L.2019, c. 248, § 2, eff. Dec. 1, 2019). *See also* Minutes, *supra* note 3, at *7 (statement of Vice-Chairman Bunn, “the Legislature has had plenty of opportunities to amend the statute, and the statute” and supporting the release of a report articulating the different viewpoints of the courts without any further recommendation.) *And see Id.* (statement of Commissioner Bertone recommending that research be undertaken since this dilemma needs to be resolved but cautioning against taking a position on what amounts to a policy issue).

⁴⁶ Letter from Jeralyn Lawrence, President, N.J. State Bar Ass’n, to Laura Tharney, Exe. Dir., N.J. Law Rev. Comm’n (Mar. 13, 2023) (on file with the NJLRC).

⁴⁷ *Id.*

humans....”⁴⁸ It emphasized that its “members find that the finding of the Court in *State v. Johnson* clearly holds that N.J.S. 39:4-50 is unambiguous in its exclusion of conveyances powered by humans and is therefore inapplicable to bicyclists.”⁴⁹ The NJSBA advised that “further research on this topic is unwarranted” and “respectfully ask[ed that] the NJLRC reconsider this project.”⁵⁰

Pending Bills

There is no pending legislation in New Jersey that concerns the issue raised in this Memorandum.

Conclusion

In the absence of an Appellate Division decision on this subject,⁵¹ a conflict in the common law exists about the applicability of N.J.S. 39:4-50 to bicyclists.⁵²

Staff seeks guidance from the Commission regarding concluding work in this area or issuing a final report to alert the Legislature of the conflict in the common law as suggested by the Courts in *Johnson* and *Machuzak*.⁵³

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *Lackovic v. New England Paper Tude Co.*, 127 N.J. Super 394, 398 (App. Div. 1974) (holding that absent an appellate court’s determination on point, a trial court is not bound to follow the holding of another trial court).

⁵² *Id. Operation of Bicycle as within Drunk Driving Statute*, 73 A.L.R.4th 1139 (1989) (referring to the decisions in *Tehan* and *Johnson* and noting that “[i]n New Jersey, a conflict apparently exists as to which of these two views is correct.”).

⁵³ Minutes, *supra* note 3, at 7-8 (statement of Chairman Gagliardi, “the statute may not be ambiguous but since it is a source of confusion, it is the Commission’s role to bring that fact to the Legislature’s attention without wading into the policy issues.”).