

To: New Jersey Law Revision Commission
From: Susan G. Thatch
Re: Title 2C – Sexual Offenses
Date: June 9, 2014

MEMORANDUM

This Memorandum is intended to alert the Commission to additional information regarding the Section 2C – Sexual Offenses project.

Executive Summary

Staff requests the Commission’s approval to conduct further research and analysis to determine whether it is appropriate to add carjacking as a predicate offense to a charge of aggravated sexual assault under N.J.S. § 2C:14-2a(3).

Introduction

This potential expansion of the Section 2C project is in response to the N.J. Supreme Court case *State v. Drury*¹. In *Drury*, defendant was convicted of multiple offenses including first-degree aggravated sexual assault, third-degree aggravated assault, third-degree terroristic threats, four counts of first-degree carjacking, third-degree theft by unlawful taking and four counts of first-degree kidnapping.²

In connection with his conviction for first-degree sexual offense, the trial court held that carjacking constituted a commission of robbery sufficient to elevate the second-degree charge of sexual assault to a first-degree charge of sexual assault.

On appeal to the Appellate Division, defendant argued that carjacking is not specifically enumerated as a predicate offense to first-degree sexual assault pursuant to N.J.S. § 2C:14-2a(3) and accordingly requested his sentence for first-degree sexual assault be vacated. The Appellate Court agreed with the conclusion of the trial court and held that carjacking is in effect a robbery and therefore satisfies the predicate offense for a conviction of first-degree sexual assault. Further, the Appellate Court held that “it would be entirely illogical to conclude that the crime of carjacking, a more specific form of the crime of robbery, would not establish the required element of an aggravated sexual assault.”³

¹ 190 N.J. 197 (2007)

² *Id.* at 206. Also, please note that the defendant was erroneously charged at the trial level; the indictment specified first-degree sexual assault based upon the predicate crime of carjacking. When State realized that carjacking was not a specifically enumerated underlying offense, State moved to seek an amended indictment basing the first-degree sexual assault charge on the underlying crime of kidnapping. The trial court held that such a modification was unnecessary because carjacking is a form of robbery which serves as a predicate crime . *State v. Drury*, 382 N.J. Super. 469, 477 (2006).

³ *Drury*, 382 N.J. Super. 469, 481.

The N.J. Supreme Court disagreed with the trial and appellate courts and concluded that the similarities between burglary and carjacking were insufficient to support the claim that carjacking is simply a form of robbery.⁴ Further, the Court refused to conclude that the Legislature “intended carjacking to be subsumed within the term robbery as it is used in the aggravated sexual assault statute in order to elevate sexual assault to a first-degree crime.”⁵ The Court accordingly reversed the Appellate Court’s conclusion that carjacking could support the conviction of first-degree sexual assault.⁶

Analysis

N.J.S. § 2C:14-2a(3) enumerates specific offenses which elevate a sexual assault from a first-degree crime to a second-degree crime. Specifically, a defendant will be charged with aggravated sexual assault if the act of penetration “is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape.”⁷

In 1993, the New Jersey Legislature passed N.J.S. § 2C:15-2 which sought to address the increasingly problematic crime of carjacking.⁸ While the carjacking mirrors the robbery statute in many respects, it adds the more specific requirement that the unlawfully taken property is a motor vehicle.⁹

Since the enactment of the carjacking legislation in 1993, the Legislature has amended several other criminal statutes to enumerate carjacking as an aggravating factor:

- New Jersey’s felony murder statute¹⁰ originally included robbery as a specified triggering offense and was subsequently amended in 1998 to specifically include carjacking.¹¹
- N.J.S. § 2A:4A-26 (1982) establishing grounds for the waiver of juveniles out of family court originally included robbery as a specified triggering offense and was subsequently amended in 1999 to specifically include carjacking.¹²
- N.J.S. § 2C:44-3 (1978) authorizing imposition of discretionary extended term under certain conditions was amended to include robbery as a triggering offense in 1981 and further amended to include carjacking in 1999.

Additionally, in several post-1993 enactments, the Legislature has specifically enumerated both robbery and carjacking as aggravating offenses.¹³ The New Jersey Supreme

⁴ *Drury*, 190 N.J. at 211.

⁵ *Id.*

⁶ *Drury* at 218.

⁷ N.J.S. § 2C:11-3 (1978)

⁸ *State v. Garretson*, 313 N.J. Super 348, *certif. denied*, 156 N.J. 428 (1998) citin *Governor's Press Release* for Assembly Bill 2047 and Senate Bill 1324, dated August 4, 1993.

⁹ *Drury*, 382 N.J. Super. at 481, *citing Garretson* at 355.

¹⁰ N.J.S. § 2C:11-3 (1978)

¹¹ *Drury* 190 N.J. at 214.

¹² *Id.*

¹³ N.J.S. § 2A:162-12 (1994) specifically enumerated robbery and carjacking as predicate offenses for bail restrictions; N.J.S. § 2C:43-7.2 (1997) specifically enumerated both robbery and carjacking in listing of offenses;

Court found this indicative that the Legislature views carjacking and robbery as separate and distinct crimes.¹⁴ Further, given Legislative efforts to specifically include carjacking in new or amended laws, the Court was guided by the principle that “the Legislature ha[ving] carefully employed a term in one place and excluded it in another, it should not be implied where excluded.”¹⁵

Conclusion

In *Drury*, a first-degree sexual assault conviction would have otherwise been possible in connection with the kidnapping charge upon the issuance of the appropriate indictment. While it may seem unlikely, it is not impossible to envision a factual situation in which a carjacking and sexual assault occur but elements of kidnapping or other predicate crimes are not satisfied.

While the *Drury* court was not persuaded that the failure to enumerate carjacking was a potential oversight¹⁶, Staff requests the Commission’s determination of whether it is appropriate to propose such a revision for specific consideration by the Legislature in conjunction with the Commission’s other proposed revisions.

As the Commission is aware, Staff has been in the later stages of preparing a Final Report by soliciting input from stakeholders and detailing the Commission’s recommendations to date. If the Commission recommends adding carjacking to N.J.S. § 2C:14-2(a)(3), Staff will conduct additional outreach to interested parties for comment and feedback.

N.J.S. § 2C:38-2 (2002) specifically enumerated both robbery and carjacking in offenses supporting conviction for crime of terrorism.

¹⁴ *Drury* at 213.

¹⁵ *Drury* at 215, citing *GE Solid State, Inc. v. Dir., Div. of Taxation*, 132 N.J. 298,308 (1993).

¹⁶ *Drury*, 190 N.J. at 213.