

**To: New Jersey Law Revision Commission**  
**From: Samuel M. Silver**  
**Re: *State v. Torella***  
**Operation of Motor Vehicle During License Suspension, N.J.S. 2C:40-26**  
**Date: November 06, 2017**

## MEMORANDUM

### Executive Summary

In *State v. Torella*,<sup>1</sup> the Appellate Division considered the proper interpretation of N.J.S. 2C:40-26, regarding the criminality of driving with a license between a period of suspension and reinstatement.

The court determined that driving under such circumstances does not constitute criminal conduct, relying upon the decision in *State v. Perry*, which states that the statute “criminalizes the operation of a motor vehicle only during the court-ordered period of suspension, not thereafter.”<sup>2</sup>

### Background

The case examined whether an individual may be found criminally liable for driving with a license that had been suspended, after the period of suspension had ended but before the licensed had been formally reinstated by the Motor Vehicle Commission.<sup>3</sup> *Torella* had been previously been convicted of a series of DWI offenses in 2001 and 2002, leading to a suspension of his license.<sup>4</sup> He failed to restore his license after the suspension ended, and was arrested twice in 2012 for driving with a suspended license and charged with a violation of N.J.S. 2C:40-26(b).<sup>5</sup>

This section of the statute reads as follows:

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). A person convicted of an offense under this subsection shall be sentenced by the court to a term of imprisonment.<sup>6</sup>

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<sup>1</sup> 2015 WL 11391309 (N.J. App. Div. 2016).

<sup>2</sup> *State v. Perry*, 439 N.J. Super. 514 (App. Div.), *certif. denied*, 222 N.J. 306 (2015).

<sup>3</sup> This period of time is commonly referred to as “gap time.”

<sup>4</sup> 2015 WL 11391309 at \*1.

<sup>5</sup> *Id.*

<sup>6</sup> N.J.S. 2C:40-26(b).

The Appellate Division in *State v. Torrella*, relying upon the holding in *State v. Perry*, explained that “[t]he statute is silent as to those driving without reinstatement beyond the court-imposed term of suspension” and that “[h]ad the Legislature intended to include those persons, the necessary language could have easily been included in both sections of the law.”<sup>7</sup> The Court went on to hold that the statute does not criminalize Torella’s conduct. In addition, the Court determined that finding otherwise “would [...] engraft additional terms onto the statute that the Legislature did not intend to include and to expand the list of potential prosecutions beyond the scope of the plain language.”<sup>8</sup>

## Discussion

Staff was authorized to review N.J.S. 2C:40-26 to determine whether it was possible to clarify this statute. As part of the review process Staff undertook analyzed the current case law and statutes. In addition, Staff conducted and outreach with various stakeholders and asked them whether they believed that the statute could be further clarified to prevent arrest of those individual who operate a motor vehicle after the court ordered suspension has passed but before one’s driving privileges are restored by the Motor Vehicle Commission (MVC). The result of Staff’s research and outreach follows.

### *State v. Fletcher*<sup>9</sup>

In addition to *State v. Perry*<sup>10</sup> and *State v. Torella*,<sup>11</sup> the Appellate Division recently commented on the clarity of N.J.S. 2C:40-26. In August of 2017, the New Jersey Appellate Division decided the case of *State v. Fletcher*.<sup>12</sup> After being found guilty of driving while intoxicated for a second time, the trial court elected to sentence the defendant as a first offender and suspended the defendant’s license.<sup>13</sup> Eight days later, *Fletcher*, was arrested for operating a motor vehicle with a suspended license.<sup>14</sup> He was subsequently indicted for fourth-degree operating a motor vehicle during a period of license suspension pursuant to N.J.S. 2C:40-26(b).<sup>15</sup> The trial court judge dismissed the defendant’s motion to dismiss the indictment. The defendant appealed his conviction.<sup>16</sup>

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<sup>7</sup> *Torella*, 2015 WL 11391309 at \*3.

<sup>8</sup> *Id.* at \*3 (citing *Perry*, 439 N.J. Super. at 525–26).

<sup>9</sup> *State v. Fletcher*, 2017 N.J. Super. Unpub. Lexis 2089 (App. Div. 2017).

<sup>10</sup> 2015 WL 11391309 (N.J. App. Div. 2016).

<sup>11</sup> 2015 WL 11391309 at \*1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*1. The defendant had been convicted of driving while intoxicated in 1996. The trial court elected to treat the defendant as a first offender after taking into consideration the amount of time that had passed between his first and second conviction. *See also N.J.S. 39:4-50(a)(3) – leniency afforded to second time DWI offenders “for sentencing purposes only.”*

<sup>14</sup> *Id.* at \*1.

<sup>15</sup> *Id.* at \*1.

<sup>16</sup> *State v. Fletcher*, 2017 N.J. Super. Unpub. Lexis 2089 at \*2, the defendant entered a conditional guilty plea, reserving his right to appeal the trial court’s denial of his motion to dismiss the indictment.

In *Fletcher*, the Appellate Division was asked to consider the application of N.J.S. 2C:40-26(b) and N.J.S. 39:4-50(a) to the case before it. The Court began its opinion by noting, “[t]he plain, statutory language is the best indicator of legislative intent.”<sup>17</sup> The Court continued, “[i]n cases where a plain reading of the statute leads to a clear and unambiguous result, then the interpretive process should end, without resort to extrinsic sources.”<sup>18</sup> The Court found, “[h]ere, we consider two statutes, neither of which is ambiguous.”<sup>19</sup> The Court, in affirming the defendant’s conviction, held that N.J.S. 2C:40-26(b) applies to those instances where individuals drive **during** the period of license suspension.<sup>20</sup>

Admittedly, *State v. Fletcher* presented the Court with circumstances diametrically opposed to those in both *State v. Perry* or *State v. Torella*. In *State v. Fletcher* the defendant operated his vehicle during the court imposed license suspension period. This case brings into specific relief the fact that the judiciary appreciates the scope of N.J.S. 2C:40-26(b). Clearly, individuals similarly situated to *Perry* or *Torella* should not be charged under the criminal statute. This conclusion should not, however, end the inquiry.

### *Title 39*

Staff was asked to conduct research to determine whether there is a more appropriate statute to charge those who operate a motor vehicle after the court imposed suspension period has expired and before having their driving privileges restored by the MVC. For the answer to that inquiry, Staff examined the New Jersey’s Motor Vehicle Statutes.

Within Title 39 there is a statute that prohibits the operation of a motor vehicle by an individual after a court has suspended or revoked one’s driving privileges. Penalties for driving with a suspended license are found in N.J.S. 39:3-40. Entitled “penalties for driving while license suspended” this statute provides:

No person to whom a driver’s license has been refused or whose driver’s licenses 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....

Applying the reasoning set forth by the Court in *Perry*, *Torella*, and *Fletcher*, an individual who operates a motor vehicle beyond the determinate sentenced term of suspension, but before reinstatement, while still under administrative suspension would properly be charged with N.J.S.

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<sup>17</sup> *Id. citing State v. Perry*, 439 N.J. Super. 514, 523 (App. Div. 2015).

<sup>18</sup> *Id.* at \*3.

<sup>19</sup> *Id.* at \*3.

<sup>20</sup> *Id.* at \*5 (*Emphasis added*).

39:3-40 and not N.J.S. 2C:40-26(b). With an understanding about the mechanics of both N.J.S. 39:3-40 and not N.J.S. 2C:40-26(b) Staff spoke about these statutes with the various stakeholders.

### *Outreach*

If the statute is clear, then there must be a reasonable explanation why individuals such as *Perry* and *Torella* were charged under N.J.S. 2C:40-26(b). Staff was authorized by the Commission to engage in preliminary outreach to stakeholders in this area of law. Staff had the opportunity to speak with a certified municipal court law attorney and representatives from the New Jersey Police Traffic Officer's Association (NJPTOA).

### *Mr. Vercammen*

Staff spoke with Kenneth Vercammen, Esq.<sup>21</sup> concerning the issues that arose in both *State v. Perry* and *State v. Torella*. Mr. Vercammen advised Staff that it his belief that the statutory language of N.J.S. 2C:40-26(b) is clear. He observed that the statute is designed to punish those who operate a motor vehicle during the period of license suspension if the individual's license was suspended or revoked for a second or subsequent offense of driving while intoxicated ("DWI"). Mr. Vercammen commented that the criminal penalty set forth in N.J.S. 2C:40-26(b) was not meant to be imposed upon those who were arrested while operating a motor vehicle during the "gap time." In his opinion, individuals who operate a motor vehicle during this "gap time" and are charged with N.J.S. 2C:40-26(b) are being "overcharged" by the police. Mr. Vercammen also stated that it was the duty of the Prosecutor to ensure that officers understood this section of the law.

In New Jersey, each prosecutor functions as the chief law enforcement officer of their vicinage. The prosecutor is required to use all reasonable diligence to detect, arrest, indict, and convict those who violate the criminal laws of New Jersey. Additionally, the duty of the prosecutor is to seek justice in a criminal case, not merely convict. In performing this function, a prosecutor is required to comply with the Rules of Professional Conduct.<sup>22</sup> Thus, if a prosecutor were to receive a case with facts similar to those present in *Torella*, absent extraordinary circumstances, it would be incumbent upon the prosecutor to request the dismissal of the indictment against the defendant. Finally, Mr. Vercammen noted that as the chief law enforcement officer in his vicinage, the prosecutor would be duty bound to educate officers on the law as set forth in *Perry* and its progeny.

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<sup>21</sup> Kenneth Vercammen, Esq. is: Municipal Public Defender in the Borough of Metuchen; the Past President of the Middlesex County Municipal Prosecutor's Association; and, a Certified Municipal Court Law Attorney.

<sup>22</sup> See *Berger v. United States*, (U.S. 1935); American Bar Association Standard 1.1(c), The Prosecution Function (1971); Comment, R.P.C. 3.8; EC 7-13

*New Jersey Police Traffic Officers' Association*

Laura Tharney attended the New Jersey Police Traffic Officers' Association (NJPTOA) and briefly discussed with its members the operation of a motor vehicle after the period of suspension, but before reinstatement of one's driving privileges. During the discussion several officers noted that in some municipalities a driver may not be charged "at the scene" with a violation of N.J.S. 2C:40-26(b). In those vicinages, the officers will wait until they have had the opportunity to review the offending driver's abstract. If the officer believes that the driver of the vehicle was driving in violation of N.J.S. 2C:40-26(b), the officer will then issue a complaint-warrant. Other officers indicated that they are able to use their on-board computer systems and make a determination whether the driver is currently driving during the suspension period, in violation of N.J.S. 2C:40-26(b); or, whether they are driving during the "gap time." Depending upon the municipality, not everyone is trained to conduct a "real-time" computer examination. The general consensus of the NJPTOA is that the reading and interpretation of the statute is "training issue" and not an issue that requires an amendment to the current statute.

The difficulty with cases such as *Perry* and *Torella* is that prosecutorial review and judicial determinations to amend or dismiss a complaint frequently come at a cost. The cost involved in later determining that a defendant has been charged under the wrong statute is the deprivation of the accused's liberty and freedom.

Individuals who are "wrongly" charged under N.J.S. 2C:40-26(b), could be subjected to incarceration for up to 48 hours. Individuals charged with a complaint-warrant rather than a traffic summons would be required to undergo a "risk assessment" before being released from custody.

Effective January 1, 2017, the New Jersey Constitution was amended to permit pretrial detention. Article I, section 11 of the New Jersey Constitution now provides:

...Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.<sup>23</sup>

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<sup>23</sup> N.J. Const. art. I, § 11.

New Jersey Statute 2A:162-16 also became effective on January 1, 2017. Section a. of this statute provides, in relevant part:

An eligible defendant, following the issuance of a complaint-warrant...shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions of release... and for the court to issue a pretrial release decision.

A court is required to make a pretrial decision for an eligible defendant without unnecessary delay.<sup>24</sup> This decision, however, may be rendered 48 hours after the defendant's commitment to jail.<sup>25</sup> During this period of confinement, the pre-trial services program has an opportunity to prepare a recommendation to the court regarding appropriate conditions of pretrial release and the level of monitoring that the court should impose upon the defendant.

Individuals who operate a motor vehicle during "gap time" should not be charged with a violation of N.J.S. 2C:40-26(b). Individuals who operate a motor vehicle during "gap time" should not have to spend up to 48 hours in jail, or longer if they are not deemed eligible for pre-trial release. Individuals who operate a motor vehicle during "gap time" should not have to face the consequences of having been arrested, only to later have the charges amended or dismissed entirely.

### **Conclusion**

It appears that the language of N.J.S. 2C:40-26 is clear to the judiciary. It further appears that the language of the statute is clear to most police officers. Cases such as *Perry* and *Torella*, however, bring to the fore the realistic possibility that a motor vehicle stop may result in the driver being charged with a violation of a criminal statute rather than a motor vehicle statute. After being charged, this individual must await prosecutorial review or a judicial determination that they should not have been charged under New Jersey's criminal statute.

This topic presents a situation where outreach and research did not lead Staff to a uniform consensus on this issue. Staff, therefore, asks for the Commission's guidance to determine whether N.J.S. 2C:40-26(b) should be clarified to explicitly provide that an individual who operates a motor vehicle beyond the determinate sentenced term of suspension, but before reinstatement should be charged with N.J.S. 39:3-40 and not N.J.S. 2C:40-26(b).

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<sup>24</sup> N.J.S. 2A:162-17.

<sup>25</sup> N.J.S. 2A:162-16(a).