

\*\*\*\* New, or amplified, portions of the Revised Draft Tentative Report have been underscored for ease of Commission review. The underscore will be removed prior to the release of this Report \*\*\*\*



## NEW JERSEY LAW REVISION COMMISSION

### **Revised Draft Tentative Report to Clarify N.J.S. 2C:40-26(b) so that an Individual Who Operates a Motor Vehicle Beyond the Determinate Sentence of Suspension, but Before Reinstatement, is not Charged with a Violation of the Criminal Code.**

**March 5, 2018**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **May 14, 2018**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Samuel M. Silver, Counsel  
New Jersey Law Revision Commission  
153 Halsey Street, 7th Fl., Box 47016  
Newark, New Jersey 07102  
973-648-4575  
(Fax) 973-648-3123  
Email: [sms@njlrc.org](mailto:sms@njlrc.org)  
Web site: <http://www.njlrc.org>

## Executive Summary

This project was brought to the attention of the Commission by the Court's determination in *State v. Torella*.<sup>1</sup> In that case, the Appellate Division considered the proper interpretation of N.J.S. 2C:40-26(b), when the act of driving occurs beyond the determinate sentenced term of suspension, but before reinstatement of the operator's driving privileges.

The *Torella* Court, citing the holding in *State v. Perry*<sup>2</sup>, concluded that driving under such circumstances does not constitute criminal conduct.<sup>3</sup> The statute "criminalizes the operation of a motor vehicle only during the court-ordered period of suspension [for the DWI offenses], not thereafter."<sup>4</sup> The "administrative" portion of the suspension, however, continues until the driver's license is reinstated by the Director of the Motor Vehicle Commission ("MVC").

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

## Case Law Background

The following pages discuss the case law context for the consideration of this issue.

### *State v. Zalta*<sup>5</sup>

On May 24, 1985, after being stopped for various motor vehicle violations, the defendant was charged with driving while being on the revoked list.<sup>6</sup> The defendant's license had been suspended several years earlier.<sup>7</sup> On January 25, 1982, the suspension of the defendant's driving privileges was extended by the Director of the Division of Motor Vehicles.<sup>8,9</sup> It is undisputed that from January 25, 1982, until the date of his arrest on May 24, 1985, the defendant never sought

---

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

<sup>2</sup> *State v. Perry*, 439 N.J. Super. 514, 519 (App. Div.), *certif. denied* 222 N.J. 306 (2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *State v. Zalta*, 217 N.J. Super. 209 (1987).

<sup>6</sup> *State v. Zalta*, 217 N.J. Super. 209, 211 (1987).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> N.J.S. 39:2A-4 establishes the New Jersey Motor Vehicle Commission as the successor to the Division of Motor Vehicles.

to restore his driving privileges.<sup>10</sup> The defendant argued that at the end of his six month suspension he was no longer on the revoked list.<sup>11</sup> He also proffered that his driving privileges had simply expired and that he was only subject to a charge for driving while unlicensed, contrary to N.J.S. 39:3-10.<sup>12,13</sup> The Appellate Division, however, disagreed.<sup>14</sup>

The issue before the court in *Zalta*, was whether the Director of the Division of Motor Vehicles was “empowered to keep a license in suspension beyond the determinate period of suspension imposed by the municipal court.”<sup>15</sup> In reaching its decision, the Court confirmed that the Director of the Division of Motor Vehicles has the following authority: unqualified licensing jurisdiction<sup>16</sup>; the power to suspend or revoke driving privileges for any violation of the Motor Vehicle Act - or any other reasonable grounds<sup>17</sup>; the discretion to determine the manner by which driving privileges shall be restored<sup>18</sup>; and the power to charge a fee for the restoration of a license<sup>19</sup>. The Court concluded that the Director is empowered to keep a license in suspension beyond the determinate period of suspension imposed by the municipal court.<sup>20</sup>

According to the *Zalta* Court, the suspension of driving privileges is not necessarily punitive in purpose.<sup>21</sup> The Court also commented on the determinate suspension period imposed under the Motor Vehicle Act or regulations. The Court held,

“[t]he determinate suspension period... is a mandatory consequence of a conviction, not a measure of the maximum period of time the director may keep a license in suspension on any reasonable grounds under his distinct statutory powers.<sup>22</sup> The ability to keep a license in infinite suspension is “for the prospective safety and protection of the traveling public....”<sup>23</sup>

---

<sup>10</sup> *Id.* at 212.

<sup>11</sup> *Id.*

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

<sup>13</sup> N.J.S. 39:3-10 Driver’s licenses. “A person shall not drive a motor vehicle on a public highway in this State unless the person... is in possession of a ...basic driver’s license issued to that person in accordance with this article.... A person violating this section shall be subject to a fine not exceeding \$500 or imprisonment in the county jail for not more than 60 days, but, if the person has never been licensed to drive in this State or any other jurisdiction, the applicant shall be subject to a fine of not less than \$200 and, in addition, the court shall issue an order to the commission requiring the commission to refuse to issue a license to operate a motor vehicle for a period of not less than 180 days.”

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 213.

<sup>16</sup> N.J.S. 39:3-10.

<sup>17</sup> N.J.S. 39:5-30.

<sup>18</sup> N.J.S. 39:5-32.

<sup>19</sup> N.J.S. 39:3-10(a).

<sup>20</sup> *State v. Zalta*, 217 N.J. Super. at 213.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Following that logic, the court concluded that an “administrative suspension” is seen as an “auxiliary remedial sanction” available to the Director of the Motor Vehicle Commission.<sup>24</sup>

*State v. Torella*

The case of *State v. Torella* examined whether an individual may be found criminally liable for driving with a license that had been suspended for certain driving while intoxicated (DWI) offenses, after the court imposed period of suspension for those offenses ends but before the license has been formally reinstated by the Motor Vehicle Commission.<sup>25,26</sup> In 2001 and 2002 the defendant in *Torella* had been convicted of a series of DWI offenses which led to the suspension of his driver’s license.<sup>27</sup> He failed to restore his license with the Motor Vehicle Commission (MVC) after the suspension ended and was arrested twice in 2012 for driving with a suspended license.<sup>28</sup> The officer arrested the defendant for driving with a suspended license.<sup>29</sup> In 2013, the a grand jury returned two indictments charging the defendant with fourth-degree operating a motor vehicle during the period of license suspension, contrary to N.J.S. 2C:40-26(b).<sup>30</sup>

The criminal statute, N.J.S. 2C:40-26(b), 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>31</sup>

On appeal, the State relied upon the holding in *State v. Zalta*.<sup>32</sup> The State argued that within the statute the phrase “period of license suspension” should include the period after the determinate sentence for the underlying offense has concluded but before restoration.<sup>33</sup> The defendant maintained that the indictments against him should be dismissed because his arrest occurred after the expiration of his court-ordered suspension for his DWI offenses.<sup>34</sup> It was uncontested that the defendant operated a motor vehicle 8 years after his court imposed

---

<sup>24</sup> *Id.*

<sup>25</sup> This period is commonly referred to as “gap time.”

<sup>26</sup> See n. 9 regarding references to Motor Vehicle Commission.

<sup>27</sup> 2015 WL 11391309 at \*1.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> N.J.S. 2C:40-26(b).

<sup>32</sup> *State v. Torella*, 2015 WL 11391309 at \* 2 (N.J. App. Div. 2016).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

suspension for his DWI offenses. <sup>35</sup> It is also unchallenged that the defendant operated his vehicle prior to the restoration of his driving privileges.<sup>36</sup>

The *Torella* Court, 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>37</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>38</sup>

At the core of N.J.S. 2C:40-26 is its criminal penalties. The statute was designed to “create penalties for persons whose driver’s licenses are suspended for certain drunk driving offenses and who, while under suspension for these offenses, unlawfully operate a vehicle.”<sup>39</sup> The statute is intended to criminalize the operation of a motor vehicle **only** when the operator is serving the court imposed term of suspension and not thereafter.<sup>40</sup>

#### *State v. Fletcher*<sup>41</sup>

In addition to *State v. Perry*<sup>42</sup> and *State v. Torella*,<sup>43</sup> the Appellate Division recently commented on the clarity of N.J.S. 2C:40-26 in the August 2017 case of *State v. Fletcher*.<sup>44</sup> In *Fletcher*, after being found guilty of driving while intoxicated for a second time, the defendant was sentenced as a first offender and his license was suspended.<sup>45</sup> Eight days later, Fletcher was arrested for operating a motor vehicle with a suspended license.<sup>46</sup> He was subsequently indicted for fourth-degree operating a motor vehicle during a period of license suspension pursuant to

---

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> *State v. Torella*, 2015 WL 11391309 at \*3.

<sup>38</sup> *Id.* at \*3 (citing *Perry*, 439 N.J. Super. at 525–26).

<sup>39</sup> *State v. Kiefer*, 2016 WL 1092753 \*1 (2016) *emphasis original*; citing, *Assembly Law and Public Safety Committee, Statement to A. 4303 (Dec. 3, 2009)*.

<sup>40</sup> *State v. Kiefer*, 2016 WL 1092753 \*2 (2016).

<sup>41</sup> *State v. Fletcher*, 2017 WL 3495783 (App. Div. 2017).

<sup>42</sup> *State v. Perry*, 439 N.J. Super. 514 (App. Div. 2015).

<sup>43</sup> *State v. Torella*, 2015 WL 11391309 (N.J. App. Div. 2016).

<sup>44</sup> *State v. Fletcher*, 2017 WL 3495783 (App. Div. 2017).

<sup>45</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>46</sup> *Id.* at \*1.

N.J.S. 2C:40-26(b).<sup>47</sup> The trial court judge dismissed the defendant's motion to dismiss the indictment. The defendant appealed his conviction.<sup>48</sup>

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). The Court began its opinion by noting, “[t]he plain, statutory language is the best indicator of legislative intent.”<sup>49</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>50</sup> The Court found, “[h]ere, we consider two statutes, neither of which is ambiguous.”<sup>51</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>52</sup>

Admittedly, *State v. Fletcher* presented the Court with circumstances different from 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.

### Statutory Provisions

The defendants in *State v. Perry* and *State v. Torrella* did not operate motor vehicles during the “court-ordered period of suspension.” Rather, they operated their motor vehicles during the period of “administrative suspension” – the time after the expiration of the determinate sentence but before the restoration of their driving privileges by the Motor Vehicle Commission. Consistent with the holding of the Court in *State v. Zalta*<sup>53</sup>, there is a motor vehicle statute with which to charge those who operate a motor vehicle after the court imposed suspension period has expired but before having their driving privileges have been restored by the MVC.

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

---

<sup>47</sup> *Id.* at \*1.

<sup>48</sup> *State v. Fletcher*, 2017 WL 3495783 (App. Div. 2017). at \*1, the defendant entered a conditional guilty plea, reserving his right to appeal the trial court's denial of his motion to dismiss the indictment.

<sup>49</sup> *Id.* at 2 citing *State v. Perry*, 439 N.J. Super. 514, 523 (App. Div. 2015).

<sup>50</sup> *Id.* at \*2.

<sup>51</sup> *Id.* at \*2.

<sup>52</sup> *Id.* at \*2 (*Emphasis added*).

<sup>53</sup> See discussion of *State v. Zalta*, 217 N.J. Super. 209 (1987), *supra*.

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**”, should be charged with a motor vehicle violation such as N.J.S. 39:3-40 and not a criminal violation of N.J.S. 2C:40-26(b). Individuals remain “suspended” indefinitely until they satisfy the fee(s) associated with the underlying suspension.<sup>54</sup>

In *State v. Sandora* the defendant neglected to pay three parking tickets.<sup>55</sup> As a result, of this failure to satisfy the fines associated with these parking tickets, Sandora's license was suspended for 180 days.<sup>56</sup> After paying the tickets, the defendant was advised to go to the Motor Vehicle office to seek the reinstatement of his license.<sup>57</sup> Prior to the reinstatement of his license, the defendant was stopped for going straight through an intersection from the “left turn only” lane.<sup>58</sup> After receiving this summons, but prior to its adjudication, the defendant had his driving privileges restored by the MVC.<sup>59</sup> Relying on the holding in *State v. Zalta*<sup>60</sup> the Appellate Division found that the operation of a motor vehicle after the period of suspension has expired but prior to the restoration constitutes a violation of N.J.S. 39:3-40.<sup>61</sup>

In an attempt to clarify N.J.S. 2C:40-26(b), the Commission asked Staff to explore whether there is another statute with which to charge the operator of a motor vehicle stopped under facts similar to those in *State v. Torella*. Under these circumstances, the Commission would like to examine whether the phrase “during the period of suspension,” should be limited to the court-imposed period of license suspension. With these parameters the Commission has asked Staff to examine the use of N.J.S. 39:3-29, the statute involving the inability of a driver to produce a valid license when stopped by a law enforcement official.

The motor vehicle statutes require the operator of a motor vehicle to possess a driver's license, and other related documents, at all times when in charge of a motor vehicle on the highways of this State.<sup>62</sup> Furthermore, “the driver or operator shall exhibit his driver's license...

---

<sup>54</sup> N.J.S. 39:3-10 and see the discussion of *State v. Zalta*, 217 N.J. Super. 209 (1987), *supra*. See *State v. Sandora*, 272 N.J. Super. 206, 207-208 (App. Div. 1994) (by virtue of the defendant's failure to restore his license following period of revocation, his license remained suspended for purposes of N.J.S. 39:3-40); See *State v. McDonald*, 211 N.J. 4, 27 (2012) (the defendant's license had not been restored following a prior suspension and since the driver's license was not restored, it remained suspended); and see **Figure 1**.

<sup>55</sup> *State v. Sandora*, 272 N.J. Super. 206 (App. Div. 1994).

<sup>56</sup> *Id.* at 207.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *State v. Zalta*, 217 N.J. Super. 209 (1987)

<sup>61</sup> *State v. Sandora*, 272 N.J. Super. at 208.

<sup>62</sup> N.J.S. 39:3-29.

when requested to do so by a police officer or judge, while in the performance of the duties of his office...”<sup>63</sup> It follows that in these situations the operators of the motor vehicles cannot exhibit a driver’s license at the time of the motor vehicle stop, contrary to N.J.S. 39:3-29.

In an attempt to clarify N.J.S. 2C:40-26(b) a reference to N.J.S. 39:3-10 or 39:3-29 would represent a shift in the existing paradigm.<sup>64</sup> To ascertain the viability of the requested statutory reference, Staff will seek additional comments from practitioners and stakeholders in this field.

FIGURE 2.

STATUTE	LANGUAGE	PENALTY	CASE LAW
39:3-10  (Requirement of driving with a valid license)	A driver shall not drive a motor vehicle on a public highway in this State unless the person [...] is in possession of a [...] basic driver’s license issued to that person in accordance with this article.	(a) <u>Unlicensed</u> : \$0-\$500 fine; or 0-60 days in jail;  (b) <u>Never licensed</u> : \$200-\$500 fine or 0-60 days in jail; 6 month MVC refuse to issue a license.	<i>State v. Zalta</i> , 217 N.J. Super. 209, 212 (App. Div. 1987): Defendant contends that at the end of the six-month period of suspension, he was no longer on the revoked list; his New Jersey driving privileges had simply expired and he was thus only subject to a charge for driving while unlicensed, contrary to N.J.S.A. 39:3-10. We disagree.
39:3-29  (Not having valid credentials in one’s possession).	The driver’s license [...] shall be in the possession of the driver or operator at all times when he is in charge of a motor vehicle on the highways of this State.	Any person violating this section shall be subject to a fine of \$150, except that if the person is a driver or operator of an omnibus [...] the amount of the fine shall be \$250.	The Court in <i>State v. Zalta</i> , 217 N.J. Super. 209, 212 (App. Div. 1987) stressed its assessment that “... a person of ordinary intelligence acting in good faith would interpret the phrase “during the period of ... suspension ...” under N.J.S.A. 39:3-40 to mean that his suspension would continue until actual restoration of his license by the director. See <i>State v. Cameron</i> , 100 N.J. 586, 591, (1985); <i>State v. Lee</i> , 96 N.J. 156, 166 (1984); <i>State v. Pickens</i> , 124 N.J. Super. 193, 196, (App. Div.), certif. den. 63 N.J. 581 (1973).
39:3-40  (Driving while license is suspended).	No person to whom a driver’s license has been refused or whose driver’s license [...] has been suspended or revoked [...] shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.	(a) 1st Offense: \$500 fine.  (b) 2nd Offense: \$750 fine; 1-5 days in the county jail.  (c) 3rd Offense: \$1,000 fine; 10 days in the county jail.  Upon conviction court shall impose or extend period of suspension up to 6 months.  45 days imprisonment if while operating a vehicle in violation of this section a person is involved in an accident resulting in personal injury to another person.  If person drives while under suspension for a DWI they will be fined an additional \$500 and have their license suspended for 1-2 years and could go to jail for up to 90 days.	<i>State v. Zalta</i> , 217 N.J. Super. 209 (App. Div. 1987): The Director of MVC is empowered to keep a license in suspension beyond the determinate period of suspension imposed by the Municipal Court.  <i>State v. Sandora</i> , 272 N.J. Super. 206, 207-208 (App. Div. 1994): by virtue of the defendant’s failure to restore his license following period of revocation, his license remained suspended for purposes of N.J.S. 39:3-40).  <i>State v. McDonald</i> , 211 N.J. 4, 27 (2012): the defendant’s license had not been restored following a prior suspension and since the driver’s license was not restored, it remained suspended.

<sup>63</sup> *Id.*

<sup>64</sup> See *State v. Zalta*, 217 N.J. Super. at 212, (the phrase “during the period of ... suspension ...” under N.J.S.A. 39:3-40 means that the suspension continues until actual restoration of his license by the Director and rejecting defendant’s argument that he was merely an unlicensed driver contrary to N.J.S. 39:3-10). See also *State v. Cameron*, 100 N.J. 586, 591, (1985); *State v. Lee*, 96 N.J. 156, 166 (1984); *State v. Pickens*, 124 N.J. Super. 193, 196, (App. Div.), certif. den. 63 N.J. 581 (1973). See also cases set forth in n. 55.

## Outreach

Considering the foregoing, Staff engaged in outreach to determine why individuals such as *Perry* and *Torella* were arrested and charged under N.J.S. 2C:40-26(b). A certified municipal court law attorney and representatives from the New Jersey Police Traffic Officer's Association (NJPTOA) provided insight into this issue.

### Municipal Prosecutor

Staff spoke with Kenneth Vercammen, Esq.,<sup>65</sup> concerning the issues that arose in both *State v. Perry* and *State v. Torella*. Mr. Vercammen advised Staff that it is 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". 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 to convict.<sup>66</sup> Thus, if a prosecutor were to receive a case with facts like those 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.

### New Jersey Police Traffic Officers' Association

On November 01, 2017, Laura Tharney attended the New Jersey Police Traffic Officers' Association (NJPTOA) meeting 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 that discussion, several officers noted that in some municipalities a driver may not be

---

<sup>65</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>66</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

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 can 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”, although not every officer is trained to conduct a “real-time” computer examination. The 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.

### Impact of Criminal Justice Reform

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>67</sup>

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.

---

<sup>67</sup> N.J. Const. art. I, § 11.

A court is required to make a pretrial decision for an eligible defendant without unnecessary delay.<sup>68</sup> This decision, however, may be rendered 48 hours after the defendant's commitment to jail.<sup>69</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 charged with a complaint-warrant rather than a traffic summons are required to undergo a "risk assessment" before being released from custody. Under the present system, even those who are "wrongly" charged under N.J.S. 2C:40-26(b), may be incarcerated for up to 48 hours.

Research and outreach supports the position that 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, 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 will remain incarcerated while they await the prosecutorial review of their case or a risk assessment hearing before the judiciary.

Since it appears that the addition of a single sentence that reflects the consensus of opinion on this issue can prevent a person from spending 48 hours in jail unnecessarily, the Commission proposes the following in an effort to effectuate that result.<sup>70</sup>

---

<sup>68</sup> N.J.S. 2A:162-17.

<sup>69</sup> N.J.S. 2A:162-16(a).

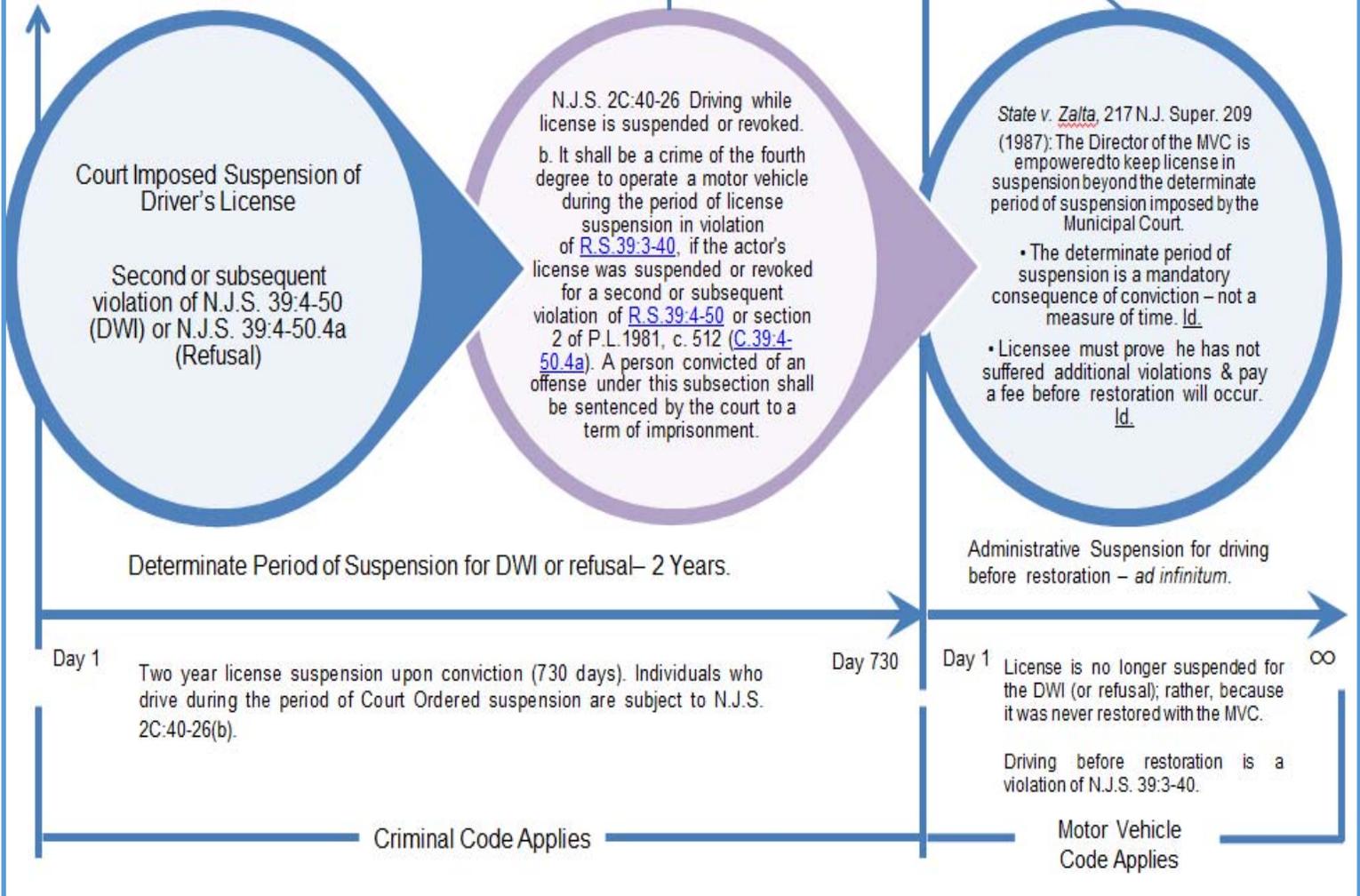
<sup>70</sup> New Jersey Law Revision Commission, Minutes of the Meeting of December 17, 2017, p.5.

**Figure 1:**

Legislative History: N.J.S. 2C:40-26 was designed to create penalties for persons whose driver's licenses are suspended for certain drunk driving offenses and who *while under suspension for these offenses*, unlawfully operate a motor vehicle. *Assembly Law and Public Safety Committee, Statement A. 4303 (Dec. 3, 2009).*

*State v. Perry*, 439 N.J. Super. 531-532: N.J.S. 2C:40-26(b) punishes those who drive while suspended for violations of DWI and refusal, by exposing them to the imposition of a criminal record and incarceration without parole.

*State v. Perry*, 439 N.J. Super. 531-532: N.J.S.: Criminalizing driving during the period of administrative suspension extending beyond the determinate suspension term for the DWI would not implement the legislative intent.



## Appendix

The full text of N.J.S. 2C:40-26(b), including three potential additions (shown with underline), based on research and outreach conducted to this time are as follows:

### Option 1:

It shall be a crime of the fourth degree to operate a motor vehicle during the court ordered 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. Persons who operate a motor vehicle beyond the determinate sentence of suspension for a violation of R.S. 39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a), but before reinstatement of their license, shall be charged with a violation of R.S. 39:3-10.

### Option 2:

It shall be a crime of the fourth degree to operate a motor vehicle during the court ordered 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. Persons who operate a motor vehicle beyond the determinate sentence of suspension for a violation of R.S. 39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a), but before reinstatement of their license, shall be charged with a violation of R.S. 39:3-29.

Option 3:

It shall be a crime of the fourth degree to operate a motor vehicle during the court ordered 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. Persons who operate a motor vehicle beyond the determinate sentence of suspension for a violation of R.S. 39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a), but before reinstatement of their license, shall be charged with a violation of R.S. 39:3-40.