

Driving on the Revoked List - a serious crime in New Jersey under certain circumstances

12/12/12

Traditionally, New Jersey has considered the offense of driving while the driver's license is suspended or revoked as a traffic matter, punishable by additional suspensions, fines, and short jail terms. However, in 2010, the New Jersey Legislature enacted a new statute, criminalizing the offense of driving a motor vehicle during a period of license suspension, if the license suspension was due to a second or subsequent violation of our DWI statutes, or for refusing to submit to an alcohol breath test.

Although the offense is classified as a 4th degree crime, the type of offense for which probation is a permissible sentence, the new law provides that "a person convicted of an offense under this subsection *shall be sentenced by the Court to a term of imprisonment.*" Fourth degree offenses carry a maximum term of imprisonment of eighteen months upon conviction. The statute was enacted on January 18, 2010. By its terms, the effective date of the new law was set for August 1, 2011, a year and a half subsequent to enactment.

In a recent case decided by the Appellate Division of the Superior Court, *State v. Christopher Carrigan*, a defendant convicted of this offense argued that the statute constituted an impermissible [ex post facto law](#) under the Federal and State Constitutions. He asserted that the enhanced penalties under the new law were not in effect when his prior suspensions were imposed, and those prior suspensions were now being relied upon to subject him to the enhanced penalties under the newly enacted statute.

The Law Division Judge who presided over the criminal charges filed against Mr. Carrigan under the new statute agreed with his position. The Law Division Judge concluded that the statute, as applied to Mr. Carrigan, violated ex post facto principles because the new statute served to increase the penalties imposed for DWI convictions that preceded the effective date of the new statute. Consequently, the Law Division Judge dismissed the criminal charge filed against Mr. Carrigan under the new law.

The State of New Jersey appealed the dismissal and, in an opinion released on November 15, 2012, the Appellate Division reversed the dismissal and reinstated the criminal charge. In rejecting the defendant's arguments that the new law constituted an impermissible ex post facto law, the Appellate Division concluded:

N.J.S.A. 2C:40-26(b) does not change the duration of the license suspensions that were previously imposed upon [the defendant] before the new law took effect. His 10-year suspensions duly imposed [by law], have not been lengthened. Nor is he prohibited during his period of suspension from doing anything that he could not have lawfully done before. The only thing that is different is that if defendant commits new offense by getting behind the wheel after August 1, 2011 [the effective date of the new law] while still under suspension, he now faces a criminal penalty for that new conduct. There is nothing unconstitutional about treating such prior offenses as enhancement factors for wrongful conduct that post-dates the new law.

As a result of this opinion, anyone serving a license suspension based upon a second or subsequent conviction for DWI or refusal to submit to a breath test, who now operates a motor vehicle during that period of suspension, faces conviction for a crime, and the prospect of a prison sentence. This may be a consequence

that was not known at the time that the prior DWI or refusal cases were resolved in court. A lack of awareness of the new law, or any argument based upon ex post facto issues, will not save the day.

Attorney

- Darren M. Gelber

Practice

- Criminal Defense