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DEFENDING A MUNICIPAL COURT APPEAL

A Primer for Assigned Counsel

Working Group on Pro Bono Attorney Training Materials—Municipal Court Appeals

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CHAPTER ONE – ASSIGNMENT

You have been assigned to represent an indigent defendant in a municipal court appeal. The purpose of this chapter is to explain how you were assigned a pro bono case.

In Madden v. Delran, 126 N.J. 591 (1992), the Supreme Court reaffirmed the bar's duty to represent indigent defendants without pay where the Legislature has made no provision for the Public Defender to represent defendants who are entitled to counsel. The Court recognized that it was placing a burden on the bar that should be more generally shared by the public at large. The Court said: "We realize it is the bar that is bearing the burden . . . . We trust that the bar understands the strong policy considerations that have persuaded us. As has so often been the case, it is the bar that makes the system work, often without compensation." Id. at 614.

Attorneys are assigned from the mandatory pro bono list to represent defendants who are appealing a municipal court decision. An appeal from a municipal court decision must be filed within 20 calendar days of the court's decision as per Rule 3:23-2. The Rule states that an appeal should be filed in the municipal court first and then, within five days of that filing, with the Superior Court.

Attorneys are assigned pro bono cases through the pro bono computer system which was developed, and is currently maintained, by the Administrative Office of the Courts. The Supreme Court in Madden chose the current system of pro bono assignments in an effort to spread the burden among as many attorneys as possible. The system maintains a list of attorneys eligible for pro bono assignment in each county. The attorneys are in the order mandated by the Supreme Court in Madden; that is, the attorneys are ordered by the number of pro bono cases the attorney has done in the past and then alphabetically. At the top of the list are the attorneys who have never been assigned a pro bono case, in alphabetical order. Next on the list are attorneys who have only been assigned one case, in alphabetical order, etc. Attorneys are called upon whenever their name reaches the top of the list. Notification is made by letter or phone call. The number of pro bono cases an attorney is required to do depends on the number of attorneys in the county and the number of pro bono assignments in that county.

When a pro bono attorney is needed, the pro bono coordinator assigns the case to the next attorney on the computer generated pro bono list. Attorneys are not required to do a certain **number** of hours per year; rather, attorneys are required to complete an assigned pro bono case, no matter how many hours that may require.

CHAPTER TWO-THE APPEAL PROCESS

You were assigned a pro bono municipal appeal matter. A municipal appeal may be filed by defendants and/or attorneys at any time within the required time limitations. A Notice of Municipal Court Appeal (Appendix A) is completed by defendants after the municipal court has rendered its decision. Additionally, the Transcript Request (Appendix B) and Certification of Timely Filing (Appendix C) are also required to be completed by defendants and/or attorneys and submitted to the municipal court. The municipal appeal is to be served on the appropriate prosecuting attorney. Please refer to (Appendix D), Determining the Prosecuting Attorney.

An appeal of a municipal court decision must be filed within 20 calendar days of the court's decision as per Rule 3:23-2. An appeal shall be filed in the municipal court first and then, within five days of that filing, a copy thereof shall be served on the prosecuting attorney and one copy shall be filed with the Criminal Division Manager's Office in the Superior Court. The 20 day time limit is an absolute and, according to court rules, not enlargeable. If it is received after the allotted time, the appeal is returned to the appellant.

Once an attorney has been assigned to the appeal, a pro bono letter is generated. Copies are provided to the Assignment judge, prosecutor's office, appellant, and municipal court with a notification to order the transcript (original and two copies) at the States expense. The attorney assigned to the case and the prosecutor are provided with a copy of the notice of appeal along with the pro bono letter. The original letter will be kept by the Superior Court Appeals Clerk.

If the person filing the appeal is incarcerated, a different pro bono letter is used. The only difference between the two letters is when the appellant is incarcerated, the name of the institution where the appellant is located is included so the attorney will be able to contact him or her. A copy of the pro bono letter is forwarded to the appellant at the appropriate jail or prison and also mailed to the appellant's home address. All other information will remain the same.

A notice fixing the date of the hearing is prepared after the transcript has been received and the date has been obtained from the judge's team leader. Copies are then mailed to the pro bono attorney, appellant, and prosecutor's office to the township/borough attorney, along with a copy of the transcript and calendar.

On the scheduled hearing date, the Superior Court judge reviews the transcript (produced from the audio recording of the trial) and any other evidence or legal papers from the trial and makes a decision regarding the case. New testimony or evidence is generally not admitted for the appeal.

CHAPTER THREE- BAIL AND STAYS

While an appeal is pending, an appellant may (1) seek a stay of non-custodial aspects of the municipal court sentence; (2) seek bail from the Superior Court if the appellant is in custody upon a sentence of incarceration by the municipal court. This chapter will discuss these two forms of relief.

A. Stay of Non-Custodial Aspects of Sentence

This section will review the relevant rules and the standard governing a request for a stay, and then offer practical advice regarding the request for a stay.

1. Relevant Rules

The authority for a stay pending appeal is found in both Part VII of the Rules of Court, governing municipal practice, and Part III, governing criminal practice.

Rule 7:13-2 invests stay authority in both the municipal court – "the court in which the conviction was had" – and the Superior Court – "the court . . . to which the appeal is taken." Rule 7:13-2 states: "Notwithstanding R. 3:23-5, a sentence or a portion of a sentence may be stayed by the court in which the conviction was had or to which the appeal is taken on such terms as the court deems appropriate."

Rule 3:23-5, in turn, addresses both forms of "Relief Pending Appeal" – bail and a stay. Subsection (a) refers to bail and is found in the discussion below regarding bail. Subsections (b) and (c) refer to stays of fine and probation. The stay-related subsections state:

> (b) Relief from Fine. A sentence to pay a fine, a fine and costs, or a forfeiture may be stayed by the court in which the conviction was had or to which the appeal is taken upon such terms as the court deems appropriate.
>
> (c) Relief from Order for Probation. An order for probation may be stayed if an appeal is taken.
>
> [R. 3:23-5].

Thus, although Rule 3:23-5 refers only to a stay of a fine, forfeiture, or probation, Rule 7:13-2 is not so limited and apparently authorizes the stay of any other non-custodial aspect of a sentence; for example, a community service obligation.

A separate rule provides for an automatic stay of a municipal court order suppressing evidence upon the State's timely appeal. Consequently, if a pro bono attorney represents a defendant as respondent on appeal, he or she should be aware that the suppression order shall be stayed. Rule 7:5-2(c) states:

> (1) Order Granting Suppression. An order granting a motion to suppress evidence shall be entered immediately upon decision of the motion. Within ten days after its entry, the municipal court administrator shall provide a copy of the order to all parties and, if the county prosecutor is not the prosecuting attorney, also to the county prosecutor. All further proceedings in the municipal court shall be stayed pending a timely appeal by the State, pursuant to R. 3:24. The property that is the subject of the suppression order shall, if not otherwise subject to lawful detention, be returned to the person entitled to it only after exhaustion by the State of its right to appeal.

Lastly, counsel should be aware that special provisions govern an application to stay an order of forfeiture of public office associated with a conviction of a disorderly person or petty disorderly persons offense involving or touching upon public office. See N.J.S.A. 2C:51-2(a)(2) (providing for forfeiture of office by anyone convicted of an offense involving or touching upon such office); N.J.S.A. 2C:51-2(e) (providing for waiver of forfeiture upon State's application in cases of disorderly persons or petty disorderly persons offense); N.J.S.A. 2C:51-2(c) (setting standard for stay of forfeiture pending appeal).

Counsel may also wish to compare the above-cited rules with the rules governing stays of sentence pending appeal to an appellate court. Rule 2:9-3(c) authorizes a stay of a fine or probation pending appeal but expressly provides that the court may require the appellant to deposit the fine and costs, to post a bond, or to submit to an examination of assets, or the court may restrain the appellant from dissipating assets.

2. Standard for Stay Pending Appeal

The Rules do not expressly dictate the factors the court must consider regarding a stay of non-custodial aspects of a sentence pending appeal. However, a court may be guided by the standard governing a stay of civil judgments. An appellant must satisfy three pre-conditions:

> (1) [I]rreparable harm will result from enforcement of the judgment pending appeal; (2) the appeal presents a meritorious issue, and movant has a likelihood of success on the merits; and (3) assessment of the relative hardship to the parties reveals that greater harm would occur if a stay is not granted than if it were.
>
> [McNeil v. Legislative Apportionment Comm'n, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting)].

The three-part test is the same test that applies to requests for injunctive relief, as set forth in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). McNeil v. Legislative Apportionment Comm'n, supra, 176 N.J. at 486 (LaVecchia, J., dissenting). See also In re: Commissioner of Insurance, 256 N.J. Super. 553, 560 (App. Div. 1992) (applying Crowe v. DeGioia injunction standards to request for stay pending appeal).

An applicant must establish each of the three factors by clear and convincing evidence. Waste Management of New Jersey, Inc. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). However, counsel should be mindful that, "although it is generally understood that all the Crowe factors must weigh in favor of injunctive relief, a court may take a less rigid view than it would after a final hearing when the interlocutory injunction is merely designed to preserve the status quo." Waste Management of New Jersey, Inc. v. Union County Util. Auth., supra, 399 N.J. Super. at 520. (citations omitted).

3. Practical Issues

Counsel seeking a stay should be aware of the following practical issues:

Requesting relief from municipal court. Some Superior Court judges may require the applicant to seek the stay first from the municipal court. Although the rules governing municipal appeals do not expressly require this, the analogous rules governing appellate practice do. See, R. 2:9-3(c) (stating that a fine or probationary sentence may be stayed by the trial court, and if denied, the application may be renewed before the appellate court); R. 2:9-5(b) (authorizing a stay of a civil judgment, but providing that the motion shall first be made to the court that entered the judgment and then, if denied, to the appellate court).

If a stay has not already been sought from the municipal court, counsel may want to inquire of the Law Division judge who will hear the stay application whether he or she requires the defendant to first seek the stay from the municipal court.

The 20-Day Stay. Some municipal court judges may stay all or a portion of their sentence for 20 days only. That period coincides with the time by which an appeal must be filed. If counsel enters the case before the 20-day stay expires, counsel will want to move swiftly to seek a stay from the Law Division. Pro bono counsel will usually enter the case long after such a 20-day stay has expired. However, execution of the sentence for one reason or another may not have been accomplished. Counsel will want to move swiftly to seek to restore the stay.

Cognizable Evidence. In satisfying the three-part test described above, counsel should be mindful that it is inappropriate to submit certifications of counsel regarding the alleged hardships or injury that the appellant would suffer. A certification or affidavit from the defendant, or other cognizable evidence, is required. R. 1:6-6.

"On such terms as the court deems appropriate". Counsel should be prepared to suggest conditions of the stay that would be appropriate under the circumstances of the case as authorized by Rule 7:13-2. For example, if a defendant is appealing a license suspension for a driving-under-the-influence conviction, a court may condition the stay upon installation of an ignition interlock device that would address to some extent the public's interest in removing impaired drivers from the roads, and thereby address the "balance of the equities" factor under Crowe. A court may also require regular drug testing as a condition of a stay if the case involved driving under the influence of drugs.

Confer with your adversary. Before filing your stay application, counsel would be well-advised to identify the assistant prosecutor who will be handling the matter and explore whether the State would consent to a stay and, if so, under what conditions. (See Appendix D) However, even if consent is obtained, counsel should still be prepared to justify the requested relief if required by the court.

B. Bail Pending Appeal

This section will review the relevant rules that expressly set forth the standard governing a request for bail pending appeal, and then offer practical advice regarding the request for bail.

1. Relevant Rules and Standards

The authority for bail pending appeal is found in both Part VII of the Rules of Court, governing municipal practice, and Part III, governing criminal practice. The municipal court judge has the authority to grant bail and indeed should impose bail according to the Rule, only if the court has significant reservations regarding defendant's appearance.

Rule 7:4-8 provides:

> When a sentence has been imposed and an appeal from the judgment of conviction has been taken, the trial judge may admit the appellant to bail within 20 days from the date of conviction or sentence, whichever occurs later. Bail after conviction may be imposed only if the trial judge has significant reservations about the appellant's willingness to appear before the appellate court. The bail or other recognizance shall be of sufficient surety to guarantee the appellant's appearance before the appellate court and compliance with the court's judgment. Once the appellant has placed bail or filed a recognizance, if the appellant is in custody, the trial court shall immediately discharge the appellant from custody. The court shall transmit to the vicinage Criminal Division Manager any cash deposit and any recognizance submitted.

However, if pro bono counsel's client is incarcerated when representation begins, the application for bail should be made to the Law Division, under Rule 3:23-5(a). That rule mandates the grant of bail. It states, "If a custodial sentence has been imposed, and an appeal from the judgment of conviction has been taken, the defendant shall be admitted to bail by a judge of the Superior Court in accordance with the standards set forth in R. 3:26-1a." (Emphasis added). Those standards are the same that govern pre-conviction bail in cases originating in Superior Court.

Rule 3:26-1(a) sets forth the factors that the court must consider:

> The factors to be considered in setting bail are: (1) the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature; (2) defendant's criminal record, if any, and previous record on bail, if any; (3) defendant's reputation, and mental condition; (4) the length of defendant's residence in the community; (5) defendant's family ties and relationships; (6) defendant's employment status, record of employment, and financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear, and, particularly, the general policy against unnecessary sureties and detention. In its discretion the court may order the release of a person on that person's own recognizance.

In applying these factors, counsel may argue that defendant is presumed innocent, inasmuch as the State must prove the defendant's guilt anew based on de novo review of the municipal court record. On the other hand, "the apparent likelihood of conviction" covered in Factor #1 may tend to support a higher bail, inasmuch as the municipal court already found the evidence sufficient to convict after a plenary trial or a plea of guilty.

Pro bono counsel should also be mindful that the court may impose conditions upon bail. "The court may also impose terms or conditions appropriate to the defendant's release including conditions necessary to protect persons in the community." R. 3:26-1(a). See, N.J.S.A. 2C:25-26(a) (stating that where a court releases on bail a defendant charged with a crime of domestic violence, "the court authorizing the release may as a condition of release issue an order prohibiting the defendant from having any contact with the victim….").

2. **Practical Issues**

Bail conditions in general. As noted above, the court has the power to impose conditions on bail. No-contact orders are commonly imposed as a condition of bail involving domestic violence or another act of violence against a person. However, counsel should be prepared to propose other conditions of bail that might assist in persuading the State and the court of the appropriateness of bail. For example, in a case of bail pending appeal from a DUI conviction involving a custodial sentence, the appellant may propose installation of an ignition interlock or restrictions on driving as a condition of bail.

No-contact conditions. Counsel should also be aware that a no-contact condition of bail is separate and distinct from no-contact restrictions in a domestic violence restraining order. Thus, if the alleged victim voluntarily dismisses the domestic violence complaint, and the restraints are consequently dissolved, the no-contact bail conditions would be unaffected. Moreover, the court may find that notwithstanding the dismissal of the domestic violence case, the bail conditions should remain in place. Indeed, in some cases, the victim may voluntarily dismiss the domestic violence complaint because the victim knows that the criminal case is still pending and she or he is protected by the no-contact condition of bail. The victim also may wish to avoid creating the impression that she or he is the one pressing charges, out of fear of retaliation.

Confer with your adversary. Before applying for bail, counsel may wish to confer with the prosecutor to determine if the request for bail can be made with consent. (See Appendix D)

CHAPTER FOUR- PREPARING THE APPEAL

You have received an appointment letter to represent an indigent defendant in his/her appeal (trial de novo on the record) to the Superior Court Law Division from a conviction in the municipal court. You have determined that the appeal has been properly filed and served and the transcripts of **all** the appearances in the court below have been ordered.

Once the transcript is received by the Superior Court, that court will enter an order fixing the dates for the filing of the defendant's brief, the State's response, and the hearing. After you have read the transcript, it is imperative that you contact both the defendant and the attorney (generally the municipal public defender) who tried the case below to assist you with the issues to be presented in the appeal.

It is important that you call the municipal court administrator and/or the Superior Court judge's law clerk to make certain that all of the exhibits that were introduced into evidence in the municipal court were transmitted to the Superior Court and that you have a copy of each of them. This is particularly important with respect to any audio/video recordings.

You must meet with your client to explain the procedure and to impress upon him/her that his/her failure to appear at the hearing renders the appeal subject to dismissal. Should the client fail to respond to a letter or phone call from you, you are obliged to make reasonable efforts to locate him/her. The client should be made to understand that testimony will not be taken, but that the court will rely upon oral argument, the brief, and the transcript(s) from the court below. You are now ready to brief the issues presented by the transcript and agreed upon by the client. (See Chapter Five.)

At the hearing, be prepared to carry the burden of moving forward. While the burden of proof has not shifted; i.e., the State must prove the defendant's guilt beyond a reasonable doubt, many courts will expect you to argue first since your client has already been convicted and it is his/her appeal. The transcript must support all of your arguments unless you are in the rare position where the Superior Court will permit the record to be supplemented. Some examples of this are when the record is incomplete, unintelligible, or when the court below erred in sustaining an objection to proffered evidence on behalf of the defense. The Superior Court has the option of remanding the matter back to the municipal court to complete the record.

You and your client must be prepared for sentencing. (See Chapter Seven) Your client may face the immediate execution of the sentence. In that case, he/she must be prepared to satisfy the fines, costs, restitution, and other penalties or make arrangements for time payments. Your client may be required to surrender his/her driver's license and perhaps even to be incarcerated. Any arguments and supporting evidence against aggravating and in favor of mitigating factors should be presented. For any charge alleging a violation of Title 39, the Motor Vehicle Code, you should have

and be familiar with your client's driving record. (Motor Vehicle Commission certified driver's abstract) Remember that any legal sentence imposed by the court below may not be increased on appeal. "However, the Law Division retains the power to correct an illegal sentence. (See Chapter Seven)." Finally, talk to attorneys who can give you insight as to the judge before whom you are appearing and the prosecutor who will be your adversary.

CHAPTER FIVE-BRIEF & TRIAL

I) Standard of Review

State v. Johnson, 42 N.J. 146 (1964)
State v. Loce, 267 N.J. Super. 102 (Law Div. 1991), aff'd o.b., 267 N.J. Super 10 (App. Div.) certif. denied, 134 N.J. 563 (1993)

With regard to the standard of review for this appeal, this is a trial de novo and as such, the court's "function is to determine the case completely anew on the record made in the municipal court, giving due, although not necessarily controlling, regard to the opportunity of the magistrate to judge the credibility of the witnesses." State v. Johnson, 42 N.J. 146, 157 (1964). Additionally, although the court "must make original findings and rulings on the evidence," the evidence to be considered is limited to the "record created in the municipal court." State v. Loce, 267 N.J. Super. 102, 104 (Law. Div. 1991), aff'd o.b., 267 N.J. Super. 10 (App. Div.), certif. denied, 134 N.J. 563 (1993).

II) Format of Brief

1) Letter Brief

a) Opening

Dear Judge _____,

Please accept this letter brief in lieu of a more formal brief in support of defendant's appeal from the denial of his Motion to Suppress, Conviction and Sentence entered in the Hamilton Township Municipal Court on November 2, 2005.

b) Procedural History – from first court appearance through filing of appeal

c) Statement of Facts

i) This is a trial de novo on the record made below. Facts taken from the transcript are cited as T (transcript) in municipal court there is often more than one hearing date, and a transcript from each date that will have a footnote at the first cite indicating the number of transcripts.

Example: T2, p.20, l.12-16

d) Legal Argument

i) Point I – Example – officer did not have probable cause to stop defendant's auto

ii) State did not prove defendant violated the statute beyond a reasonable doubt

iii) Etc.

e) Conclusion

III) Trial/Oral Argument

1) Defendant needs to be present

a) if the defendant is convicted again, he will need to be sentenced.

b) the original sentence is usually imposed but argument can be made for a lesser sentence if allowed by law.

2) Because it is a trial de novo, some judges may require the State to go first. On the other hand, some judges will require the defendant to make his argument first.

3) Keep in mind the judge will have reviewed the briefs so hit the high points in your argument and be prepared to field questions from the court.

See Appendix E for Sample Brief

CHAPTER SIX – COMMON ISSUES

There are a number of common issues that arise in the context of a municipal court appeal. Some issues may be procedural, such as defects associated with the taking of a guilty plea, while others may be more substantive, such as motions to suppress evidence, motions to exclude a confession, and sentencing errors. In all cases, a careful reading of the transcript is necessary to identify those issues to raise on appeal. As counsel handling an appeal, you must be aware of the standard of proof associated with various aspects of the municipal court trial. Proof beyond a reasonable doubt does not apply across the board to every decision made by a municipal court judge.

1. Standards of Proof

a. Probable Cause

Probable cause must be established for issuance of a complaint. There must be sufficient facts established to demonstrate that a violation of a state statute or municipal ordinance occurred and that the defendant committed it. This standard is generally applied to the initial issuance of process, the complaint, and the issuance of a search warrant. Probable cause has been defined in case law as follows:

> [M]ore than mere naked suspicion but less than legal evidence necessary to convict. It is not a technical concept but rather one having to do with "the factual and practical considerations of every day life" upon which reasonable men, not constitutional lawyers, act. It has been described by this Court as a "well grounded suspicion" that a crime has been or is being committed. [State v. Waltz, 61 N.J. 83, 87 (1972); citations omitted].

b. Reasonable and Articulable Suspicion

This standard of proof must be met by the State to justify an investigative detention and frisk for weapons, to effect a motor vehicle stop, and to seek consent to perform a non-custodial warrantless search. The reasonableness of an officer's suspicion is judged from the standpoint of a reasonably prudent officer. Due weight must be given to the reasonable inferences an officer is entitled to draw from the facts the officer encounters in light of his experiences. State v. Lund, 119 N.J. 35, 45 (1990). The standard is not satisfied by a law enforcement officer relying on an un-particularized suspicion or hunch. This standard of proof is often seen in DWI cases where the State must justify the underlying motor vehicle stop. The facts in the record should be applied to the question: was there a reasonable and articulable suspicion that the defendant's operation of a motor vehicle violated some part of the motor vehicle code?

c. Preponderance of the Evidence

The standard of proof known as “preponderance of the evidence” is applicable in a number of municipal court proceedings, such as motions to suppress evidence, penalty enforcement actions, and parking ticket cases. It is the level of proof usually needed in civil cases. To prevail, the State must prove the allegations are more likely true than not true.

d. Clear and Convincing Evidence

The clear and convincing evidence standard is defined as that amount of admissible evidence that produces in the mind of the judge a firm belief or conviction as to the truth of facts that the municipal prosecutor is trying to prove. It has further been defined as evidence that is so clear, direct, and convincing so as to enable the judge to come to a clear conviction without hesitancy of the precise facts in issue. In Re Seaman, 133 N.J. 67, 74 (1993). The municipal prosecutor must meet this standard of proof to establish foundational requirements for the admissibility of an Alcotest, or the former Breathalyzer, test result. It also applies to the State in certain motions to suppress evidence where the issue involves consent to search, inevitable discovery of evidence, or the independent source rule.

e. Proof Beyond a Reasonable Doubt

The prosecutor must satisfy this standard of proof in order to secure a conviction in criminal and quasi-criminal proceedings, traffic offenses, and municipal ordinance violations. This standard is also applied to the State when the prosecutor seeks to establish the voluntariness of a confession or when attempting to disprove an affirmative defense. The New Jersey Supreme Court defined this standard in State v. Medina, 147 N.J. 43, 61 (1996), cert. denied, 520 U.S. 1190 (1997) in a jury trial, but the definition applies to a judge acting as a fact finder as well:

> A reasonable doubt is an honest and reasonable uncertainty in your mind about the guilt of the defendant after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would have.
>
> Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find

> him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.

f. Conclusion

You must examine the record carefully to determine the issues to raise on appeal and argue the standard of proof that applies.

2. Legal Error

No trial is perfect. Because municipal appeals are tried de novo on the record before the Superior Court judge, it is not necessary to rely on only those errors that were subject to an objection by the defendant or defense counsel. In theory, all errors are automatically preserved in a de novo hearing. However, many, if not most, errors are harmless. The better practice is to focus the appeal on those errors that had the capacity to cause an unjust result. See generally, R. 2:10-2.

3. The Guilty Plea

The procedural requirements of a legally sufficient guilty plea sometimes form the basis of an issue on appeal. R. 7:6-2(a)(1). A municipal court judge must be satisfied that every guilty plea is entered voluntarily with an intelligent understanding not only for the charge or charges but also the consequences of the plea; namely, what are the penalties that will be faced as a result of pleading guilty? If a plea is entered by a self-represented defendant, the judge must be sure there is an intelligent waiver of counsel. Every plea must be supported by a factual basis.

A defendant must make a knowing and intelligent plea. To ensure this is the case, a municipal court judge must make sure that the defendant understands the charge and the consequences of pleading guilty. The defendant should be advised of the range of penalties, and in the case of a traffic matter, that notice of the guilty plea will be sent to the New Jersey Motor Vehicle Commission and become part of the defendant's New Jersey driving record. Defendants licensed in another state should be advised that their home state will be notified of the violation.

The transcript should reflect that the municipal court judge spoke to the defendant directly explaining the consequences of a guilty plea. The transcript should also contain an acknowledgement by the defendant that he or she understands the charge, the consequences of the guilty plea, and that the plea is entered freely and voluntarily, not as a result of threats or coercion, or the payment of any consideration.

For a defendant who was not represented by counsel at the municipal court level, the record should contain a knowing and voluntary waiver of the right to counsel and

court-appointed counsel for those cases that subject a defendant to a consequence of magnitude. A consequence of magnitude is any charge that exposes a defendant to a jail sentence, suspension of driver's license, or suspension of a defendant's right to apply for a driver's license, or fines and other penalties that will exceed $750.00. There should be a colloquy between a defendant and the municipal court judge about the risks of representing oneself while not being familiar with the Rules of Court, the Rules of Evidence, all potential defenses, and the way to effectively cross-examine witnesses. Failure to knowingly waive one's right to counsel may be an issue to raise on appeal.

Lastly, all guilty pleas must be supported by a factual basis, an admission from the defendant that he or she committed all the elements of the offense charged. The factual basis must come from the defendant directly, not just representations from defense counsel. This requirement applies to every guilty plea involving criminal, traffic, and ordinance violations. This ensures that the defendant is in fact guilty of the offense and subject to the sentence. State v. Pineiro, 385 N.J. Super. 129 (App. Div. 2006).

4. Conditional Guilty Plea

Some transcripts may contain a conditional guilty plea. This is authorized by R. 7:6-2(c). A conditional guilty plea allows a defendant to plead guilty while reserving the right to appeal from certain pre-trial motions. It must be done with the consent of the prosecutor and approval of the court. For instance, a judge may rule against a defendant on a motion to suppress evidence or a motion that there was no reasonable and articulable basis for a motor vehicle stop or a motion to exclude a confession. After such a ruling goes against a defendant, there may be no other defenses to the charge. Therefore, the Rules of Court allow a defendant to enter a conditional guilty plea so as not to waste time on a trial, while preserving a defendant's right to appeal the adverse ruling on the motion.

5. Motions to Suppress Evidence

Many municipal court cases are decided on motions to suppress evidence. The motions may be filed in a variety of contexts, such as:

- Lack of a reasonable and articulable suspicion that defendant committed a violation of the motor vehicle code or other law justifying the police stop of the defendant. The motion is made to suppress all evidence collected after the stop.

- Lack of probable cause to believe that a defendant is under the influence of an alcoholic beverage, even if there was a valid stop, justifying the arrest of the defendant. The motion is often made to suppress evidence collected as a result of the arrest in an effort to suppress the Alcotest results, which are obtained as a "fruit" of the arrest.

- A warrantless search of a defendant's person during a street encounter by law enforcement.

- A warrantless search of defendant's automobile after a roadside stop to enforce the motor vehicle laws, See, State v. Pena-Flores, 198 N.J. 6 (2009).

- A search of a residence conducted after defendant, or someone else, gave consent to law enforcement to enter the residence.

Municipal court jurisdiction extends only to motions to suppress evidence seized as a result of a warrantless search. Motions to suppress evidence seized pursuant to a search warrant are heard in the Superior Court, R. 7:5-2. The right of an accused to be free of unreasonable searches and seizures is found in the Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution. In many instances, New Jersey case law has recognized Article I, Paragraph 7 grants persons greater rights than the Fourth Amendment. In all motions to suppress evidence, the State bears the burden of proving that a warrantless seizure of evidence falls within one of the recognized exceptions to the warrant requirement. See, State v. Hill, 115 N.J. 169 (1989).

6. Alcotest Results

Lack of clear and convincing evidence to support pre-conditions for admitting into evidence Alcotest results. See, State v. Chun, 194 N.J. 54 (2008). For example, a defendant must be observed for 20 minutes before submitting to the test to ensure that he/she has not regurgitated or put substances in his/her mouth that would contaminate the results. Id. at 79. Alcotest results have been excluded on appeal, and a conviction vacated, because the State failed to prove that the defendant was observed for the requisite 20 minutes. See, State v. Filson, 409 N.J. Super. 246 (Law Div. 2009).

7. Defendant is Not Guilty

Sometimes the only issue on appeal is whether the evidence presented supports a verdict of guilty beyond a reasonable doubt. You may find that no legal error was committed below. Your client may simply insist that he did not commit the offense alleged. The municipal appeal allows a trial de novo on the record before a new fact finder.

Two fact finders reviewing the same record may reach different conclusions. You may argue the evidence below simply should not firmly convince the Law Division judge of the defendant's guilt. You may wish to remind the Law Division judge that he or she need not find legal error in the municipal court's verdict. A different fact finder is empowered to reach a different verdict. The municipal appeal is not like an appeal of a Law Division verdict to the Appellate Division, where the appellate court is required to defer to the fact findings below.

The only deference required in the municipal appeal pertains to credibility findings. The Law Division judge is required to give "due, although not necessarily controlling, regard to the opportunity of the magistrate to judge the credibility of the witnesses." State v. Johnson, 42 N.J. 146, 157 (1964). Also, the municipal court, because of the volume of its caseload, is not required "to articulate detailed, subjective analyses of factors such as demeanor and appearance to support credibility determinations on each and every witness presented…." State v. Locurto, 157 N.J. 463, 475 (1999). However, in some cases, credibility determinations turn not on demeanor, which the municipal court judge is uniquely able to assess, but on such issues as consistency of testimony, motive, and bias, which the Law Division judge is equally able to consider. Moreover, no deference need be accorded unsupported conclusions based on speculation by the municipal court. State v. Segars, 172 N.J. 481, 498 (2002) ("Certainly, no deference was to be accorded the wholly unsupported conclusions the municipal court reached by speculating about what prompted the officer's inaccurate testimony.")

If the appeal rests on the argument that the State failed to prove the defendant guilty beyond a reasonable doubt, then defense counsel should carefully analyze the record evidence. Counsel may wish to examine closely the elements of the charged offense. Perhaps counsel may wish to focus, in particular, on one of the essential elements of the offense that the State failed to prove. For example, in a harassment case, the defendant's communications may be indisputable, but the defendant's "purpose to harass" – an essential element – may be debatable. See, N.J.S.A. 2C:33-4. In some respects, your brief and oral argument would be akin to a summation at the end of a trial.

8. Miscellaneous

There are other common issues that arise during a municipal court trial that may form the basis of an appeal.

a. Speedy Trial

There are four factors that a court weighs in analyzing whether the prosecution of a case in municipal court denies a defendant the right to a speedy trial. The four factors are: 1.) length of delay, 2.) reason for the delay, 3.) assertion of one's right to a speedy trial; and 4.) prejudice to the defendant. Courts must balance these factors. No single factor is controlling on a speedy trial motion. See, Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L Ed. 2d 101 (1972); State v. Gallegan, 117 N.J. 345 (1989), and State v. Tsetsekas, 411 N.J. Super. 1 (App. Div. 2009).

b. Miranda

Miranda warnings must be given before a suspect's statement made while in custody may be admitted into evidence. Motions to exclude statements and

confessions are often made in municipal court. The issue may revolve around the fact of custody. When is a person considered "in custody"? See, e.g., State v. Stott, 171 N.J. 343 (2002). If there is an adverse ruling on a Miranda motion raised in municipal court, that issue may be a ground for appeal.

c. Discovery

Discovery issues are raised many times in municipal court. There may be pre-trial motions to compel the production of certain documents, photographs, videotapes, and other evidence. The record should be examined carefully to determine if denial of discovery had an adverse impact on the municipal court proceedings.

d. Sentence

There may be situations where the only issue to be raised in an appeal is the sentence imposed by the municipal court judge. The basis for such an appeal may be that the sentence imposed by the municipal court judge was illegal, beyond that permitted by statue, or that the judge abused his or her discretion and imposed an excessive sentence. Alternatively, the appeal may simply seek a de novo sentencing before another judge, without an assertion of illegality, or abuse of discretion.

Note: Ineffective assistance of counsel is not generally the subject of an appeal to the Law Division since that argument usually relies on things that are outside of the trial record. Ineffective assistance of counsel may be raised in a post-conviction relief application to the municipal court that heard the matter. See, R.7:10-2.

CHAPTER SEVEN – SENTENCING

1. Introduction

When a Superior Court judge finds a defendant guilty of an offense as part of a municipal appeal, the judge is required to impose sentence. Typically, the judge will impose sentence immediately, usually after affording both the defendant and his attorney the opportunity to speak in mitigation of punishment.

The sentence imposed on any offense by the Superior Court on appeal may not exceed the sanctions that were imposed in municipal court. This restriction is based upon a judicial policy set by the Supreme Court in the landmark decision of State v. De Bonis, 58 N.J. 182, 188-189 (1971). However, when the sentence imposed in the municipal court was illegal, the Superior Court judge may correct it, even if it results in an increased penalty. This practice is justified under the theory that where the sentence imposed in the first instance was illegal, a defendant has no basis to argue that imposition of a harsher sentence on appeal is prohibited. State v. McCourt, 131 N.J.Super. 283, 287-88 (App.Div.1974).

In any traffic matter, you should review your client's driver's abstract before sentencing. This is important to determine if your client is a first or repeat offender or if the accumulation of points (see below) will affect his/her driving privileges. The New Jersey Motor Vehicle Commission website has a brochure on how to read a driver's abstract. It can be found at: http://www.state.nj.us/mvc/Licenses/DriverHistory.htm. With these basic concepts in mind, the following sections will detail the range of sentence that may be imposed in the Superior Court following a municipal appeal.

2. Sentencing in Traffic Cases – In General

The statutory authority to impose fines for moving motor vehicle violations in Chapter 4 of Title 39 usually stems from one of two independent sources. First, the language of the statute that was violated may contain its own fine provision. If the statute does not specifically provide the penalty to be assessed for a violation, then the fine is usually assessed under N.J.S.A. 39:4-203, the general sentencing statute of the Motor Vehicle Code, applicable to most moving violations in Chapter 4.

Chapter 3 of Title 39 also has a general penalty provision set forth under N.J.S.A. 39:3-86. The statute can be utilized in those instances where no specific fine has been set forth in the statute.

3. Court Costs and Assessments

Court costs of up to $33 may be imposed on every traffic ticket where a conviction has been entered. N.J.S.A. 22A:3-4. In addition, a $6 assessment must be added to every fine or penalty imposed for a Title 39 violation. See generally N.J.S.A. 39:5-41.

4. Suspension of Driving Privileges

Normally, the suspension or revocation of a defendant's driver's license is imposed for a motor vehicle violation because the violated statute mandates it. For example, driving while intoxicated, driving on the revoked list, leaving the scene of a motor vehicle accident, and driving without liability insurance are all offenses that require the court to suspend a defendant's license upon conviction. Some offenses, such as driving on the revoked list, allow the judge discretion in setting the suspension period. Others specifically provide the time period of defendant's license loss.

On occasion, a motor vehicle statute may provide authority for the judge to suspend the defendant's driving privileges as a matter of discretion or because the driving conduct was particularly dangerous. (For example, see N.J.S.A. 39:5-31, allowing for the suspension of driving privileges for a willful violation of any provision of Subtitle 1 of Title 39.) When a judge chooses to order a discretionary suspension, the case law requires the judge to weigh and evaluate a number of aggravating and mitigating factors. See, State v. Moran, 202 N.J. 311(2010).

5. Imprisonment

Short jail sentences are an option that may be imposed following a municipal appeal. The jail term may either be required as part of the statutory sentence or may be imposed as a matter of discretion by the judge. Unless otherwise required by law, discretionary jail sentences imposed for traffic offenses are extremely rare in the absence of evidence of extremely dangerous driving. If a jail term is imposed as a result of a conviction of a number of traffic offenses arising from a single incident, the total sentence may not exceed 180 days. State v. Federico, 414 N.J. Super. 321 (App. Div. 2010).

Finally, some counties maintain a labor assistance program that can be utilized as a substitute for a jail term. The sentencing judge may also authorize the jail term to be served on a periodic basis. See, N.J.S.A. 2B:12-22.

6. Probation

Probation is an option in any motor vehicle case where the mandatory penalty is not fixed by statute. N.J.S.A. 39:5-7. The term of probation must not be less than six months nor more than one year. A defendant who is sentenced to probation may be subject to the same conditions as a person placed on probation for a criminal offense. N.J.S.A. 2C:45-1. Therefore, a judge may, as conditions of defendant's probation, require the defendant to support his family, find or continue employment, undergo medical or psychological treatment, pursue vocational training, refrain from consorting with disreputable people, remain in the jurisdiction, or perform community service.

Where a defendant has been sentenced to pay restitution, that payment shall be a condition of probation. N.J.S.A. 2C:45-1(c). By utilizing this option, a defendant

convicted following a municipal appeal may be required to pay for any personal injury or property damage occurring in a routine traffic accident through the court as a condition of probation rather than through civil litigation.

7. Civil Reservation

Often in motor vehicle cases, a plea or finding of guilt may affect a subsequent civil case involving personal injury or property damages. This is especially true where a traffic accident is involved. The Rules of Court provide a mechanism for people to resolve their municipal court cases without necessarily exposing them to liability in any later civil suit. Rule 7:6-2(a)(1) allows a defendant to plead guilty with a reservation that the guilty plea will be non-evidential in any civil proceeding. This offers a defendant in municipal court a way to avoid a trial and settle his motor vehicle case in an expeditious manner without any danger to his position in a related civil matter.

In order to plead guilty with a civil reservation, the defendant must request the court to order the non-evidential effect of the plea. The Rule does not specify whether such an order is mandatory or discretionary once the defendant has made the request. The use of the word "may" implies that the order is left to the discretion of the judge. However, one court has held differently, stating that a "non-evidential order should … be entered **as a matter of course** on the request of a defendant, unless the State or a victim… shows good cause to the court why the order should not be entered." State v. LaResca, 267 N.J. Super. 411 (App. Div. 1993).

8. Motor Vehicle Points

The Motor Vehicle Commission has imposed a point system for various motor vehicle violations. Information may be found at the State of New Jersey Motor Vehicle Commission web address: http://www.state.nj.us/mvc/Violations/penalties.htm

CRIMINAL SENTENCING

1. Introduction

The Superior Court hears many appeals each year dealing with disorderly and petty disorderly persons offenses. The sentences authorized by the Legislature for these violations are set forth in N.J.S.A. 2C:43-1 et seq. Sentencing for disorderly and petty disorderly persons offenses is controlled exclusively by the Code of Criminal Justice, Title 2C.

The normal range of punishment for a disorderly persons offense allows the court to impose a jail sentence of up to six months or a fine of up to $1,000, or both. A petty disorderly persons offense carries a jail sentence of up to 30 days or fine of up to $500, or both. There are also mandatory associated assessments for both types of offenses, including the $50 Victims of Crime Compensation Organization (VCCO) assessment

and the $75 Safe Neighborhood Services Fund assessment. Court costs of up to $33 may also be added.

Thus, the Code authorizes a range of sanctions for disorderly and petty disorderly offenses. It also offers guidance as to how and under what circumstances those sanctions are to be imposed. It explains how a judge is required to exercise the discretion provided to him by the Legislature when determining the appropriate sentence for a disorderly or petty disorderly persons offense.

In addition, there are numerous other possible sentencing alternatives authorized by the Code for disorderly or petty disorderly persons offenses. These include, among other things, probation, restitution, suspended sentences, loss of driving privileges, and credit for time served before the imposition of sentence. These issues are every bit as applicable to sentencing for disorderly and petty disorderly persons offenses in a municipal appeal as they are for sentencing in the upper courts of New Jersey. This chapter will outline some of the sentencing options available following a municipal appeal in determining the appropriate sentence to be imposed in a disorderly or petty disorderly persons offense.

2. Suspended Sentence

Pursuant to N.J.S.A. 2C:43-2(b), the court can suspend the imposition of a sentence on a defendant. This means that a judge has the right to suspend part of a sentence and still impose the balance of the sentence on the defendant or the judge may suspend the entire sentence. A judge, however, may not impose a term of imprisonment for a specific number of years, and then suspend that sentence. See, State v. Cullen, 351 N.J. Super. 505, 507-08 (App. Div. 2002), Cannel, New Jersey Criminal Code Annotated, comments on N.J.S.A. 2C:43-2. In either situation, the judge has the discretion to suspend a defendant's sentence provided that the defendant meets or follows certain conditions authorized by N.J.S.A. 2C:45-1.

N.J.S.A. 2C:43-2(b) also gives a judge the authority to suspend fines. It does not allow a judge to suspend mandatory assessments such as the VCCO and Safe Neighborhood Fund. By law, these assessments cannot be suspended. It is doubtful, therefore, that a judge may suspend any portion of a defendant's sentence which is otherwise mandatory. For example, N.J.S.A. 2C:20-11(c)(4) mandates a defendant to serve at least 90 days in jail for a third offense of shoplifting. A judge hearing a municipal appeal would not be able to legally suspend the mandatory jail sentence.

3. Probation

Following a municipal appeal, the sentencing judge has the authority to place one or more of several conditions upon a defendant whose sentence has been suspended or who has been sentenced to probation. The Code of Criminal Justice offers 12 specific conditions that may be imposed, plus a “catch-all” provision which allows the court to

impose any other condition that is reasonably related to a defendant's rehabilitation, but not unduly restrictive. N.J.S.A. 2C:45-1(b)(1) to (11) and (13).

4. Fines

The court is authorized to impose a fine on a person convicted of an offense. Absent any extraordinary circumstances, a defendant may be sentenced to up to a $1,000 fine for a disorderly persons offense and up to a $500 fine for a petty disorderly persons offense. A judge may use his or her discretion in sentencing a defendant to any amount up to the statutory limit, subject to N.J.S.A. 2C:44-1(a) and 44-2 (c)(1). On appeal, a defendant who claims an inability to pay a fine imposed by the municipal court should be prepared to present evidence of his financial situation at sentencing in the Law Division.

5. Restitution

A court may also order a defendant to make restitution to the victim instead of, or in addition to, the imposition of a fine. Corporate defendants may also be required to make restitution to a victim. However, when the victim is any department or division of the New Jersey government, the sentencing court is required to order the defendant to make restitution to the victim. N.J.S.A. 2C:43-3. The amount of restitution is set at the discretion of the court, subject to N.J.S.A. 2C:44-2(c)(2). Unless otherwise stipulated, the amount should be determined following a hearing where the judge will balance the loss to the victim against the defendant's ability to pay. State in Interest of R.V., 280 N.J. Super. 118 (App. Div. 1995). The total restitution must not exceed the amount of the victim's loss, except that a failure to pay a State tax allows the State to receive the amount evaded, plus any civil penalties and interest.

6. Imprisonment

Following a municipal appeal, the Superior Court has the authority to impose a jail sentence on a person convicted of a disorderly or petty disorderly persons offense. A defendant may be sentenced up to six months in jail for a disorderly persons offense and up to 30 days in jail for a petty disorderly persons offense. There is no presumptive term for a disorderly or petty disorderly persons offense. There is also no authority for a judge to require that the defendant serve a portion of his sentence with a minimum term of parole ineligibility. When sentenced to jail, a defendant may also be sentenced to pay a fine and make restitution as well.

When sentencing any criminal defendant, a court must follow certain steps. First, the court must determine if imprisonment is appropriate based on certain factors set forth in the Code of Criminal Justice. Second, if the presumption of non-incarceration does not apply or is overcome, the court must determine the appropriate length of the sentence, based on the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b). In analyzing the aggravating factors, the sentencing court must disregard those factors which are also elements of the offense. This so-called "double counting" of elements

has been banned by the Supreme Court. State v. Yarbough, 100 N.J. 627 (1985). For example, harm to the victim of a simple assault could not be considered as an aggravating factor since injury is an element of the offense of simple assault.

Disorderly and petty disorderly persons offenders who are first offenders are afforded a presumption of non-incarceration. N.J.S.A. 2C:44-1(e). This presumption can only be overcome if the sentencing court finds that because of aggravating factors, incarceration is necessary for the protection of the public. If the presumption of non-incarceration does not apply to the defendant, then no presumption exists at all. The presumption of incarceration never applies to disorderly or petty disorderly persons offenses.

If the presumption of non-incarceration does not apply or is overcome and the sentencing court decides that a term of incarceration is necessary, it must use the balance of aggravating and mitigating factors in determining the appropriate sentence. Since there are no presumptive terms for disorderly and petty disorderly persons offenses, the aggravating and mitigating factors are the only things a court has available on which to base a jail sentence.

Finally, following a municipal appeal, judges in the Superior Court may impose a so-called "split sentence." A split sentence involves a probationary term, coupled with a period of incarceration that can be as long as 90 days. N.J.S.A. 2C:43-2(b)(2). See, State v. Hartye, 105 N.J. 411, 418-19, (1987). The fact that a defendant has a presumption of non-incarceration does not apply to this type of sentence.

Both N.J.S.A. 2B:12-22 and N.J.S.A. 2C:43-2(b)(7) allow a defendant to serve his custodial sentence at night or on the weekends, so that he may continue to work or participate in training or educational programs. These statutes are especially important for municipal appeals because, although the jail terms tend to be relatively short, a defendant who serves his sentence continuously could conceivably lose his job and be unable to support his family. Sentencing judges thus have the option of sentencing offenders to jail at nights, on weekends, or any other time that would allow the defendant to continue his employment and support her/himself and her/his family. Serving a jail term this way also allows the defendant to continue generating income so that he can pay his fines, restitution, costs, and assessments as well.

DRUNK DRIVING SENTENCING

A. First Offense – Direct Consequences

1. Monetary sanctions

A DUI defendant who has been found guilty following a municipal appeal will be subject to a variety of monetary sanctions. These include the following:

Monetary Sanction	**Required Amount**	**Statute**
Fine	$250–$400	N.J.S.A. 39:4-50(a)(1)(i)
Fine	$300–500	N.J.S.A. 39:4-50(a)(1)(ii)
Fine 2nd Offense	$500 – $1000	
Fine 3rd Offense	$1000	
VCCO	$50	N.J.S.A. 2C:43-3.1
SNF	$75	N.J.S.A. 2C:43-3.2
DUI Enforcement	$100	N.J.S.A. 39:4-50.8
DUI Surcharge	$100	N.J.S.A. 39:4-50(i)
Court Costs	$33	N.J.S.A. 22A:3-4
Additional fine assessments	$6	N.J.S.A. 39:5-41

2. Loss of Driving Privileges

First Offense – 3 Months (BAC less than 0.10%)

First Offense – 7 Months to 1 year (BAC 0.10% or greater or under influence of drugs)

Second Offense – 2 years

Third Offense – 10 years

3. Jail term

First Offense – Up to 30 days (discretionary)
Second Offense (2 days to 90 days)
Third Offense (Mandatory 180 days)

4. Community Service

30 days (180 Hours) Mandatory for 2nd offenders

5. Ignition Interlock Device

First Offense (6 – 12 months discretionary with BAC less than .15%)
First Offense (6 – 12 months mandatory with BAC greater than .149%)
Second and Subsequent offenses (1 – 3 years – mandatory)

CHAPTER EIGHT- APPEAL TO THE APPELLATE DIVISION

Appeals from final judgments of the Superior Court following a trial de novo may be taken to the Appellate Division per R. 2:2-3(a)(1). The appeal shall be taken within 45 days pursuant to R. 2:4-1(a).

R. 2:7-2(d) governs the extent of the pro bono attorney's obligation on appeal. That rule provides:

> Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise his or her right to appeal. An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal.

Hence, unless an application for assignment of counsel on the appeal is made when the notice of appeal is filed, the attorney filing the notice of appeal will be deemed to be appellate counsel.

If the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense. R. 2:5-3(d). Additionally, an indigent provided with transcript services on appeal from the municipal court to the Law Division is also so entitled, without formal application, on appeal from the Law Division to the Appellate Division. R. 2:7-4.

APPENDIX A

STATE OF NEW JERSEY
NOTICE OF MUNICIPAL COURT APPEAL

_____v. _____ Superior Court of _____
(Title of Action) (Appellant)

Municipal Court Ticket or Complaint#. (Refer to ticket or complaint):

Lawyer's Name:

Address:

Lawyer's #:

I am appealing to the Superior Court from a conviction entered in the Municipal Court on _____.

On that date, _____ (Appellant) was convicted of the following offense(s):

1.
2.
3.
4.
5.

The Municipal Court Judge found appellant guilty and ordered the following:

• Fine (Specify Amount):
• Restitution (Specify Type): Amount:
• Jail Sentence (Length of Sentence):
• Community Service (Describe):
• Probation(Length):
• Driver License Suspension (Length of Suspension):
• Other Penalty (Please Specify):

In connection with this outcome:
____ No Fine was Assessed, or

A Fine was Assessed and:
_____ has been paid
_____ has not been paid
_____ has been stayed pending appeal

In connection with this outcome:
____ No Jail Term was Imposed, or
A Jail Term was Imposed:
____ however, I am not in jail
____ I am in jail confined at the following facility:

A Sound Recording was made in the above matter at the time of the trial, as required by Rule 7:8-8.

Docket # _____
(Superior Court Use Only)

Revised 02/2001, CN 10559-English, How to Appeal a Decision of a Municipal Court

APPENDIX B

TRANSCRIPT REQUEST-MUNICIPAL COURT

Name of Municipal Court:

Title of Action: v.

Name of Municipal Court Judge:

Name of County:

Date(s) of Hearing(s):

COMPLETE THIS SECTION ONLY IF YOU ARE FILING AN APPEAL OF A MUNICIPAL COURT JUDGMENT

To file a Municipal Court appeal you must order and pay in advance for a minimum of two (2) copies of your court case transcript. The Municipal Court Administrator will file the original copy of the transcript with the Criminal Division Manager at the Superior Court and a certified copy with the Prosecuting Attorney. You may also order one or more copies of the transcript for yourself if you choose, at an additional charge.

Number of transcripts requested:

_____ Copy for the Criminal Division Manager at the Superior Court (**required**)
_____ Copy or copies for the Prosecuting Attorney or Attorneys (a minimum of one is **required)**
_____ Additional copies (**optional**)

Total Copies Ordered

Your name:

Address:

Telephone #: ( ) -

I agree to pay for the preparation and all copies ordered of the transcript.

_____ _____
(Your Signature) (Date)

(Type or Print your name)

New Jersey Court Rule 3:23-8(a) requires that when an appeal is filed, the original transcript must be filed with the Criminal Division Manager at the Superior Court and a certified copy with the Prosecuting Attorney.

Note: Before you send or deliver the *Transcript Request- Municipal Court* form to the court, please call the court to get from them 1) the estimated cost of the transcript and 2) who the check should be written to.

Amount of Deposit: $_____ (Court Use Only)

Revised 02/2001, CN 10559-English, How to Appeal a Decision of a Municipal Court

APPENDIX C

CERTIFICATION OF TIMELY FILING

I certify that a copy of the Notice of Municipal Court Appeal form has been mailed or delivered to the Municipal Court Administrator of the _____ Municipal Court, and also to the Prosecuting Attorney(s), within the deadlines specified by the Rules of Court. In addition, I certify that I have contacted the Municipal Court Administrator of the Municipal Court stated above, before filing my Notice of Municipal Court Appeal, and I have ordered an original and a copy of the transcript of my proceedings. Additionally, if required, I have paid the transcript deposit specified by the Municipal Court Administrator to have the transcript produced.

I certify that the foregoing statements made by me are true. I am aware that if any of these statements made by me are not true, I am subject to punishment.

_____ _____
(Signature) Appellant (Date)

(Type or print your name)

List the name(s) and address(es) of the Prosecuting Attorney(s) who has been provided with a copy of (*Notice of Municipal Court Appeal).*

(a) Name:
Address:

(b) Name:
Address:

(c) Name:
Address:

APPENDIX D

DETERMINING THE PROSECUTING ATTORNEY

In order for you to file a Notice of Municipal Court Appeal with the prosecuting attorney, you must first determine who the prosecuting attorney for your case will be when it gets to the Superior Court. It may be an attorney representing the municipality where your matter was heard, the county prosecutor, or even an attorney from the office of the state attorney general. Who the prosecuting attorney will be is determined by the nature of the case that you are appealing. For example:

a) If one or more of the charges on which your client was found guilty and is appealing is a municipal ordinance violation, a copy of Notice of Municipal Court Appeal must be mailed or delivered to the municipal attorney for the town where the municipal court is located. Staff at the town's main administrative building can provide you with the name and address of the municipal attorney.

b) If your appeal is based on a claim that a State law, statute, rule, regulation, or an order by the executive branch of government is unconstitutional, then a copy of Notice of Municipal Court Appeal must be mailed or delivered to the Office of the Attorney General at the following address:

Office of the Attorney General
R. J. Hughes Justice Complex
25 Market Street, P.O. Box 080
Trenton, NJ 08625

c) For all other matters, a copy of Notice of Municipal Court Appeal must be mailed or delivered to the county prosecutor. This includes most traffic offenses and driving while intoxicated (DWI) violations. Please be aware that your case may require you to send a copy of Notice of Municipal Court Appeal to more than one prosecuting attorney. For example, if one of the charges is a municipal ordinance violation and another a speeding offense, then you will need to send a copy of Notice of Municipal Court Appeal to both the municipal attorney and the county prosecutor. The municipal prosecutor, the local police department, or municipal court staff can provide you with information on whether a particular charge is a municipal ordinance violation or a State law violation.

In Summary:

If you are appealing:	**You must send a notice to:**
A municipal ordinance violation	The municipal attorney for the town where the municipal court is located
A violation of State law, (i.e., a traffic violation, assault charge, or most other matters)	The county prosecutor
The constitutionality of the law, rule, regulation, or an Executive Order	The Office of the Attorney General
If you are not sure who the prosecuting attorney will be	Ask the municipal prosecutor or municipal court staff for help

APPENDIX E

SAMPLE BRIEF

March 14, 2006

Honorable Maryann Bielamowicz, J.S.C.
Mercer County Courthouse
209 South Broad Street
Trenton, New Jersey 08650
Hand Delivered

Re: **State v. John Doe**
Docket #17369
Appeal #47-2005
Municipal Appeal

Dear Judge Bielamowicz:

Please accept this letter brief in lieu of a more formal brief in opposition to the defendant's appeal from his Denial of Motion to Suppress, Conviction and Sentence entered in the Hamilton Township Municipal Court on November 2, 2005, in which defendant pled guilty to a violation of N.J.S.A. 39:4-50 and was sentenced to fines, costs, and penalties totaling $2,146.00, 180 days to be served in jail, and 10 years suspension of his driver's license.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 2, 2005, in Hamilton Township Municipal Court, the Honorable Paul Catanese, P.J.M.C. heard argument and testimony on the defendant's motion to suppress the evidence. New Jersey State Trooper Jason Botti testified for the State. On April 9, 2005, Trooper Botti was on a tour of duty in which he was responsible for Interstates 195, 295 and 95. (1T 7:11-14). He was in uniform and operating a marked troop car with overhead lights. (1T 7:15-21). At approximately five o'clock in the evening Trooper Botti received a call from his dispatcher to be on the lookout for a white work van with a ladder on top. (1T 7:22 through 8:12). His dispatcher advised that the caller

was still on the phone because he was giving location updates. (1T 8:20-22). Trooper Botti observed a vehicle that fit the description and heard someone honking as the white van passed his location. (1T 8:19, 22-23).

As a result, Trooper Botti pulled out of the right shoulder and began to follow the van at approximately Milepost 1 on 195. (1T 9:5-12). As Trooper Botti started to follow the vehicle, he observed the van was weaving within the center lane and crossed over into the right lane about three times. (1T 9:13-19, 10:15-17). Trooper Botti followed the van for approximately 1500 feet, made the determination that he was going to stop the vehicle, and then proceeded to activate his camera as the van began to make an exit off of 195 onto 295. (1T 10:24 through 11:6, 16:12-18).

Trooper Botti observed further motor vehicle infractions after his camera was activated. At 16:08:39 of S-1 Trooper Botti observed defendant's vehicle cross over the white line. (1T17: 19-22). At 16:08:51, 52 of S-1 Trooper Botti observed defendant's vehicle failed to maintain a straight lane and crossed over the line again. (1T17: 25 through 18:2). At 16:09:06 of S-1 Trooper Botti observed defendant's vehicle weaving to the left, going back to the left again, getting close to the white line, and going further to the left yet again. (1T18: 4-9). At 16:09:17 of S-1 Trooper Botti observed defendant's vehicle hit the white line again. (1T18:25 through 19:1). At approximately 16:09:40 of S-1 Trooper Botti observed defendant's vehicle go to the left and come back to the right again. (1T21: 12-14). At 16:10:50 of S-1 Trooper Botti observed defendant's vehicle once again failed to maintain a straight line. (1T24: 10-12). Trooper Botti went to the shoulder to make sure it was a safe stopping area, activated his lights and siren, and proceeded to pull over the defendant's vehicle. (1T 25:17 through 27:19). Trooper Botti issued defendant a summons for weaving based upon his observations of defendant's vehicle. (1T 29:11-15).

The trial court held Trooper Botti, who Judge Catanese found to be a credible witness, had a reasonable basis to stop defendant's vehicle on two separate grounds. First, the trial court found Trooper Botti was justified in stopping defendant's vehicle based upon his community caretaking function. Second, the trial court found Trooper Botti was justified in stopping defendant's vehicle because he had a reasonable and articulable belief that defendant failed to maintain a lane. Judge Catanese specifically held:

> Two prong. Number one is that when he saw the vehicle weaving within the lane I believe he would have had the opportunity to stop the vehicle and had a right to based upon a caretaking function alone. That vehicle is weaving within a lane and going – drifting to one side and jerking back, the trooper would have a right, if he wanted to, to stop the vehicle to determine whether, in fact, there was a problem with the driver or whether there was a problem with the vehicle.

(1T 42:8-17)

The court further added:

> But quite candidly, that's not the only basis on which I'm making my determination. It's clear to me, based upon the trooper's testimony, the defendant's vehicle had failed to maintain a lane or he had a reasonable and articulable belief that he failed to maintain a lane.
>
> And he had this articulable reasonable suspicion that he committed a motor vehicle offense by seeing the vehicle moving from the center lane to the right lane and then back and then also, quite candidly, on going over the fog line on two different occasions. And when in fact trooper saw this weaving and saw the defendant going over the fog line, that is a reasonable basis to stop the vehicle and, in fact, issue a motor vehicle summons.
>
> So, I am satisfied that, in fact, there was probable cause for the stop, that the trooper had a reasonable and articulable suspicion that a motor vehicle offense had occurred, and therefore, the motion to suppress is denied.

(1T 42:18 to 43:12)

LEGAL ARGUMENT

STANDARD OF REVIEW

With regard to the standard of review for this appeal, this is a trial de novo, and as such, the Court's "function is to determine the case completely anew on the record made in the Municipal Court, giving due, although not necessarily controlling, regard to the opportunity of the magistrate to judge the credibility of the witnesses." State v. Johnson, 42 N.J. 146, 157 (1964). Additionally, although the Court "must make original findings and rulings on the evidence," the evidence to be considered is limited to the "record created in the Municipal Court." State v. Loce, 267 N.J. Super. 102, 104 (Law Div. 1991), aff'd o.b., 267 N.J. Super. 10 (App. Div.), cerif. denied, 134 N.J. 563 (1993).

The lone issue on appeal is the propriety of the police officer's initial stop of the defendant. The defendant argues that the police action of stopping the defendant was unconstitutional because the factual circumstances were insufficient to establish an objectively reasonable and particularized suspicion that criminal activity was afoot or a crime or a traffic offense had been committed. The State submits that such contentions are without merit for two reasons. First, the State submits Trooper Botti lawfully stopped defendant's vehicle pursuant to his community caretaking function. Second, or in the alternative, the State asserts that the factual circumstances, taken as a whole, established a reasonable, articulable suspicion sufficient to justify the trooper's stop of defendant's vehicle. Specifically, Trooper Botti had a reasonable and articulable belief that defendant failed to maintain a lane.

POINT I

TROOPER BOTTI LAWFULLY STOPPED THE DEFENDANT'S VEHICLE PERSUANT TO HIS COMMUNITY CARETAKING FUNCTION

The community caretaking function was first developed by the Supreme Court of the United States in Cody v. Dombrowski, 413 U.S. 433 (1973). This exception to the warrant requirement is closely related to the reasonable suspicion standard. The distinction is that the suspicion of the officer is not that there has necessarily been a violation of the law, but rather that there may be a problem with the vehicle or its operator. The community caretaking exception has been found in several cases by the Appellate Division to justify a motor vehicle stop. See, State v. Martinez, 260 N.J. Super. 75 (App. Div. 1992)(Objectively reasonable to stop a vehicle going 10 miles per hour in a residential area at 2:00 a.m.); State v. Goetaski, 209 N.J. Super 362 (App. Div. 1986)(Motor vehicle stop was legally sufficient where vehicle was operating in the shoulder of a roadway with left-turn signal on).

In State v. Washington, 296 N.J. Super. 569 (App. Div. 1997), the Appellate Division found the community caretaking function justified the stop of a vehicle traveling nine miles per hour below the speed limit and weaving both within its lane of travel and, at one point, slightly across the shoulder portion of the roadway. The court found the conduct of the driver "engenders reasonable grounds to conclude that the vehicle is a potential safety hazard to other vehicles and that there is either something wrong with the driver, with the car, or both." Ibid. at 572.

In State v. Chapman, 332 N.J. Super. 452, 463-464 (App. Div. 2000), the Appellate Division held that officers were justified in making a community caretaking stop in order to determine if the operator of an erratically driven car was intoxicated or fatigued, thus posing a danger to others on the road.

Applying the legal principles articulated above to the facts at hand, the State argues that any detention of the defendant's vehicle was based upon Trooper Botti's community caretaking function and thus, legally valid. According to the testimony of Trooper Botti, which Judge Catanese found to be credible, defendant's vehicle was drifting to the left and jerking back to the right and then twisting to the left and jerking back to the right. (1T 37:4-7). S-1, which shows defendant's vehicle making wide swings within its lane on several different occasions, lends further credibility to the testimony of Trooper Botti. This type of abnormal conduct clearly suggests objectively reasonable concerns that involve the community caretaking function of an alert police officer. The most obvious of these concerns is that there is something wrong with the car or something wrong with the driver.

POINT II

THE FACTUAL CIRCUMSTANCES, TAKEN AS A WHOLE, ESTABLISHED A REASONABLE, ARTICULABLE SUSPICION SUFFICIENT TO JUSTIFY THE STOP OF DEFNDANT'S MOTOR VEHICLE

In order to stop an automobile, a police officer need only have a reasonable suspicion to believe that a crime or traffic offense is being or has been committed. Delaware v. Prouse, 440 U.S. 648; State v. Murphy, 238 N.J. Super. 546, 554 (App. Div. 1990). This reasonable suspicion is less than probable cause. Murphy, 238 N.J. Super. at 554. In addition, a police officer's observation of a motor vehicle offense, even a minor one, is sufficient to justify a stop. Ibid. at 553.

Moreover, to validate the officer's stop, the State need not prove that a motor vehicle violation occurred as a matter of law. State v. Williamson, 138 N.J. 302,304 (1994). Pursuant to the Williamson Court, constitutional precedent requires only reasonableness on the part of the officer, not legal perfection. Id. Thus, the State need

only prove that the police lawfully stopped the car, not that it could convict the driver of a motor vehicle offense. Ibid. See also State ex rel. D.K., 360 N.J. Super. 49, 54 (App. Div. 2003)(Where the license plate of a vehicle was covered by a tinted shield, the court noted that it does not matter to the validity of the stop that it is ultimately decided there was no infraction). It is also important to note the constitutional reasonableness of traffic stops does not depend upon the "actual motivations of the officers involved." See, Whren v. United States, 116 S.Ct. 1769 (1996). The subjective intentions and/or ulterior motives of an officer play no role in the court's analysis and thus, will not serve to invalidate a "stop" that is otherwise justifiable on the basis of a reasonable, articulable suspicion of criminal activity. Id.

Furthermore, State v. Davis, 104 N.J. 490 (1986) offers additional insight into reviewing the propriety of a given "stop" and/or seizure. Specifically, this Davis Court established a "totality of the circumstances" analysis surrounding police/citizen encounters, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions. Ibid. at 504. The function of the Court is to insure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions at the unfettered discretion of the officers in the field. See, Delaware v. Prouse, supra.

Applying the legal principles articulated above to the facts at hand, the State argues that any detention of the defendant's vehicle was based upon a reasonable, articulable suspicion that defendant failed to maintain a lane and thus, legally valid. According to the testimony of Trooper Botti, which the trial court found to be credible, defendant's vehicle was weaving within the center lane and crossed into the right lane approximately three times before defendant even came upon the exit for Interstate 295 and Trooper Botti activated his camera. Thus, the stop of defendant's vehicle was fully

justified independent of the motor vehicle violations documented on S-1. Further, S-1 clearly shows defendant weaving within his lane multiple times and crossing over the fog line twice on the exit ramp to Interstate 295. (1T 41:3-9).

Defendant's argument that Trooper Botti's understanding of N.J.S.A. 39:4-88b renders the stop of defendant's vehicle unconstitutional is wholly without merit. Defendant's vehicle was not merely weaving within his lane of travel. Rather, defendant's vehicle crossed from the center lane into the right lane approximately three times before defendant's vehicle even came upon the exit ramp to Interstate 295 and Trooper Botti activated his camera. Further, as the trial court emphasized, S-1 clearly shows defendant's vehicle crossing over the fog line on at least two separate occasions. (1T 41:3-9).

Defendant's contention that his vehicle twice crossed the fog lines on the exit ramp due to road conditions is also without merit. With reference to the exit ramp, Judge Catanese specifically found "people don't have to go over the fog line" and that "they can stay within the lane of traffic." (1T 41:19-22). S-1 displays nothing about the exit ramp which suggests it is impractical for a driver to maintain his lane. Defendant also suggests his previous motor vehicle infractions on Interstate 195 were nothing more than proper lane changes. This argument obfuscates the testimony of Trooper Botti, who the trial court found to be a credible witness. Trooper Botti clearly testified defendant's vehicle crossed over the right lane marking about three times and then proceeded to change lanes. (1T 10:14 to 11:18). Finally, defendant's argument that the motor vehicle stop was based solely upon an anonymous tip by a passing motorist is misplaced. This "tip" merely alerted Trooper Botti to an erratically driven vehicle which was weaving both within and outside of its lane of traffic.

CONCLUSION

For the foregoing reasons, the State respectfully submits that the defendant's motion to suppress evidence should be denied.

Respectfully submitted,

JOSEPH L. BOCCHINI, JR.
MERCER COUNTY PROSECUTOR

By: JOHN M. JINGOLI, JR.

Assistant Prosecutor

APPENDIX F

SUPERIOR COURT CLERK'S OFFICE-LAW DIVISION DIRECTORY

A copy of *Notice of Municipal Court Appeal* must be sent to the Criminal Division Manager at the Superior Court in the county where you are filing your Appeal. Use this list of addresses to find the address of the appropriate Superior Court.

Atlantic County
Superior Court of N.J.
Atlantic County Criminal Division
Criminal Records Team
4997 Unami Blvd
Mays Landing, NJ 08330
(609) 909-8154

Bergen County
Superior Court of N.J.
Bergen County Criminal Division
Bergen County Justice Center
Room 119
10 Main Street
Hackensack, NJ 07601
(201) 646-3000

Burlington County
Superior Court of N.J.
Burlington County Criminal Division
49 Rancocas Road-3rd Floor
Mt. Holly, NJ 08060
(609) 518-2565

Camden County
Superior Court of N.J.
Camden County Criminal Division
101 South Fifth Street
Hall of Justice
Camden, NJ 08103
(856) 379-2202

Cape May County
Superior Court of N.J.
Cape May County Criminal Division
DN-209B
4 Moore Road
Cape May Court House, NJ 08210
(609) 463-6600

Cumberland County
Superior Court of N.J.
Cumberland County Criminal Division
P.O. Box 757
Bridgeton, N.J. 08302
(856) 451-7152

Essex County
Superior Court of N.J.
Essex County Criminal Division
Essex County Veterans Courthouse
Criminal Records Office Rm. 100S
50 West Market Street
Newark, NJ 07102
(973) 693-5965

Gloucester County
Superior Court of N.J.
Gloucester County Criminal Division
Justice Complex, 1st Floor
Hunter & Euclid Streets
Woodbury, NJ 08096
(856) 853-3534

Hudson County
Superior Court of N.J.
Hudson County Criminal Division
Hudson County Admin. Building
Criminal Records Office, Room 104
595 Newark Avenue
Jersey City, N.J. 07306
(201) 795-6114

Hunterdon County
Superior Court of N.J.
Hunterdon County Criminal Division
Hunterdon County Justice Center
65 Park Avenue
Flemington, NJ 08822
(908) 806-4338

Mercer County
Superior Court of N.J.
Mercer County Criminal Division
Mercer County Criminal Courthouse
Records Section, 2nd Floor
209 S. Broad St.
Trenton, NJ 08650
(609) 989-6462

Middlesex County
Superior Court of N.J.
Middlesex County Criminal Division
Records/Municipal Appeals
P.O. Box 2673
New Brunswick, NJ 08903
(732) 981-3128

Monmouth County
Superior Court of N.J.
Monmouth County Criminal Division
Monmouth County Courthouse
P.O. Box 1271
Freehold, NJ 07728
(732) 677-4240

Morris County
Superior Court of N.J.
Morris County Criminal Division
Morris County Courthouse
P.O. Box 910
Morristown, NJ 07963-0910
(973) 285-6381

Ocean County
Superior Court of N.J.
Ocean County Criminal Division
Ocean County Justice Complex
Room 220
Toms River, NJ 08753
(732) 929-2009

Passaic County
Superior Court of N.J.
Passaic County Criminal Division
Passaic County Courthouse
77 Hamilton Street
Paterson, NJ 07505
(973) 247-8346

Salem County
Superior Court of N.J.
Salem County Criminal Division
2nd Floor, Court House
Market Street
Salem, NJ 08079
(856) 935-7510

Somerset County
Superior Court of N.J.
Somerset County Criminal Division
Court House-2nd Floor
20 North Bridge Street
P.O. Box 3000
Somerville, NJ 08876-1262
(908) 231-7600

Sussex County
Superior Court of N.J.
Sussex County Criminal Division
Sussex County Judicial Complex
43-47 High Street
Newton, NJ 07860
(973) 579-0696

Union County
Superior Court of N.J.
Union County Criminal Division
Union County Courthouse
2 Broad Street, 5th Floor
Elizabeth, NJ 07207
(908) 659-4688

Warren County
Superior Court of N.J.
Warren County Criminal Division
P.O. Box 900
Belvidere, NJ 07823
(908) 475-6140