

DWIs in the State of New Jersey, Jim Trabilsy

Hogan: Hello and welcome to Your Legal Rights. I am John Hogan and today we are going to be talking about DWI in the State of New Jersey. A primer. What we are going to be doing today is give you some general information about DWI in the State of New Jersey. However, what we are going to be talking about should not be considered legal advice. If you have specific questions about a problem you may have or the law, we suggest that you speak to an attorney with the specific questions. This is for informational purposes only, for entertainment value and should not be considered legal advice. Joining me today is Jim Trabilsy with the law firm Wilentz Goldman & Spitzer. How are you?

Trabilsy: Hi John, good afternoon.

Hogan: Nice to see you

Trabilsy: Thank you.

Hogan: Jim is a well-known and respected DWI defense attorney in the State of New Jersey. Jim, the reason we've brought you here today is to talk a little bit about DWI. Can you briefly explain to the audience what the difference is between DWI, driving while intoxicated and driving while under the influence?

Trabilsy: In the State of New Jersey, John, there is no difference. Often times, client will call me and they will say they have a drunk driving or they say they have a driving while impaired or driving under the influence, in New Jersey, it's all the same. Other States just use different terminology for the exact same thing but in the State of New Jersey, if somebody's charged with drunk driving, driving under the influence, it's all considered the same and it's the same penalties.

Hogan: Speaking of penalties, what would someone be expecting as far as penalties with the DWI.

Trabilsy: It's interesting you ask that because the law recently changed and most people are somewhat familiar with the changes but specifically, on January 20, 2004, the law did change and the penalties changed. Prior to January 20, 2004, the legal limit was .10 and when I said legal limit, that's the limit based on a breathalyzer test or sometimes a blood test is administered. And, .10 was the legal limit prior to January 20, 2004. Since that time, the law changed in New Jersey as a two tier limit now, so they reduced it. So, that if somebody blows or has a reading of a .08 or .09, now that is considered a drunk driving offense in the State of New Jersey and that's since January 20, 2004. Now, if they blow or have a reading of .08 or .09, the penalties are different than if they have a reading of .10 or above. And that's why I say it's two tiers now. So, if they take a breathalyzer or blood is taken from them, if somebody's in a bad car accident, they'll take blood. But when we are dealing with the readings, we're dealing with the same terminology whether it's a breathalyzer or a blood test. So, if somebody has a .08 or .09 from a breathalyzer machine or from blood, they will lose their license for a period of 3

months. That's mandatory. There is now work permits, there's no conditional license. It's a 3 month license suspension, from the date of conviction. Sometimes people think when they get their tickets and they are arrested, whether the suspension starts then, it does not. It at the time they are convicted. If it's a .10 or above, because now its two tiers, as of January 20, 2004, the loss of license is 7 months minimum, up to a year. It could be up to a year loss of license. Now these are the penalties for first offenders. If it's a repeat offender, a second offender, a third offender, it's enhanced. But essentially, if it's a second offense, then it's a 2 year loss of license. And if it's a third offense, it's a 10 year loss of license.

Hogan: I heard some places, Jim, that there are penalties for school zone offenses. Is that true?

Trabilsy: And that's correct. Yes. That Statewide, but it depends whether you fall within a school zone. But the school zone law is part of DWI law and we call it subsection G, but if you're issued a ticket and your convicted for a school zone violation, the penalties are enhanced, essentially they are doubled. So instead of if you have a .10 and above I said it was 7 months, now if you're convicted of a school zone violation, you're talking about a 14 month loss of license. Those are just the penalties that deal with the loss of license. There's also the monetary penalties which really add up also. For any drunk driving offense, there's a surcharge attached, which is \$1,000 a year for 3 years, which totals \$3,000, which is a very very stiff monetary penalty. That's called an insurance surcharge penalty but ironically, John, it's not paid to the insurance company. You know, everybody thinks this money is going to the insurance company and, therefore, our insurance rates should go down.

Hogan: But where does the money go?

Trabilsy: The money goes to the State of New Jersey. So, when we hear of budget problems, you often wonder, because on every DWI case the State does collect \$3,000 and that applies whether it's an .08 .09 or that .10 or above, it applies first or second offenders. A third offender, it's \$1,500 a year for 3 years, as an insurance surcharge. In addition to that, you have your fines. You know, we didn't even discuss that. But you have monetary fines. First offender, if it's an .08 or .09, and I know this gets technical, but essentially, if it's an .08 or .09, the fine could be \$250 to \$400. If it's a .10 or about, the fine is \$400 to \$500. If it's a second offense, it's \$500 to \$1,000.

Hogan: And those monies get paid directly to the court, is that correct?

Trabilsy: Correct, the court keeps a portion of it and a portion gets sent down to Trenton for the State of New Jersey.

Hogan: Are there any other financial consequences to a DWI?

Trabilsy: Well, yeah there are. There's collateral consequences. First, there are some other monetary penalties that are imposed. For every DWI offense, there is a safe neighborhood fee that's imposed of approximately \$75, there's a fee of \$50 for the violent crimes compensation board. You have court costs of about \$30, and then you also have a \$200 surcharge, not the insurance surcharge, this is a separate surcharge. Some monetarily, it's very substantial. In addition, you insurance rates are going to go up because for every DWI offense you obtain 9 insurance points, they're called eligibility points. As opposed to DMV points. Oftentimes people ask me well do you get any Division of Motor Vehicle points. You do not get any DMV points because you are going to lose your license automatically on a drunk driving offense. However, you do get 9 insurance points. So you insurance rates do go up substantially which adds a big financial burden over the next several years.

Hogan: Well you mentioned earlier also that there are no conditional licenses in New Jersey. No work licenses. So, presumably if you require your vehicle for work, and you cannot drive, you may have a problem with employment, as well.

Trabilsy: Sure, a collateral consequence could be a loss of employment. The State of New Jersey does not permit conditional license, work permits.

Hogan: Let me ask you this question Jim. You said no work permits. What about an emergency. Can you get behind the wheel of a car and drive?

Trabilsy: No, in the State of New Jersey, you obviously take the risk. I am not going to tell you people don't do it but under the law they are not supposed to and I would never advise somebody to drive when their license is suspended.

Hogan: Even if the person has to be in the hospital for some reason, you don't have an excuse, you cannot drive?

Trabilsy: No, in the State of New Jersey. New York does have work permits. A lot of states do and there have been bills introduced but it's never gone to the Governor's desk and as of today, and I don't see in the near future, that you will be permitted to drive if suspended and that's important because if you are suspended, and a lot of people are in New Jersey, not just from drunk driving but, as you know, if you accumulate a lot of points with the Division of Motor Vehicles you lose your license. Sometimes it could be as minor as forgetting to pay a parking ticket. You may lose your license if you drive without insurance. It's a year loss of license. But, in any event, there's a large portion of the public that's driving around that are suspended and its important to note, if you get a DWI offense and you are suspended as a result of the DWI charge, if you do take the risk and drive and you are caught and you get a ticket for driving while suspended when your suspension is based on a drunk driving conviction, you will go to jail.

Hogan: If convicted of driving while suspended.

Trabilsy: Correct. Its mandatory. At least 10 days, 10 to 90 days in jail. If you are in an accident, where a person is injured, its 45 days in jail. And, in addition, you will also lose your license for an additional 1 to 2 years.

Hogan: Well its fair that the State takes DWI very seriously. But one of the things we want to know is what does the State have to prove in order to convict somebody of DWI.

Trabilsy: Yes. That's a good question because obviously that's what clients really want to know. When they come into my office, they already have their ticket and they want to know, well what does the State have to prove. Its not that complicated. Basically, they have to prove that somebody is operating a vehicle while under the influence of alcohol. So, there is really 2 elements. One is operation and under the influence.

Hogan: Does it have to be alcohol?

Trabilsy: No. The statute applies to under the influence of alcohol or drugs. So there are charges under the influence. People that are driving or under the influence of marijuana, cocaine. Sometimes you have people under the influence of zanax, where they don't have a prescription for certain drugs.

Hogan: Well, even if somebody had a prescription for a drug and that prescription made them unable to drive the vehicle safely, would that also constitute an offense?

Trabilsy: Correct. Absolutely. If the State could prove they are under the influence of that drug. Now the question is what does it take to prove under the influence. If its alcohol, there's two ways they can prove somebody's under the influence. One is what I call scientific evidence. And that would be like I indicated earlier, either a breathalyzer test. Because when they blow into the breathalyzer machine, a numerical number is obtained. And we explained, if it's an 08 or above, they are automatically guilty. The other way is through blood. As I mentioned early, you have cases where somebody's in a bad accident, the police come, they smell the odor of alcohol, they have probable cause, they take the person to the hospital, they obtain blood. So, to prove under the influence based on scientific evidence, it could be breath or blood. That's for alcohol. If the officer believes somebody is under the influence based on drugs, as you were alluding to, then that could be determined either through blood or urine - tests will show the presence of certain drugs. That's the scientific evidence. But oftentimes, people refuse. Let's say they refuse a breathalyzer. So the State does not have the scientific evidence, they don't have a breathalyzer result.

Hogan: Well, people can be charged with refusing too. That's a different offense. Correct?

Trabilsy: Absolutely. Under our law, when you obtain your driver's license, you've implicitly consented to submit to the motor vehicles laws of New Jersey and under our law, you have to submit to the breathalyzer test. They can't force you

to blow. Right, an officer can't force to blow into that machine. So if you do not consent to the taking of the breathalyzer, you will be charged with a refusal charge. The refusal charge is separate and apart from the drunk driving charge. So in essence, you get 2 tickets. You get your drunk driving ticket and you get a refusal ticket. The penalties are basically the same. The refusal charge, in and of itself, carries a 7 month loss of license. The drunk driving charge will carry a 3 month loss of license. You can be convicted of both.

Hogan: And that's for a first offense?

Trabilsy: That would be first offense. Second offense it would be 2 years on the refusal, 2 years loss of license on the drunk driving charge. But its important to note that if somebody refuses, they don't necessarily get off the drunk driving charge. See, sometimes a person thinks, OK I know I drank too much, I don't want to blow into this machine. I know it's going to show above a .10. I'm going to do the smart thing and refuse so they don't have that scientific evidence.

Hogan: Is that the smart thing?

Trabilsy: No. No. Because one, you do end up with 2 tickets. So you do get a refusal ticket which carries a 7 months loss of license. But secondly, its important to note that you can be convicted of drunk driving without the scientific evidence. Earlier I said there's two ways to prove someone is under the influence of alcohol. One is the scientific evidence but you could also be convicted of drunk driving on what I call an observation case. If the State does not have the luxury of a breathalyzer reading, of a blood reading, they could still convict somebody of drunk driving based on the persons inability to properly operate a car, the slurred speech, the fumbling to get the credentials, the swaying, the staggering. Then the officers always will administer what we called standardized field sobriety tests on the roadway and those are the balance test that you see. The walking heel to toe, lifting one leg to see if somebody has the proper balance and coordination.

Hogan: So, all of those, the performance of the individual on all of those tests, regardless of what the reading is, if they do provide a reading, can still be used to prove a DWI, is what you are saying?

Trabilsy: Yes, absolutely and a lot of people don't realize that. They think, well they will refuse, they will get off the DWI. But that doesn't happen. It also, the mere fact that you refused, can be used as evidence. As one of those factors to convict you of the drunk driving charge on that observation case. So when somebody refuses, one they are breaking the law, they are going to be issued a refusal ticket. With that refusal ticket comes a 7 month loss of license and there is a chance they could be convicted as well of the drunk driving charge. So in the State of New Jersey, under the law, you should not refuse the breathalyzer.

Hogan: Well, if somebody were to submit to a breathalyzer test and the reading would come out above the legal limit, but they swear they didn't drink that much, what would you do with kind of person?

Trabilsy: That happens all the time, quite frankly. Everybody seems to only have 2 drinks, whether they blow an 08 or a 18. I usually at that point take a couple of minutes and explain to the defendant that there's an attorney client privilege between he and I, that everything he tells me is in confidence. That is cannot disclose it to the court or to the prosecutor. That's its doing him no good to not tell the truth to his own lawyer, whose there to try to help him and you'd be surprised. Usually people start off telling me they had a couple of drinks and when they realize that they are not fooling me and they are only kidding themselves, they come forth with the more accurate version of what occurred. Because the truth is, I have been doing this 24 years, although I look much younger, don't I John. But, the truth is, the breathalyzer machine is a fairly accurate machine. If its properly operated, although it looks ancient, and its been around for 40 - 50 years, it's a fairly accurate machine. However, as you probably know and the public's probably read, there's a new machine that's been coming out in the State of New Jersey called the alco test 7110. In our county, Middlesex County, as we speak, that has been implemented into all the municipalities within Middlesex County and that machine takes away operator error. So as I have indicated, even though the old machine was accurate, the old machine sometimes through operator error, and what I mean is the officer would have to set up the machine and go through several steps to get everything in proper working order and oftentimes the officer may not have fully complied with the check list and that permitted defense attorneys like myself to attack the reliability of that breathalyzer reading. The new machine which is out in Middlesex County and over the next probably year and a half, will come out throughout the whole State, takes away the operator error. The officer does not have to go through a long check list and set up the machine and that will take away many of the arguments that the defense attorneys would make attacking the liability of the breathalyzer reading.

Hogan: While we are on the subject of consequences of DWI and what can be done, we have a question from one of our audience members. The question is, if you get a DWI in another State, does that carry into New Jersey and what are the effects of that?

Trabilsy: Yes. A DWI is counted or is considered for enhance sentencing purposes in the State of New Jersey but the law says its got to be substantially similar. And what does that mean? Well, as I indicated prior to January 20, 2004, our limit was a .10 or above. So let's say if we are in the year 2003 and somebody had a DWI in Kansas and they were convicted in that State, what if the limit was an 08 or an 07 and they had a DWI in Kansas and I could prove that the DWI in Kansas was a .08 DWI, then I would be able to argue in New Jersey that that offense is not substantially similar to the New Jersey law and would not be counted. But now, our per se level has been reduced to a .08. So those arguments are going to be much harder. So essentially, if somebody has a drunk driving offense in another

state and if its substantially similar, which now its been in most states its substantially similar, it will be counted and the person would be treated as a second offender. Let's say if its his first offense in New Jersey and we go to court and if he is convicted of his first offense in New Jersey, the out of state conviction will count, he would be a second offender in New Jersey and lose his license for 2 years.

Hogan: If somebody wanted to fight that out of state conviction from counting in New Jersey, where would they fight that?

Trabilsy: Well, you would first, what I do is I try to obtain all the records from that other state and I try to obtain the statutes in that other state and sometimes in the other state it may be a driving while impaired which may be different than a driving under the influence that we have in New Jersey. But the easiest place for the client is to fight it in New Jersey in the court that we're at. Because the idea would be to try to get that person treated as a first offender in New Jersey and not as a second offender. So, I would first to fight it in the court where the present case is pending to try to get him treated as a first offender.

Hogan: Now, would the Division of Motor Vehicles, or now the Motor Vehicle Commission, be the place where you would first challenge that from coming on to your driving record in New Jersey?

Trabilsy: Well, it would already be – I mean, what happens, its an interesting question. Sometimes I have had cases where a client will be in my office and tell me he had an offense, lets say a drunk driving offense in Kansas and I get his abstract. If it does not show up on his abstract -

Hogan: His New Jersey abstract?

Trabilsy: Yes. I get the New Jersey abstract, sometimes it doesn't show up. If it shows up, then the court in New Jersey is aware of it and then, like I say, I would try to get all the information from that other state and I would try to attack it in the court where the case is pending to try and get him treated as a first offender instead of a second offender. If it doesn't show up, then there are ethical concerns because now, as I indicated earlier, there is attorney client privileges between a client and an attorney. So if a client discloses something to me in confidence, the issue becomes whether that has to be disclosed to the court. And you cannot actively mislead a court, if a judge were to ask if there is any prior convictions. However, there was a recent case by the US Supreme Court, probably about 2 years ago, that did say a defendant is entitled to his 5th Amendment right, not to incriminate himself. So that's an interesting issue, when it does not show up on an abstract and quite frankly, I have spoken to different attorneys, different attorney's view it different. Whether they disclose it to the court, whether they assert the 5th Amendment, which under the law they are permitted to, and not disclose it. But under no circumstances should an attorney misrepresent the fact to the court.

Hogan: OK. Well, let's talk a little about how you deal with the DWI, because you have mentioned what the State has to prove, but I have also heard that they is no plea bargaining permitted in the State of New Jersey. So if somebody walks into court with a DWI and they could be the most wonderful person, most accomplished person, you now, they could have been very philanthropic, very well liked, never done anything wrong in their life -

Trabilsy: Like yourself

Hogan: Like myself, or like yourself, Mr. Trabilsy, what does that person, how does that person deal with the fact that they have a DWI. Are they going to get special treatment because they are a good person?

Trabilsy: No. In New Jersey, as you have indicated, you are not permitted to plea bargain. And the questions is, first, what's a plea bargain. Some people really don't understand that concept. But a plea bargain is where you have a client and he is guilty lets say of 4 offenses, or you believe he is guilty of them. And you go to court and you present facts as you have indicated, he is a nice person, he's the sole breadwinner, he need his license to get to get to work, he has no prior offenses and you would just like to state out of the goodness of their heart, to reduce the charges or drop some charges, even though they can prove the elements of defenses. So even though they could prove their case, you give them mitigating factors and you try to work out a plea bargain where everybody's happy. They drop some, they reduce the drunk driving to a reckless driving. But that's a plea bargain and that's prohibited. The State cannot and the court will not permit the State to drop to dismiss a drunk driving charge just because my client's a nice person. However, there are ways an attorney, like myself and other defense attorneys, help clients charged with drunk driving by findings issues, by coming up with factors to demonstrate that the State cannot prove their case. See, if I can show through legal issues, sometimes expert reports, that --

Hogan: Well, that raises a question by one of our audience viewers. How reliable is the breathalyzer. Can it be beat?

Trabilsy: It could be beat but I have indicated if the breathalyzer machine is in proper working order and if the officer properly administers the test and everything is done pursuant to protocol, the machine is an accurate machine even though it looks very old, its accurate but it could be beat because sometimes the State can't prove their case. So in other words, the cases that I get off drunk driving, the clients are probably for the most part guilty of the offense but the State was unable to prove every element of that offense. So it's my job to force the State to be able to prove their case and through experts and legal issues, police officers are human. And humans make mistakes and it is my job to find the human error, the mistakes that maybe an operator made or that the machine wasn't operated properly.

Hogan: The machine can break too?

