

The Notice Defense for Driving While Suspended

1. What is the best defense available to try to beat a driving while suspended case?

Driving while suspended tickets issued under N.J.S.A. 39:3-40 are issued like "hot cakes" in the Garden State. If you driving while on the suspended list, chances are the police will bust you for this offense sooner or later. Almost all police cars now have an onboard computers. Therefore, many police officers can now simply type in a license plate number and immediately find out if the driver is on the suspended list. Many police officers advise me in private that one in five of the drivers license plates that they punch into the computer show up driving while suspended.

The State normally will try to prove the knowledge element by providing copies of any notices sent by the MVC to the driver. If you are suspended by the MVC then you have to have receive two notices. The first one is a proposed suspension notice. The second is the notice of the actual suspension. These notices are sent to the address that is listed on the driver's license. In many cases a defendant may have moved, and he may not have advised the MVC of the change of his address. Thereafter, any notices sent by the MVC notices will be sent to the wrong address. Nonetheless, the prosecutor is only required to prove that the MVC sent these suspension notices to the defendant's last known address. Additionally, many of these notices are sometime returned undelivered.

Many defendants may also have marital problems and because of this factor they don't receive all of their mail. I have heard of countless scenarios wherein some disgruntled ex-wife throws away MVC notices for her estranged husband. Additionally, let's face the quality of the postal service varies from town to town. It is entirely reasonable to argue that a defendant did not receive any MVC notices because of poor mail delivery. Basically, you can blame the lack of notice on the Postman. Why not, you have nothing else to lose!

The best defense by far is to allege that the defendant never received adequate notice of the alleged suspension. There is valid New Jersey case law that provides that the prosecutor must prove that the defendant received notice of the proposed suspension.

2. Could you please provide some case law to support a due process defense against a driving while suspended case?

Illustrative is the case of Parsekian v. Cress, 75 N.J. Super. 405 (App. Div. 1962). In this case the court held that the DMV must provide adequate notice to defendants of any proposes suspension of their driver's licenses. The Appellate Division

held that the DMV could not suspend a defendant without first providing notice to the driver, and by giving him the reasons for the suspension.

Another important case is State v. Wenof, 102 N.J. Super. (Law Div. 1968). The Wenof holding also stands for the doctrine that all drivers must receive adequate notice of any proposed suspension. In the Wenof case the court emphasized that it was extremely important for any defendant to receive adequate notice of any suspension. In this case, the DMV sent a defendant a written notice of proposed suspension because he blew off a traffic ticket. The defendant initially failed to contest his license suspension. Thereafter, the DMV sent an order of suspension by regular mail. These notices were mailed to the defendant at his last address. Unfortunately, the defendant did not leave a forwarding address. Nonetheless, the court still held that the defendant did receive adequate notice and he could not complain of any lack of due process. In summary, the defendant's conviction of driving while suspended was still upheld. Even though the driver lost his appeal, some important points of law were created by the court. The Wenof court held that due process is an important part of any driving while suspended case.

In summary the New Jersey courts have consistently held that a driver's license may not be suspended or revoked without complying with due process standards. See, State v. Wenof, supra, 102 N.J. Super 370 (Law Div. 1968). Moreover, the New Jersey legislature has ever codified these legal rights in N.J.S.A. 39:5-30 which provides;

Every registration certificate, every license certificate, every privilege to drive motor vehicles may be suspended or revoked by the director for a violation of the provisions of this Title or on any other reasonable grounds, after due notice in writing of such proposed suspension, revocation, disqualification, or prohibition or ground thereof." N.J.S.A. 39:5-30.

Furthermore, the New Jersey Supreme Court has held that a driver's license may not be taken away without due process, and he must be fully informed of the charges against him, and he must be afforded a fair opportunity to be heard. Bechler v. Parsekian, 36 N.J. 242 (1961).

3. What are some good arguments that can be raised to support a notice defense against a driving while suspended case?

When a driver is charged with driving while suspended it should be argued that the prosecutor should be required to introduce:
(a) Notice of scheduled suspension; (b) Proof of mailing notice;
© Order of suspension; (d) Proof of mailing order; and (e)

Certified motor vehicle abstract. Quite often the prosecutor will not have all of these documents, and it will be impossible to convict a defendant.

4. How can I contest a driving while suspended case based on restoration issues?

Many drivers are pulled over because they don't pay the restoration fee. The MVC requires that all drivers must pay a \$100 restoration fee. There is a split of legal authority on the issue as to when a suspension is considered legally over. In the case of State v. Zalta, 217 N.J. Super. 209 (App. Div. 1987), the court held that a prior suspension still continues until the restoration fee is paid. Meanwhile, in the case of State v. Somma, 215 N.J. Super. 142 (Law. Div. 1986), the court held that the failure of a driver to pay the \$100 restoration fee does not extend the period of the suspension.

5. How can I contest an out-of-state driving while suspended case based on an out of state suspension?

In many cases a defendant is given a driving while suspended charge because he is suspended in another state. Believe me most prosecutors will never obtain the necessary paperwork from the sister state to enable New Jersey to obtain a conviction. If a person's driver's license has been suspended in another state, then the defendant can still be charged with driving while suspended in New Jersey.

An illustrative case is State v. Profita, 183 N.J. Super. 425 (App. Div. 1982). Here the defendant was a New York driver and she was suspended there because she blew off a traffic ticket. Eventually she was busted for driving while suspended in New Jersey. She admitted to the officer that she knew that she was suspended in New York. The Appellate Division affirmed her driving while suspended conviction even though the New Jersey MVC took no action to suspend her New Jersey driving privileges. In this case, the prosecutor would have never been able to prove that the defendant was aware that her license was suspended. However, the defendant sunk herself by giving a confession.

6. How can I contest a driving while suspended based on unpaid parking tickets?

Many drivers are ultimately suspended because they don't pay their parking tickets. These knuckleheads usually throw away their tickets, or they just forget to pay them. Unfortunately parking tickets never just disappear. If parking tickets go unpaid they eventually create a snowball effect. A simple unpaid parking ticket can lead to a driver's license suspension for driving while suspended. Eventually, the *Parking Offense Adjudication Act* N.J.S.A. 39:4-139.2 will catch up to a driver

who blows off his parking tickets. If the suspension for the failure to pay a parking ticket was ordered by a Municipal Court, then defense counsel could subpoena from the suspending court any copies of notices that were mailed to the driver. Many Municipal Courts won't be able to provide such notices. They either won't have these notices because they were not sent out. Moreover, these notices could be lost. Finally, in many cases the Municipal Court clerks may be too busy to comply with the requests as specified in the subpoena.

Nonetheless, the due process/notice requirements could provide an excellent defense against a driving while suspended based on unpaid parking tickets. If the originating court failed to provide proper notice of the proposed suspension, then the defendant can argue that there were no adequate grounds to justify any type of suspension.

7. How can I contest a driving while suspended case that was enhanced because of prior "convictions?"

The driving while suspended laws require mandatory enhanced penalties on conviction for a second and third offense. Moreover, an additional ten days of jail time can be added for every driving while suspended after the third one, if it was committed in conjunction with a moving violation.

In this scenario defense counsel should try to attack the prior convictions. In certain circumstances, a prior conviction may not necessarily count for sentencing purposes. If a defendant was not represented by legal counsel, then some judges may be persuaded that this conviction should not count as a prior for sentencing purposes. See, State v. Laurick, 120 N.J. 1 (1990), cert. denied, 498 U.S. 967, 111 S. Ct. 429 112 L. Ed. 2d 413 (1990).

Another interesting issue is whether an administrative suspension by the MVC should count as a prior conviction for sentencing enhancement purposes. Both the MVC and a Municipal Court can suspend a defendant. A strong argument can be made that a prior MVC conviction should not count as a prior conviction for sentencing purposes. Illustrative is the case of State v. Conte, 245 NJ Super. 629 (Law Div. 1990). Here, the court examined a case where a defendant had two prior administrative suspensions by the MVC pursuant to N.J.S.A. 39:5-30 and N.J.A.C. 13:19-10.8. The defendant had no prior court-imposed suspensions/convictions.

In a trial de novo, the Assignment Judge Longhi held that a suspension by the MVC does not count as a prior driving while suspended conviction. In his opinion he provided in pertinent part:

The word conviction is not defined in the statute.
Black's Law Dictionary defines conviction as " thefinal

judgment in a verdict or finding of guilty." Black's Law Dictionary (6th Ed. 1990) at 333. N.J.S.A. 2C:44-4(a) defines "prior conviction of an offense" as "an adjudication by a court of competent jurisdiction that the defendant committed an offense constitutes a prior conviction." Conviction has also been defined as " the confession of the accused in open court or the verdict returned by the jury which ascertains and publishes the fact of guilt." Tucker v. Tucker, 101 N.J. Eq. 72,73, 137 A. 40 (Ch. 1927).

The motor vehicle statute, N.J.S.A. 39:3-40, is quasi-criminal and penal in nature and must be strictly construed against the state. State v. Churchdale-Leasing Inc, 115 N.J. 83 (1989). The word conviction, as it is used in N.J.S.A. 39:3-40, refers only to a plea or a finding of guilty in a court of competent jurisdiction and not an order of suspension entered by the MVC as the result of an administrative proceeding. The two prior suspensions are not convictions and the defendant must be viewed as a first offender under the statute. See, State v. Conte, supra, 245 N.J. Super. at 631.

In the Conte case the sentence imposed was reversed. Moreover, the case was remanded for re-sentencing the defendant as a first time offender. In summary, it should always be argued that a suspension by the MVC does not count a prior conviction for sentencing purposes in a driving while suspended case.