

The Appellate Advocate:

A Recap of Recent Decisions by NJ's Appellate Courts



State v. Driesse **A-0779-22**

In my 10+ years since graduating from law school, my focus has been on civil litigation. Criminal law only comes up from time to time. That is very different from when I clerked at the Appellate Division, where criminal cases took up a lot of my day-to-day. I was always—and remain—fascinated by criminal sentencing; the factors, the solemnity, and the intense impact on both the convicted felons and the victims of crime. That is why I was drawn to this recent opinion.

If the facts seem cinematic, that is because “cinema” was the defendant’s precise theory of the case.

May 3, 2016. A remote stretch of the Long Pond Ironworks State Park. Defendant Jason Driesse drove there with “Stacy” (the Appellate Division used a pseudonym). She was a friend and former lover. According to Driesse, Stacy had expressed a suicidal intent. So, when Driesse arrived at his destination, he told her to write a suicide note. When she refused, he pulled a gun.

Later, Driesse would claim it was a misunderstanding, a twisted attempt at therapy. He was imitating an episode of M*A*S*H—a soldier on the brink, a doctor faking an execution to shock the soldier into choosing life. Stacy didn’t buy it. Neither did the police or the jury. Ultimately, Driesse was convicted of making terroristic threats (while dodging a charge for attempted murder) and sentenced to five years in prison.

Driesse raised a number of issues on appeal, but I want to focus on the two items specific to his sentencing.

First, Driesse argued the trial court erred by refusing to waive the Graves Act. The Graves Act triggers a mandatory term of imprisonment if, under certain circumstances, a firearm is used in connection with the commission of a crime. The Graves Act can, however, be waived by the trial court on a recommendation by the prosecutor. But this waiver is subject to immense discretion on the part of prosecutor and trial court, all of which the Appellate Division reviewed—in detail—and determined to be appropriate.

The Appellate Division's summary of the trial record is a fascinating read for anyone interested in the nitty-gritty of sentencing, and I strongly encourage you to peruse it.

Second, Driesse argued the trial court misapplied certain sentencing factors. Here the Appellate Division agreed—but only in minimal part. The panel ruled that the trial court had applied one aggravating factor that was not supported by the record, and had failed to apply certain mitigating factors that were supported by the record; or at least, had failed to explain why the mitigating factors did not apply.

Again, I encourage you to read the opinion. This blog would never do the panel justice in describing how carefully the appellate judges evaluated the sacred question, i.e., whether Driesse should be resentenced in light of the trial court's error. The Appellate Division ruled that he should not be resentenced because, notwithstanding the error, "there is no reasonable basis to conclude he would receive a lighter sentence."

Whether it is civil litigation or criminal litigation, remember that not every error is a reversible error—even when it comes to criminal sentencing.

About Thomas Cotton

Thomas Cotton is a litigation partner at Schenck Price, representing clients in trial and appellate courts throughout the United States. In addition to his practice, he authors *The Appellate Advocate*, a semi-weekly blog offering thoughtful yet accessible commentary on recent appellate rulings.



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About Schenck Price

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