2022 NJSBA Annual Meeting

Criminal Law Appellate Practice Update

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EMERGENT & INTERLOCUTORY APPEALS

DECIDING WHETHER TO FILE AN INTERLOCUTORY APPEAL

Some factors to consider in deciding whether to file an interlocutory appeal include:

TIMING IS EVERYTHING- Is this matter emergent, what stage of proceedings is this decision taking place? Is it emergent? Could this have been prevented with planning?

EXPENSE - Consider the costs of appeal, filing fees and transcripts.

HOW IMPORTANT IS THIS ISSUE - How necessary is evidence or ruling to your case? Can it survive without it or will it be irreparably harmed?

LIKELIHOOD OF SUCCESS - Will you win on the merits?

JUDGE FACTOR - Do you want to antagonize the judge who will be ruling on the remainder of your case?

MOTIONS FOR LEAVE TO APPEAL - R. 2:2-2; 2:2-4; R. 2:5-6(a)

An appeal as of right may be taken to the Appellate Division only from a final judgment. R. 2:2-3(a)(1). A final judgment is one which adjudicates all claims raised in an action as to all parties. An interlocutory order is any other ruling of a court or administrative agency.

If a judgment or order is interlocutory, the aggrieved party generally has no right to appeal to the Appellate Division. R. 2:2-4; R. 2:5-6(a). Interlocutory orders may be challenged when final judgment is entered and are appealable as a right as part of that final judgment. R. 2:2-3. If appellate review of an interlocutory order is desired prior to final judgment, leave to appeal must be requested pursuant to R. 2:5-6.

STANDARDS FOR GRANTING

Leave to appeal is a "highly discretionary." It is extraordinary relief which is granted in the interests of justice to consider a fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary cause. R. 2:2-4; State v. Reldan, 100 N.J. 187, 205 (1985). Our courts exercise the authority to grant leave to appeal only sparingly.

State v. Reldan, supra.

Leave to appeal is limited to exceptional cases where on a balance of interests, justice suggests the need for review in advance of trial. The merits of the appeal and the interests of justice are considered in addition to the delay, expense and calendar congestion which may be caused by the appeal.

In a criminal case, leave to appeal is ordinarily granted to the State when the trial court suppresses evidence because of the double jeopardy consequences which flow from an acquittal at trial which follows the suppression. State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997).

Except where the interests of justice require, a final decision of an administrative agency is not appealable as of right to the Appellate Division so long as there is a right of review remaining within the agency. R. 2:2-3(a).

STAY OF TRIAL COURT PROCEEDINGS - R. 2:5-6(a)

The filing of a motion for leave to appeal does not stay the order which is the subject of the motion or proceedings in the trial court or agency. R. 2:5-6(a).

A motion for a stay must be made to the trial court or agency which entered the order. R. 2:9-3(f) (stays pending criminal appeal), R. 2:9-5 (civil actions).

If it is denied, then a motion for a stay may be made to the Appellate Division, if necessary, on an emergent basis.

FINAL OR INTERLOCUTORY?

The key to determining whether an order is interlocutory or final depends on whether it disposes of all of the issues in controversy and as to all parties. Wein v. Morris, 194 N.J. 364, 377 (2008); Hudson v. Hudson, 36 N.J. 549, 553 (1962); State in the Interest of R.L., 202 N.J. Super. 410, 411 (App. Div.), certif. denied, 102 N.J. 357 (1985).

FINAL JUDGMENTS

The dismissal of all counts of an indictment, accusation or complaint is final. State v. Ruffin, 371 N.J. Super. 371 (App. Div. 2004). Dismissal of only some counts are interlocutory.

Order entering a judgment of acquittal notwithstanding the verdict (NOV), following a jury verdict of guilty is final. R.

3:18-2(b)(3); State v. Kleinwaks, 68 N.J. 328, 330 (1975); State v. Bowen, 154 N.J. Super. 368, 370 (App. Div. 1977), certif. denied, 77 N.J. 479 (1978).

INTERLOCUTORY ORDERS

CRIMINAL CASES - examples of interlocutory orders include:

Order waiving a juvenile to adult court, State in the Interest of R.L., 202 N.J. Super. 410 (App. Div.), certif. denied, 102 N.J. 357 (1985);

Order denying a defendant's admission to the Pretrial Intervention Program (PTI), R. 3:28(f)3;

Order granting or denying suppression motions, R. 2:3-1(b)(5), R. 3:5-7(d);

Order dismissing some (but not all) counts of an indictment accusation or complaint;

Order vacating a jury verdict and requiring a new trial.

Orders granting post-conviction relief, State v. Sarto, 195 N.J. Super. 565, 569-570 (App. Div. 1984). See also State v. Banks, 349 N.J. Super. 234, 235 (App. Div. 2001) (State appealed grant of PCR by way of leave to appeal), aff'd o.b., 171 N.J. 466 (2002);

Orders on evidentiary rulings, State v. Fortin, 318 N.J. Super. 577, 580 (App. Div. 1999), aff'd and remanded, 162 N.J. 517 (2000); State v. Davis, 96 N.J. 611, 614 (1984) (rejection of expert testimony in penalty phase of capital murder case reviewable prior to judgment only on leave granted).

INTERLOCUTORY ORDERS WHERE LEAVE NOT NECESSARY - R. 2:2-3

There are some cases where the court rules expressly permit appeals as of right from interlocutory orders. R. 2:2-3.

PTI ORDERS - R. 2:2-3

Some PTI orders, although interlocutory, are treated as final by R. 2:2-3(a)(3) when:

The order admitting a defendant into pretrial intervention (PTI) is entered over the objections of the prosecutor. It is

considered final and State may appeal as of right, R. 2:2-3(a)(3); R. 3:28(f).

An order of the trial court enrolling a defendant into PTI over the objection of the prosecutor is deemed final for appeal as of right and is automatically stayed for 15 days following its entry, and if the prosecutor files a notice of appeal within that 15 day period, for the duration of the appeal. R. 2:9-3(e); R. 3:28(f).

The State must appeal from an order enrolling a defendant into PTI over the prosecutor's objections within 15 days following its entry in order to challenge such orders. State v. Robbins, 407 N.J. Super. 148, 151 (App. Div. 2009). State's failure to file appeal within 15 day period or obtain a stay of PTI participation warranted dismissal of the State's PTI appeal. Robbins, 407 N.J. Super. at 151-152 (notice of appeal filed 25 days after order entered).

CERTIFICATION OF INTERLOCUTORY ORDER AS FINAL - R. 4:42-2

An interlocutory order may be certified as final under R. 4:42-2 only if it satisfies two preconditions:

FIRST - it must fall within one of the three numbered subparts of the rule, and

SECOND, it must be "subject to process to enforce a judgment pursuant to R. 4:59 if it were final." Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. at 550.

A trial judge cannot make an interlocutory order final merely by labeling it as final under this rule; the requirements of the rule must be met before the certification is effective. Delbridge v. Jann Holding Company, 164 N.J. Super. 506, 510 (App. Div. 1978); DeFelice v. Beall, 274 N.J. Super. 592, 595 n.1 (App. Div.), certif. denied, 138 N.J. 268 (1994); Kurzman v. Appicie, 273 N.J. Super. 189, 191-192 (App. Div. 1994) (appeal dismissed because trial court improperly certified interlocutory order as final).

The Appellate Division has repeatedly disapproved of litigants' attempts to use R. 4:42-2 as a device to secure appellate review of an interlocutory order without moving for leave to appeal. Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 551-552. The Court noted in Janicky that its numerous pronouncements regarding the inappropriateness of using a

finality certification to obtain review of an interlocutory order have gone unheeded. Vitanza v. James, 397 N.J. Super. 516, 518-519 (App. Div. 2008; Janicky, 396 N.J. Super. at 552. As a result, the Appellate Division dismissed the appeal in Janicky because it failed to qualify for certification as final under R. 4:42-2. Janicky, 396 N.J. Super. at 552-553.

TIME LIMITS AND EXTENSIONS - R. 2:5-6; R. 2:4-4(b)(1)

A motion for leave to appeal from an interlocutory order of a judge or the decisions or actions of a state administrative agency or officer must be filed within twenty (20) days after date of service of such order, administrative decision or notice of such administrative decision. R. 2:5-6(a).

The computation of the twenty (20) day period is calculated from the date of service of the subject order, rather than the date of its entry by the trial court. R. 2:5-6(a).

EXTENSIONS - R. 2:4-4(b)(1)

The appellate court may extend the time for filing an interlocutory appeal for a period not exceeding an additional fifteen (15) days. R. 2:4-4(b)(1).

It may extend the time for filing a notice of motion for leave to cross-appeal "for such period as it deems reasonable." R. 2:4-4(c).

It may also grant leave to appeal as within time from an interlocutory order so long as the appeal is taken within the time for appeals from final judgments (45 days). R. 2:4-4(b)(2).

MOTION FOR RECONSIDERATION

A motion for reconsideration is considered timely if it is filed and served within twenty (20) days after date of service of the interlocutory order. R. 2:5-6(a). If a reconsideration motion is timely filed, the time to file LTA is extended to 20 days after service of trial court order deciding motion for reconsideration. R. 2:5-6(a).

EMERGENT APPLICATIONS

Emergent applications may be necessary in rare cases where time is of the essence in resolving an interlocutory issue. The best example is a pre-trial ruling that may derail your case, the trial date is looming and the trial court refuses to grant a stay.

Emergency must be genuine and not "self-created." It is

wise to resolve anticipated and disputed issues before trial so there is sufficient time to seek leave to appeal.

APPELLATE DIVISION EMERGENT APPLICATIONS

The Judiciary website has forms for emergent applications to the Appellate Division. You fill out the form and collect the necessary documents - order from which leave to appeal is sought, any opinion of the trial court, order granting or denying stay.

The Appellate Division no longer publishes a list of judges on emergent duty that the parties directly contact for emergent applications. After the form is complete, you contact the Appellate Division at (609) 815-2950 ext. 52614 and tell them that you have an emergent application. You will be put in touch with the individual who handles the emergent applications. If the forms are in order, you can e-mail or fax the forms to the Emergent Application contact, who will forward you application to a judge.

You must also serve copies of the emergent application, by e-mail or fax, on your adversaries and the trial judge. That contact information is required to be put on emergent application form.

APPELLATE DIVISION JUDGE CAN DO A NUMBER OF THINGS.

BAD NEWS

1. DENY emergent application because not a genuine emergency. Counsel can file leave to appeal or stay motion in ordinary course.

2. DENY application because counsel did not apply for stay to trial court, and did not obtain signed order of trial court ruling before seeking stay from Appellate Division.

3. DENY application because it concerns an order entered during trial or on the eve of trial as to which there is no prima facie showing that immediate interlocutory intervention is warranted.

GOOD NEWS

1. **APPLICATION IS GRANTED** on the following terms:

Counsel must file motion for emergent relief and a notice of appeal or motion for leave to appeal within a specified time frame [usually days].

Copies filed that same day with counsel and trial judge. Do not send through mail. E-mail, fax and overnight mail. Must be in opposing counsel's hands date it is filed with court. Opposition given time to respond.

SUPREME COURT EMERGENT APPLICATIONS

If you are denied emergent relief from the Appellate Division, you can file an emergent application with the Supreme Court.

Emergent Application form is on the Judiciary website under "Supreme Court" forms. There is an instruction sheet for filing the emergent application. You are asking the Court to allow you to quickly file a motion and brief before the "emergent event" occurs [trial starts, discovery ordered, prisoner released].

You need written order from Appellate Division, like denial of leave to appeal, denial of a stay, opinion ordering immediate relief, in order to file application with Supreme Court.

Complete the Supreme Court Emergent Matter Intake Form [found on website] and set forth the relief you are seeking. After Intake Form is complete, call the Supreme Court Clerk's Office, 609-815-2955 and tell them that you want to file an emergent application. They will instruct you what to do.

If Appellate Division denied emergent application you must submit copy of that form, the disposition page and all attachments to the Supreme Court with the Intake Form.

If Appellate Division decided motion, you must send Supreme Court a notice of motion and brief for review. Court may allow you to rely on Appellate Division brief.

A single justice may act on the Emergent Application. The Justice may deny emergent relief or grant temporary relief pending review by the entire Court.

DRAFTING THE MOTION BRIEF FOR LEAVE TO APPEAL

The brief in support of a motion for leave to appeal cannot exceed 25 pages. R. 2:8-1. In addition to the merits of the issue raised it must explain why leave to appeal is necessary.

Questions to Consider

What is the irreparable harm and interests of justice that can convince the court to grant leave?

How can you make the issue compelling?

Do you have time to get the transcripts or do you have trial attorney to prepare a certification in lieu of transcripts?

The criminal case trump card - double jeopardy.

APPENDIX

The appendix must include a copy of the order appealed from and the trial court's decision. If a transcript cannot be obtained in time, a certification in lieu of transcript may be submitted.

NOTICE TO THE TRIAL COURT - R. 2:5-6(c)

A party filing a motion for leave to appeal from an interlocutory order shall serve a copy on the trial judge or officer who entered the order. R. 2:5-6(c).

If the judge or officer has no filed a written statement of reasons or if no verbatim record was made of the oral statements of reason, the judge or officer shall, within 5 days after receiving the motion, file and transmit to the Clerk of the Appellate Division and the parties a written statement of reasons for the disposition. R. 2:5-6(c).

The trial judge may also, within the 5 day period, comment on whether the motion for leave to appeal should be granted and amplify any statements of reasons previously made. R. 2:5-6(c).

APPELLATE OPTIONS IF LEAVE TO APPEAL GRANTED

The Appellate Division could grant leave to appeal and summarily reverse the trial court. R. 2:11-2. More likely in cases where leave is sought during jury trial.

The Appellate Division could grant leave to appeal and permit further briefing and oral argument. R. 2:11-2. If you have nothing else to add to leave to appeal brief, you can update it (new cover, update procedural history, add order granting leave to appendix) and use it as your merits brief. You will have to file an additional five copies of the updated brief with the court.

APPELLATE OPTIONS IF LTA IS DENIED

If the Appellate Division denies the motion or grants and denies relief, you can file motion for leave to appeal to the Supreme Court. R. 2:2-5(a)

If leave to appeal is granted but you lose with a dissenting opinion, you have no appeal as of right to the Supreme Court until the judgment is final. State v. Marrero, 148 N.J. 469 (1997).

RESPONDING TO A MOTION FOR LTA

Focus on why interlocutory review is not necessary. Defendant can have matter reviewed on direct appeal following conviction. If acquitted, issue is moot.

Short response is best. If leave to appeal is granted, you will have full opportunity to brief issue.

CROSS-APPEALS - R. 2:5-6(b)

A motion for leave to file a cross-appeal must be filed 20 days after trial court order or the order deciding the reconsideration motion. R. 2:5-6(b). The time runs from the date of service, not entry of, the interlocutory order, decision or action. R. 2:5-6(b).

A cross-appeal as of right may be filed from the same interlocutory order to which leave has been granted by service of a notice of cross-appeal 15 days after service of Appellate Division order granting leave to appeal. R. 2:4-2(a). Lanzet v. Greenberg, 222 N.J. Super. 540, 544-45 (App. Div. 1988).

When leave to appeal has been granted and the other party wishes to cross-appeal from a different interlocutory order, that party may file a notice of motion for leave to cross-appeal within ten (10) days after entry of the order granting leave to appeal, but only if a cross-appeal has not been previously made and denied. R. 2:5-6(b), R. 2:4-2(b); Lanzet v. Greenberg, 222 N.J. Super. 540, 545 (App. Div. 1988).

CONSEQUENCES WHEN NOA RATHER THAN LTA FILED

The "nunc pro tunc" or within time grant of leave to appeal had been a common remedy under R. 2:4-4(b)(2) when a party has filed a timely notice of appeal rather than a motion for leave to appeal under the mistaken belief that the order was final and not interlocutory ... BUT

The tide has turned and dismissals of appeals are more

common remedy. Vitanza v. James, 397 N.J. Super. 516 (App. Div. 2008); Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545 (App. Div. 2007); Parker v. City of Trenton, 382 N.J. Super. 454 (App. Div. 2006).

The court may dismiss any appeal if a notice of appeal, rather than a notice of motion for leave to appeal, is erroneously filed. Parker v. City of Trenton, 382 N.J. Super. 454, 458 (App. Div. 2006).

While leave to appeal has sometimes been granted as within time in such situations, the Appellate Division has recently taken a strong stand against such a remedy. Vitanza v. James, 397 N.J. Super. at 519; Parker v. City of Trenton, 382 N.J. Super. at 458.

The court has come to realize that if it reviewed every interlocutory appeal on the merits, despite the failure to seek leave to appeal, just because the case was fully briefed, there would be no adherence to the Court Rules and the parties will believe that there is no need to seek leave to appeal from interlocutory orders. Vitanza v. James, 397 N.J. Super. at 519; Parker v. City of Trenton, 382 N.J. Super. at 458.

The Appellate Division made it clear in Vitanza that, "the time has come to enforce the Rules regarding motions for leave to appeal and not to decide an appeal merely because the respondent did not move to dismiss it and it was fully briefed." Vitanza, 397 N.J. Super. 519.

If you are the respondent in a case where the other party has filed a notice of appeal, rather than a motion for leave to appeal, from an interlocutory order, you should consider filing a motion to dismiss the appeal. See, State v. Vitanza, 397 N.J. Super. at 519 ("respondents have neglected to move, as they should, to dismiss an appeal from an interlocutory order" where no motion for leave to appeal was filed or granted).

SUBSEQUENT APPEALS AFTER JUDGMENT

Once final judgment is entered and appealed, all interlocutory orders that have not been rendered moot or definitely ruled upon in a prior interlocutory appeal may be raised in that appeal. Daly v. High Bridge Teachers' Ass'n, 242 N.J. Super. 12, 15 (App. Div.), certif. denied, 122 N.J. 356 (1990).

An issue that has been litigated and adjudicated on a prior

interlocutory appeal is law of the case and cannot be challenged on appeal from a final judgment. State v. Myers, 239 N.J. Super. 158, 164 (App. Div. 1990), certif. denied, 127 N.J. 323 (1992); State v. Stewart, 196 N.J. Super. 138, 143-144 (App. Div.), certif. denied, 99 N.J. 212 (1984).

However, a party may not seek appellate review of an adverse interlocutory order without seeking relief from the outcome of the litigation as embodied in the judgment. A litigant satisfied with the judgment cannot have an advisory appellate evaluation of an alleged interlocutory error. Grey v. Trump Castle Associates, L.P., 367 N.J. Super. 443, 448 (App. Div. 2004); Magill v. Casey, 238 N.J. Super. 57, 62 (App. Div. 1990).

A. Search and Seizure – Liz

State v. Nyema/State v. Myers – 249 N.J 509 (2022)
State v. Terres/ State v. Radel – 249 N.J. 489 (2022)

B. Miranda/Remain Silent – Alison

State v. Sims (decided 3/16/22)
State v. Gonzalez – 249 N.J. 612 (2022)

C. Hedge-Smith/Carrion (Criminal Practice Committee) – Claudia

State v. Hedgespeth – 249 N.J. 234 (2021)
State v. Carrion – 249 N.J. 253 (2021)

D. Juvenile – Carol

State v. Comer/ State v. Zarate – 249 N.J. 359 (2022)
State v. Rivera – 249N.J. 285 (2021)

E. State v. Arroyo-Nunez , decided 1/18/22 2022 WL 151605- Alison and Claudia

F. Sentencing – Kim

State v. Torres (consecutive sentences) – 246 N.J. 246 (2021)
State v. Melvin/ State v. Paden-Battle (acquittals cannot enhance sentence)- 248 N.J. 321 (2021)