



HIV Criminalization in New Jersey

The HIV criminalization laws in New Jersey are in great need of reform. Consensual sex between adults with a condom can result in a prison sentence and a minor bite wound may be charged as attempted murder.

Statute Allowing for Criminal Prosecution based on HIV Status

The crime of “sexual penetration by a diseased person” involves “commit[ting] an act of sexual penetration without the informed consent of the other person” if one knows “that he or she is infected with human immune deficiency virus (HIV) or any other related virus identified as a probable causative agent of acquired immune deficiency syndrome (AIDS).”¹ For the purposes of this statute, an act of sexual penetration is broadly interpreted as “vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor’s instruction.”² This an offense of the third degree³, meaning those sentenced under this statute may face 3-5 years in prison⁴ and up to \$15,000 in fines.⁵

Prosecutions under this statute have been seen as recently as the 2012 case *State v. E.W.*, in which the Appellate Division of the Superior Court of New Jersey affirmed a conviction against a man who pled guilty to third-degree sexual penetration by a diseased person.⁶ The conviction was affirmed on grounds unrelated to the offense.⁷

In 2011, a 63-year-old HIV-positive man pled guilty to having sexual intercourse with two women without disclosing his HIV status.⁸ It was not relevant under the statute whether either woman contracted HIV, as the language for this offense is targeted at the sexual act itself.

In March 2010, a 20-year-old man was charged with two counts of sexual intercourse without disclosure of his HIV-status.⁹ There was no evidence that anyone was infected.¹⁰

¹ N.J. Stat. Ann. § 2C:34-5(b).

² N.J. Stat. Ann. § 2C:14-1.

³ New Jersey does not use a felony/misdemeanor system. Rather, indictable crimes are classified by numerical degrees, with first-degree offenses carrying the most severe punishments and fourth-degree offenses carrying the least.

⁴ N.J. Stat. Ann. § 2C:43-6.

⁵ N.J. Stat. Ann. § 2C:43-3.

⁶ *State v. E.W.*, 2012 WL 1948654, at *1 (N.J. Super. Ct. App. Div. May 31, 2012).

⁷ Defendant based his appeal on ineffective assistance of counsel in regard to his sentence under a concurrent sexual assault charge and did not address the HIV-related offense.

⁸ *Plainfield police captain who had sex without revealing HIV jailed*, MYCENTRALJERSEY (Apr. 11, 2015), <http://www.mycentraljersey.com/story/news/local/2015/04/11/retired-plainfield-officer-jailed-hiv-status/25626165>.

Note that pursuant to this statute, police officers are allowed to disclose serostatus to third parties, if the disclosure is done as part of their official duties.¹¹ In the 2005 case *Apertua v. Pirrello*, the defendant police officer successfully argued that Morris Township should pay his legal fees from an HIV-disclosure defamation suit.¹² His argument was based on his belief that by telling a third party about the plaintiff's alleged HIV-status, he was acting to prevent the spread of the virus. The court ruled that his disclosure was within the goals of law enforcement.¹³

General Criminal Laws Used to Prosecute on the Basis of HIV Status

Attempted Murder and Aggravated Assault:

In a 1993 case, *State v. Smith*, an HIV-positive man was found guilty of attempted murder, aggravated assault, and terroristic threats for biting and puncturing the skin of a correctional officer.¹⁴ Testimony from physicians supplied by both the state and the defendant supported the idea that the likelihood of transmitting HIV via bite is “extremely remote,”¹⁵. The defendant was convicted on the Court's finding that he subjectively believed his bite could transmit HIV and ultimately kill the officer.¹⁶ The fact that HIV was not transmitted to the officer was determined to be irrelevant to the prosecution.¹⁷

At trial and on appeal, the defendant relied upon evidence supporting his claim that he knew that HIV could not spread via a bite wound, including testimony on his own readings and conversations with physicians,¹⁸ a mental health worker¹⁹ and his diagnosing physician.²⁰ Nevertheless, the appellate court held a reasonable jury could have rejected his claim that he knew biting and spitting could not spread HIV, because of a “conflict in the record between that claim and his conduct in jail over several months.”²¹ According to witnesses, the defendant threatened numerous officers that he would bite them or spit at them for the express purpose of giving them HIV. His defense to this testimony was that everyone was lying.²²

⁹ Michael Buck, *HIV-positive Man Charged with Second Sex Crime in Hunterdon County*, LEHIGH VALLEY LIVE (Mar. 10, 2010), http://www.lehighvalleylive.com/hunterdon-county/express-times/index.ssf/2010/03/hivpositive_man_charged_with.html.

¹⁰ *Id.*

¹¹ *Apertua v. Pirrello*, 886 A.2d 1081 (N.J. Super. Ct. App. Div. 2005).

¹² *Id.* at

¹³ *Id.* at 1083.

¹⁴ *State v. Smith*, 621 A.2d 493 (N.J. Super. Ct. App. Div. 1993).

¹⁵ *Id.* at 499.

¹⁶ *Id.* at 493.

¹⁷ *Id.* at 497.

¹⁸ *Id.* at 500.

¹⁹ *Id.*

²⁰ *Id.* at 506.

²¹ *Id.* at 507.

²² *Id.*

In 1994, a 17-year-old woman was indicted on charges of attempted murder and aggravated assault after she bit a juvenile detention officer on the arm and drew blood.²³ Whether she actually had HIV or if it was possible to transmit the virus by biting was not relevant because, following the rule of *State v. Smith*, criminal charges could be asserted if she thought she had HIV and that she could transmit it to the officer by biting him.²⁴ In New Jersey, like the many other states that have HIV criminalization laws, “impossibility is not a defense.”²⁵ The law of this state seeks to punish on the basis of mental state and intent, rather than objective fact.²⁶ The burden in these types of cases is on the defendant to prove beyond a reasonable doubt that they know which actions can lead to transmission of HIV, and that their actions did not fall into this category.

Robbery with a Deadly Weapon:

In 1998, *State v. Aimis* held that a hypodermic needle allegedly infected with AIDS is a deadly weapon for the purposes of the No Early Release Act (“NERA,” a statute under which those convicted of certain violent offenses must serve at least 85% of their sentence before becoming eligible for parole).²⁷ In trying to determine if a syringe could be a deadly weapon, the court noted that “the object being scrutinized cannot be viewed in isolation, but must be viewed in light of how it is employed by the defendant.”²⁸ Here, the court concluded that a man brandishing a syringe that he stated contained AIDS was sufficient to trigger NERA.²⁹ In keeping with *State v. Smith*, it was irrelevant whether the syringe contained AIDS, as impossibility is not a defense.

Later courts have confirmed that determining what constitutes a deadly weapon for the purposes of the NERA is a heavily fact-dependent decision. The court in *State v. Grawe* noted that “absent the direct and imminent threats, it is questionable whether the Law Division judge [in *Aimis*] would have considered the hypodermic needle a ‘deadly weapon’ under the NERA.”³⁰

Medical Record Disclosure in Criminal or Civil Cases

In the 2013 case, *State v. C.M.*, it was held that medical records cannot be released to “initiate or pursue criminal or civil charges against the subject of those records or to conduct any investigation of that person” unless certain criteria are met.³¹ Medical records will be released with a court order granted pursuant to a good cause hearing, in which the court “weigh(s) the public interest and need for disclosure against the injury to the person who is the subject of the record, to

²³ Joseph F. Sullivan, *Girl Who Thinks She has AIDS to Stand Trial for Biting of Guard*, N.Y. TIMES (Aug. 31, 1994), <http://www.nytimes.com/1994/08/31/nyregion/girl-who-thinks-she-has-aids-to-stand-trial-in-biting-of-guard.html>.

²⁴ *Id.*

²⁵ *State v. Smith*, 621 A.2d 493 at 502.

²⁶ *Id.*

²⁷ *State v. Aimis*, 721 A.2d 329, 331 (N.J. Super. Ct. L. Div. 1998).

²⁸ *Id.*

²⁹ *Id.* at 332.

³⁰ *State v. Grawe*, 744 A.2d 246, 252 (N.J. Super. Ct. App. Div. 2000).

³¹ *State v. C.M.*, 2013 WL 3582074, at *2 (N.J. Super. Ct. App. Div. July 16, 2013).

the physician-patient relationship, and to the services offered by the program.”³² A lower standard applies if a defendant is charged with a first-degree offense³³. Records for defendants charged with these type of offenses may be released if “there is a reasonable likelihood that the record in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution”.³⁴

Senate Bill 148, introduced January 14, 2014 and currently before the New Jersey Senate Judiciary Committee, seeks to expand the range of situations under which medical records may be disclosed to include any case involving “the crime of a diseased person committing an act of sexual penetration.”³⁵ The same bill also seeks to render that offense ineligible for expungement.³⁶ Since its referral to the Judiciary Committee, no action has been taken on the bill.³⁷

(July 9, 2015)

³² *Id.*

³³ First-degree offenses include aggravated sexual assault, murder, and manslaughter. These offenses can carry prison terms typically ranging from 10-20 years and fines up to \$200,000 (N.J. Stat. Ann. §§ 2C:43-3,6).

³⁴ *Id.*

³⁵ S.B. 148, 216th Leg., at 2:21-28 (N.J. 2014).

³⁶ *Id.* at 4:32-33.

³⁷ If the bill is not addressed by the commencement of the 2014-2015 legislative session, it will be considered dead. The sponsor is free to re-introduce it in a subsequent session under a different number.