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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1196-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL RICCIUTI,

Defendant-Appellant.

Submitted April 6, 2022 – Decided May 19, 2022

Before Judges Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey, Law
Division, Ocean County, Municipal Appeal No. 20-12.

Nicholas A. Moschella, Jr., attorney for appellant.

Bradley D. Billhimer, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella, Chief
Appellate Attorney, of counsel; Cheryl L. Hammel,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Michael Ricciuti entered a conditional negotiated guilty plea in municipal court to driving while intoxicated (DWI), a per se violation contrary to N.J.S.A. 39:4-50, stemming from his operation of a motor vehicle while having a blood alcohol concentration (BAC) in excess of the legal limit. On de novo appeal to the Law Division, defendant maintained that his Alcotest breath sample test results that formed the evidentiary basis for the violation were inadmissible because the State failed to produce certain Alcotest repair and calibration-related records during discovery. The Law Division judge rejected defendant's argument and entered a December 1, 2020 order denying his appeal, enforcing the plea agreement, and imposing sentence.

In this ensuing appeal of the December 1, 2020 order, defendant raises the following argument for our consideration:

POINT ONE

THE DEFENDANT WAS DENIED RELEVANT EVIDENCE AND WAS THEREFORE DENIED A FULL AND FAIR OPPORTUNITY TO PRESENT A VALID DEFENSE TO THE CHARGE OF DRIVING UNDER THE INFLUENCE.

A. The State Failed To Provide Relevant Evidence.

B. Defendant Was Denied Due Process And Right To Confrontation.

C. The State Was Obligated To Produce The Record Of Digital Thermometer Readings Pursuant To State v. Cassidy[, 235 N.J. 482 (2018)].

We also reject defendant's argument and affirm.

We glean these facts from the record. On April 28, 2019, Barnegat Township police officers stopped defendant for various motor vehicle violations and subsequently arrested him for DWI. After arriving at police headquarters, defendant was administered tests with an Alcotest machine, which analyzed his breath samples to determine his BAC. The tests showed defendant had a BAC of 0.16%, which is slightly more than twice the legal limit. See N.J.S.A. 39:4-50 (prohibiting individuals with a BAC of 0.08% or more from operating motor vehicles). As a result, defendant was issued summonses for DWI, N.J.S.A. 39:4-50; speeding, N.J.S.A. 39:4-98; unsafe lane change, N.J.S.A. 39:4-88(b); delaying traffic, N.J.S.A. 39:4-56; and reckless driving, N.J.S.A. 39:4-96.

For reasons undisclosed in the record, the matter was transferred to Jackson Township municipal court for disposition. At a hearing conducted on August 1, 2019, the municipal court judge adjourned the matter because the State had not yet produced the foundational documents required by the Court in State v. Chun, 194 N.J. 54, 153 (2008), to establish the reliability of the Alcotest machine utilized in connection with the prosecution. The municipal prosecutor

explained that "communication issues between [his] office and Barnegat [Township]" delayed production of the documents. Because the case was then already three-months-old, the judge said he would entertain a motion for a Holup¹ order at defendant's next appearance if the delays continued.

By defendant's next court appearance on September 12, 2019, the State still had not produced the foundational documents. Consequently, the judge issued a Holup order, requiring the State to deliver the missing discovery items within forty-five days. The next hearing occurred on November 21, 2019. By then, the State had produced all but one of the Chun foundational documents. However, defendant sought additional discovery, including Breath Testing Instrument Service Reports (BTISRs) and recordings from the NIST-traceable thermometer used to calibrate the Alcotest machine.² Regarding the former, according to defense counsel, the Alcotest machine in question had been

¹ State v. Holup, 253 N.J. Super. 320, 325 (1992) (explaining that when the State has not fulfilled its discovery obligations in a municipal matter, a defendant may seek "an order limiting time for the production of discovery and upon the municipal prosecutor's failure to do so, dismissal of the action").

² "The [National Institute of Standards and Technology (NIST)] is the federal agency responsible for maintaining and promoting consistent units of measurement. When a thermometer's temperature measurements are 'traceable' to the standard measurements of the NIST, those measurements are generally accepted as accurate by the scientific community." Cassidy, 235 N.J. at 488.

serviced on May 11, 2015, and the State Police should have created two BTISRs related to that servicing – one when they sent the machine to the manufacturer and another when the machine was returned. The prosecutor agreed to contact Barnegat Township and request the BTISRs.

Regarding the latter discovery request, defense counsel asserted that following our Supreme Court's 2018 decision in Cassidy, "going forward," the State was required "to keep track of the digital thermometer readings [during] calibration[s]," as a safeguard against miscalibration of the machine. Cassidy arose following the indictment of State Trooper Marc W. Dennis, who, for several years, allegedly falsely certified that he had calibrated Alcotest machines using a NIST-traceable thermometer. 235 N.J. at 486, 502. Although defendant's case was not impacted by Dennis's alleged malfeasance and Cassidy was decided only five months before defendant's DWI arrest, the municipal prosecutor agreed to produce the thermometer readings if the State had them.

On January 23, 2020, another hearing was held to follow up on the outstanding discovery issues. By then, defendant had received all the Chun foundational documents, but defense counsel and the prosecutor disputed whether the State had produced the repair records and whether the State was obligated to record the thermometer readings in defendant's case. As to the

repair records, the prosecutor asserted defendant already possessed all existing repair records from the machine's manufacturer and that the BTISRs may not exist. The prosecutor also argued that Chun did not require production of BTISRs. Defense counsel responded that Chun was not the "end all/be all" of discovery requirements and relied on this court's decision in State v. Maricic, 417 N.J. Super. 280, 286 (App. Div. 2010), to support his argument that defendant was entitled to "all repair records" related to the Alcotest machine at issue. The municipal court judge ruled that the BTISRs were not "relevant" given the fact that defendant was already in possession of the manufacturer-generated repair records documenting "the machine's proper operation post repair." The judge also reasoned that the BTISRs were "repair report[s,] not [repair] record[s]" as contemplated in Maricic.

Turning to the thermometer readings, the prosecutor stated that no record of the readings existed. The prosecutor explained that the State Police began maintaining thermometer reading records in January 2019 after receiving guidance that month from the Attorney General. The prosecutor pointed out that prior to defendant's arrest, the last calibration of the Alcotest machine utilized in defendant's prosecution occurred on November 18, 2018, five days after the

Court issued its opinion in Cassidy.³ Although the prosecutor conceded the State was obligated to record the readings, he maintained that "a modicum of reasonableness ha[d] to apply," and "[t]he State ha[d] to be . . . afforded an opportunity to implement the proper procedures." According to the prosecutor, because Cassidy was decided a mere five days before the State Police calibrated the Alcotest machine in question and the Attorney General did not issue guidance until several weeks later, it was unreasonable to expect the police to have had a recording procedure in place on November 18 when the machine was calibrated.

Defense counsel countered that those considerations were irrelevant because the Cassidy Court declared that a record of the thermometer readings would be required "going forward," and the State's failure to immediately "implement the procedure" for recording the readings "did[not] relieve [it] of [its] obligation." According to defense counsel, under Cassidy, the Alcotest results were "inadmissible" without the thermometer readings. The judge agreed with the prosecutor and ruled he would not "dismiss a case because the State

³ See Chun, 194 N.J. at 153 (ordering the "inspection and recalibration of all Alcotest devices every six months").

failed to implement procedures for the preservation of information set forth in Cassidy five days after the opinion was rendered."

After resolving other lingering discovery issues not pertinent to this appeal, defendant entered a negotiated guilty plea to a per se violation of N.J.S.A. 39:4-50. In exchange, the prosecutor agreed to dismiss the remaining violations. With the prosecutor's agreement, defense counsel explained to the judge that defendant intended to challenge the admissibility of the Alcotest results on appeal and reserved the right to withdraw his guilty plea if the Law Division ruled the results were inadmissible. In turn, the State reserved the right to reinstate the dismissed violations, except for the speeding violation, if the Law Division deemed the Alcotest results inadmissible. After ensuring the plea was knowing and voluntary and supported by an adequate factual basis, the municipal court judge accepted defendant's guilty plea, see R. 7:6-2(a)(1), and sentenced defendant as a second offender because defendant had a previous drunk driving conviction in 2012. See N.J.S.A. 39:4-50 (setting forth the penalties for first and subsequent DWI violations). The judge stayed the sentence pending appeal.

On December 1, 2020, the Law Division judge conducted a trial de novo on the municipal court record. See R. 3:23-8(a)(2). At the outset, the judge

determined that the manufacturer-generated repair records satisfied the State's obligation to provide "repair records" under Maricic, and the BTISRs were not "critical under the circumstances." The judge reasoned that the manufacturer-generated repair records "identifie[d] what the repair was, and that the [machine was] now properly functioning and [had] been properly calibrated."

However, the judge explained he had "concerns about the digital thermometer issue," stating:

I'm troubled by the language that was used in Cassidy. I thought that it was particularly inartful to use the expression, "going forward." . . . It would seem to me that it would have been more effective of the Supreme Court to have said, you know, henceforth within 60 or 90 or 120 days, or some quantifiable material that we would have had the obligation upon the State clearly identified

The judge posited that the issue was "whether the digital thermometer readings [were] an essential component of establishing the reliability of the machine" and directed counsel to focus their arguments on that issue.

After hearing counsels' arguments, the judge rendered an oral decision on the record, concluding the municipal court judge properly admitted the Alcotest results. Based "on the record below," the judge determined no recording of the thermometer readings existed and reasoned the Alcotest results were admissible, notwithstanding Cassidy, because the State had not acted in "bad faith," and

there was no evidence of "any type of subterfuge." In support, the judge relied on "the timing issues, between the date that [Cassidy] was published, and . . . the stop." As a result, the judge "den[ied] . . . defendant's appeal" and found "defendant was, in fact, guilty." Regarding sentencing, the judge suspended defendant's driving privileges for a period of two years; ordered defendant to serve forty-eight hours at the Intoxicated Driver Resource Center and complete thirty hours of community service; and imposed three years' installation of an ignition interlock device and appropriate fines and costs. The judge entered a memorializing order and a stay pending appeal, contingent upon installation of the ignition interlock device. This appeal followed.

"[A]ppellate review of a municipal appeal to the Law Division is limited to 'the action of the Law Division and not that of the municipal court.'" State v. Palma, 219 N.J. 584, 591-92 (2014) (quoting State v. Joas, 34 N.J. 179, 184 (1961)). We review the Law Division judge's legal conclusions "de novo, without affording any special deference to the trial court's interpretation of the law and the legal consequences that flow from established facts." State v. Rivera, 411 N.J. Super. 492, 497 (App. Div. 2010) (citing Manalapan Realty, L.P. v. Manalapan Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). However, "[a] trial court's resolution of a discovery issue is entitled to

substantial deference and will not be overturned absent an abuse of discretion." State v. Stein, 225 N.J. 582, 593 (2016). Likewise, "[w]e review evidentiary rulings under an abuse of discretion standard." State v. Jackson, 243 N.J. 52, 64 (2020). See Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (noting that the abuse of discretion standard is established "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis'" (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985))).

In Chun, the Court held that the Alcotest machine "is sufficiently scientifically reliable that its reports may be admitted in evidence" to prove a per se violation of N.J.S.A. 39:4-50. 194 N.J. at 148, 150. Consequently, the Court ordered the State "forthwith" to produce certain foundational documents during discovery to demonstrate the device was in proper working order. Id. at 153. However, the Court declared that only three of the foundational documents, none of which are at issue here, must be entered into evidence for trial courts to admit Alcotest results. Id. at 145.⁴ Additionally, the Court "commend[ed] to

⁴ The three documents consist of "(1) the most recent calibration report prior to a defendant's test . . . and the credentials of the coordinator who performed the calibration;" (2) "the most recent new standard solution report prior to a defendant's test;" and (3) "the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests." Chun, 194 N.J. at 145.

the State the establishment of a protocol for maintaining repair logs to the extent that [machine repairs] become more frequent and, therefore, potentially relevant." Id. at 145 n.48.

In Maricic, while acknowledging that repair records are not Chun foundational documents, we held a defendant is entitled to Alcotest machine repair records during discovery. 417 N.J. Super. at 288. We pointed to the Chun Court's comment about the potential relevance of repair records as machine repairs become more frequent and observed that Rule 7:7-7, governing discovery in municipal courts, provides that municipal prosecutors must produce relevant material during discovery upon written request from defendants. Maricic, 417 N.J. Super. at 283, 285.

"Relevancy is the hallmark of admissibility of evidence," State v. Darby, 174 N.J. 509, 519 (2002), and relevant evidence "ha[s] a tendency in reason to prove or disprove any fact of consequence to the determination of the action," Stein, 225 N.J. at 595 (alteration in original) (quoting N.J.R.E. 401). Nonetheless, prosecutors are only obligated to produce relevant documents within the State's "possession, custody or control." R. 7:7-7(b)(6). Moreover, "[w]hile our system recognizes a defendant's right to have complete discovery, 'allowing a defendant to forage for evidence without a reasonable basis is not an

ingredient of either due process or fundamental fairness in the administration of the criminal laws.'" Maricic, 417 N.J. Super. at 284 (quoting State v. Ford, 240 N.J. Super. 44, 49 (App. Div. 2010)).

In Cassidy, the Court determined the failure "to use a thermometer that produce[d] temperature measurements traceable to the standards set by the [NIST] to measure the temperature of simulator solutions used to calibrate" Alcotest machines "cast doubt on the calibration process" and undermined "the scientific reliability of breath tests subsequently performed on the Alcotest machine[s]" at issue. 235 N.J. at 486-87. "During the calibration process, simulator solutions containing varying concentrations of ethanol are used to calibrate the Alcotest and confirm the accuracy of its blood alcohol content readings." Id. at 488. "It is essential that the temperature of the solution be accurate in order for the Alcotest's blood alcohol content readings to be correct." Ibid.

"The Alcotest's calibration procedure requires the test coordinator to insert a thermometer that produces NIST-traceable temperature measurements into the simulator solution used to calibrate the Alcotest" to ensure that accuracy. Ibid. The Court held that the Alcotest is not "sufficiently reliable absent the use of a NIST-traceable thermometer in its calibration," and thus

"breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer [were] inadmissible." Id. at 491, 498. As a result, "[thousands of] breath samples called into question by Dennis's alleged misconduct" were ruled unreliable and consequently inadmissible. Id. at 491. Additionally, the Court "commend[ed] to the State that it require the manual recording of the NIST-traceable readings going forward as a check against negligent performances of this integral human test" as occurred in the cases impacted by Dennis's transgressions. Id. at 498 (emphasis added).

Here, contrary to defendant's contentions, the judge did not abuse his discretion in admitting the Alcotest results notwithstanding the State's failure to produce the BTISRs or thermometer readings. Critically, in Cassidy, the Court did not declare Alcotest results without thermometer reading recordings inadmissible. It declared "breath test results produced by Alcotest machines not calibrated using a NIST-traceable thermometer" inadmissible. Ibid. Moreover, the Court did not add thermometer reading recordings to the list of foundational documents the State must produce during discovery in DWI cases. Instead, the Court "commend[ed] to the State that it require" law enforcement to record the thermometer readings "going forward" as an additional quality control measure. Ibid.

Defendant argues that the Cassidy Court's use of the phrase "going forward" imposed an immediate obligation on the State to record and produce thermometer readings in discovery, notwithstanding the fact that the last calibration of the Alcotest machine used in defendant's prosecution occurred five days after Cassidy was decided and a protocol for retaining the readings was not established until approximately six weeks later. In support, defendant relies on several cases where the Court announced a new rule of criminal law and used the phrase "going forward" to declare that the rule would apply prospectively. However, those holdings are inapplicable here. See State v. Covil, 240 N.J. 448, 471 (2020) (discussing the use of hypothetical questions at trial); State v. Witt, 223 N.J. 409, 450 (2015) (pertaining to warrantless automobile searches); State v. Miles, 229 N.J. 83, 99 (2017) (clarifying the rule for double jeopardy analysis). We are persuaded that given the absence of any qualifying language in the Court's commendation to the State, the timing of the decision in relation to defendant's DWI arrest, and the absence of any evidence of misconduct in connection with the calibration of the subject Alcotest machine, the State's failure to record and produce thermometer readings in discovery did not provide a basis for suppressing defendant's Alcotest results.

Further, because defendant had already obtained the manufacturer-generated repair records, we discern no abuse of discretion in the judge's decision to admit the Alcotest results without the BTISRs. We agree with the judge that the production of the manufacturer-generated repair records, which were the only repair records in the State's possession, satisfied the State's obligation to provide repair records under Maricic, where we reversed the trial court's denial of all repair records. 417 N.J. Super. at 282; see also State v. Gordon, 261 N.J. Super. 462, 465 (App. Div. 1993) ("Even under our criminal discovery rules, a prosecutor is not obligated to create tangible items of evidence; he is only required to turn over items 'within the possession, custody or control of the prosecuting attorney.'" (citation omitted) (quoting R. 3:13-3(a)(4), (6) and (8))). Moreover, as we acknowledged in Maricic, although relevant, repair records are not among the foundational documents required to establish the reliability of the Alcotest machine and, in turn, the admissibility of the Alcotest results. Id. at 288; see also State v. Robertson, 438 N.J. Super. 47, 65 (App. Div. 2014) (explaining that "the State was not required to introduce . . . non-core foundational documents into evidence in order to establish admissibility" of the Alcotest results); Chun, 194 N.J. at 145.

Affirmed. The stay of defendant's sentence is vacated, and the matter is remanded to the trial court for execution of the sentence in the ordinary course. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION