SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000469-24T1

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	
	:	ON APPEAL FROM:
Plaintiff-Respondent,	:	Superior Court, Law Division
	:	Essex County
v.	:	
	:	
THOMAS L. PARKER,	:	Sat Below:
	:	Hon. Arthur J. Batista, J.S.C.
Defendant-Appellant.	:	Docket No. Below: MA-2024-008
	:	

BRIEF FOR

APPELLANT THOMAS L. PARKER

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TRANSCRIPTS:

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ABBREVIATIONS:

BWC .....body worn camera
DRE .....drug recognition expert
DWI operating a motor vehicle while under the influence of alcohol or drugs
HGN.....horizontal gaze nystagmus
IID..... breath alcohol ignition interlock device
NHTSA ..... National Highway Traffic Safety Administration
NJSP.....New Jersey State Police
OLS.....one-leg-stand
SFST ..... standardized field sobriety testing
W&T .....walk-and-turn

PRELIMINARY STATEMENT

An innocent man, Defendant Thomas Lee Parker, was convicted of operating a motor vehicle while under the influence of alcohol and drugs ["DWI"] based on evidence demonstrating impairment from being tired, nervous, and distracted—not from drugs, alcohol, or combination thereof. He was arrested at about 11:00 a.m. on August 13, 2023, after being up all night. Objective evidence demonstrates a blood alcohol content of 0.00 percent. No toxicology shows the presence of any drugs.

While the arresting officer, Trooper Russell C. Johnson of the New Jersey State Police ["NJSP"], expresses an opinion that Parker *may* have been DWI, Johnson concedes that the impairment he observed could have been due to tiredness or some medical condition. Johnson neither sought a warrant for a toxicological sample nor requested a drug influence evaluation, admitting that the only reason he charged Parker with DWI was because Parker exercised his right to decline to provide a urine sample.

The trial courts misguidedly acceded to Johnson's default assessment, indulged in credibility determinations adverse to the defense, and disregarded the absence of any objective corroboration of a DWI finding. In this case, as a matter of law, the evidence fails to establish that Parker was guilty of DWI.

PROCEDURAL HISTORY

Pretrial. On August 13, 2023, Trooper Russell C. Johnson issued complaints E23-023632, E23-023633, E23-023634, E23-023635, and E23-023636 charging Defendant Thomas Lee Parker with DWI, reckless driving, unsafe lane change, consuming alcohol or cannabis in a motor vehicle, and having an open container or unsealed cannabis in violation of *N.J.S.A.* 39:4-50, *N.J.S.A.* 39:4-96, *N.J.S.A.* 39:4-88(b), *N.J.S.A.* 39:4-51A, and *N.J.S.A.* 39:4-51B, respectively. Da1a-5a.[1] Austin Burnett appeared as defense counsel, Municipal Prosecutor Robert Candido represented the State, and the Hon. Vincent A. Pirone, J.M.C., presided over all municipal court proceedings. 1T3-11/17;[2] *see* 2T4-1/5, 3T3-10/15, 4T3-3/9, 5T3-1/8, 6T3-1/8. On September 12, 2023, Parker was arraigned and pleaded not guilty. 1T3-18/4-16. The defense received discovery on October 10, 2023. 2T3-9/10. There was a status conference on November 7, 2023. 3T3-17/18. A defense motion to dismiss the DWI charge was denied on February 27, 2024, on the basis that

[1] Defendant's appendix, attached, is cited to as suggested in *R.* 2:6-8—*e.g.*, page one of the appendix is cited as "Da1a."

[2] Transcripts are cited to by page and line as suggested in *R.* 2:6-8—*e.g.*, page 3 from line 11 to line 17 of the September 12, 2023, transcript is cited as "1T3-11/17," and page 5, line 22, to page 37, line 7, of the February 27, 2024, transcript is cited as "4T5-22/37-7." Other transcripts are cited as needed with the volume numbers indicated in the tables.

Johnson was not a drug recognition expert ["DRE"] and that the case would proceed solely on observation evidence. 4T3-18/4-19.

Trial. Trial began immediately thereafter. Johnson testified. 4T5-22/37-7. Body worn camera ["BWC"] video recorded from the perspective of an assisting trooper was identified as exhibit *S-4* and viewed. *See* 4T20-22, 22-1/4; *see also* 5T4-15/21, 5-14/16. Trial continued with more testimony from Johnson on March 3, 2024. 5T4-4/47-17. More video was viewed (5T4-24/5-18; *see* 5T20-22, 22-1), including exhibits *S-5* (dashcam), *S-6* (Johnson's BWC at the scene), and *S-7* (BWC showing Parker's release at a Walgreen's). 5T17-7/18-14, 18-8/13, 20-8/12. Johnson's narrative report, Drinking Driver/Operator Questionnaire, Drinking Driving/Operating Report, and Miranda Warning form were admitted in evidence as exhibits *S-1*, *S-2*, *S-3*, and *S-8*, (Da6a-9a) respectively, without objection. 5T19-22/20-4, 20-13/18. A defense motion for a directed verdict of not guilty after the State's case was denied. 5T55-19/21; *see* 5T48-15/55-18. Parker testified. 5T56-1/103-7. Burnett summed up (5T104-1/116-13), as did Candido (5T116-16/119-5). Judge Pirone reserved decision. 5T119-6/10.

Decision. On April 23, 2024 (6T3-9/17-3), Judge Pirone found Parker guilty of DWI, reckless driving, unsafe lane change, and having an unconcealed container with alcohol in a motor vehicle; merged the reckless driving charge into the DWI

charge; acquitted Parker of consuming alcohol or cannabis in a motor vehicle (6T17-4/9, 23-1/5); and stayed execution of sentence pending appeal (6T19-12/13, 23-6/8).

Sentence. For DWI, Judge Pirone sentenced Parker to pay a $257 fine, $33 court costs, and $350 in various assessments, to forfeit his driving privilege until he installs and maintains a breath alcohol ignition interlock device ["IID"], to be restricted to an IID-equipped vehicle for three months thereafter, and to attend an Intoxicated Driver Resource Center for 12 hours. 6T22-14/21; *see* Da10a. For the unsafe lane change, Parker was fined $157 with $33 court costs, and on the so-called open container charge, he was fined $207 with $33 court costs. 6T22-22/24.

Appeals. Parker timely filed a Notice of Appeal with Superior Court, Law Division, Essex County. Da11a-13a. The Hon. Arthur J. Batista, J.S.C, heard argument on July 31, 2024, and reserved decision. 7T23-20/21. On September 6, 2024, he issued an opinion (Da14a-56a) and found Parker guilty of all charges (Da57a-58a). Parker timely filed a Notice of Appeal (Da59a-60a) and Case Information State (Da61a-62a) with this Court, which docketed the appeal (D63a-64a). This brief follows. Oral argument was requested. Da65a.

FACTS

Vehicle in Motion. While driving home at about 11:00 a.m. on August 13, 2023 (4T7-22/8-2), Defendant Thomas Lee Parker went through the Essex Toll Plaza on the Garden State Parkway southbound in Bloomfield in the far-left lane

(5T60-25/61-1). He was exhausted. 5T64-24, 71-2. To make the first exit in heavy traffic, he swerved over to the far-right lane directly in front of a State Trooper. 5T61-1/5, 95-5/10; *See* Da29a. Trooper Russell C. Johnson noticed that Parker's car had some difficulty staying within the lane markings and decided to make a motor vehicle stop (4T6-20/23) out of concern that there was a medical emergency or that the driver was falling asleep (4T8-10/16). Johnson activated his car's overhead lights; Parker pulled over onto the ramp for Exit 149 directly after the toll plaza and stopped at the stop sign at the end of the ramp; Johnson, through his public address system, told Parker to turn left onto Kennedy Drive. 4T8-17/9-2; *see* 5T6-9/7-22; *see also* Da30a. Parker pulled over close to the curb to get as far out of traffic as possible. 5T65-1/5; *see* 5T9-10/10-5; *see also* Da30a.

Personal Contact. Johnson approached Parker from the passenger side of his car. 4T9-5. Johnson described Parker's speech as slow and slurred, and "he just didn't seem like he was all there" as if he had a medical issue. 4T9-14/17. Johnson thought Parker was possibly impaired and asked him to get out of his car to do standardized field sobriety testing ["SFST"]. 4T6-24/8-2, 9-6/24. Parker exited without difficulty. *See* BWC at time signature 10:46:43.[3] More troopers arrived. 4T20-17/19.

[3] From the record, one BWC, *S-6* (*see* 5T10-19), is identified as Johnson's, and another, *S-4*, is identified as that of another trooper (*see* 5T5-14/16). The time signatures on these two BWC videos are synchronized and used for reference.

Horizontal Gaze Nystagmus. Johnson had Parker remove his sunglasses, which Parker did with alacrity, and Johnson administered a test to detect horizontal gaze nystagmus ["HGN"], making three horizontal passes in 21 seconds while Parker remained still, save for the movement of his eyes.[4] BWC from 10:47:13 to 10:47:34; *see* 4T10-1/16. In response to Johnson's instructions, Parker recited the alphabet from C to T quickly and in order and counted backward from 76 to 57, repeating "59, 58, 57," when Johnson reminded Parker that the instruction was to count backward to 52. BWC from 10:47:34 to 10:48:08; *see* 4T9-21/24. Parker was distracted from nearby traffic and a trooper standing to his right (5T66-7/13) and nervous, noting,

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[4] The National Highway Traffic Safety Administration ["NHTSA"] states that there should be a total of seven horizontal passes and one vertical pass in 96 seconds, inclusive of 64 seconds of observation time and 32 seconds of transition time as described in its *DWI Detection and Standardized Field Sobriety Testing Participant Manual*, which NJSP posts on its website at https://www.nj.gov/njsp/division/investigations/pdf/adtu/2023_DWI_Detection_and_Standardized_Field_Sobriety_Testing-Participant_Guide.pdf (2023) ["*2023 SFST Participant Manual*"] (viewed June 9, 2025), as follows:

- 8 seconds for equal tracking (*id.* at 239, "pg.26, session 8"),
- 16 seconds for lack of smooth pursuit (*id.* at 244-45, "pg.31-32, session 8"),
- 32 seconds for distinct and sustained nystagmus at maximum deviation inclusive of 16 seconds of observation time and 16 seconds of transition time to check (*id.* at 246-47 "pg.33-34, session 8"),
- 24 seconds for onset of nystagmus prior to 45 degrees inclusive of 16 seconds of observation time and 8 seconds of transition time (*id.* at 249-50 "pg.36-37, session 8"), and
- 16 seconds for vertical gaze nystagmus inclusive of 8 seconds of observation time and 8 seconds of transition time (*id.* at 253, "pg.40, session 8").

> I am standing there on one foot with 3 officers over here. I have cars driving by me at 50 miles an hour. I'm doing my best. My heart is beating itself out of my chest. I'm trying to keep it together, do the best that I can.
>
> [5T99-18/22.]

Walk-and-Turn. Johnson next gave a walk-and-turn ["W&T] test, the performance of which he described as "unsatisfactory," testifying that Parker's "steps may not have been heel to toe" and that he "had difficulty maintaining his balance." 4T12-15/13-2. Parker remained in the heel-to-toe position throughout the instructions, appeared to understand them, walked the correct number of steps along an imaginary line, touching heel-to-toe on every step while keeping his arms loosely at his sides as traffic went by. He pivoted on the turn rather than take the series of small steps Johnson had instructed. *See* BWC from 10:48:10 to 10:49:31; *see* 5T11-20/12-5.

One-Leg-Stand. Next, Johnson had Parker attempt a one-leg-stand ["OLS"]. Almost immediately, Parker hopped. Johnson told Parker "to take your time, gather yourself. You had a little trouble just now. Gather yourself. Take your time." Parker tried again and hopped again. "Stop, stop," Johnson said; "Gather yourself. I think you're more nervous than anything else." BWC from 10:48:58 to 10:50:15; *see* 4T13-13/16. As Johnson explained,

> I give people more than one opportunity, because there are times where people are afraid[,] and they may actually not perform well on the test because they are afraid. So, I give them the option to regroup

> themselves, get themselves together. That way they give themselves the best opportunity to conduct the test in a satisfactory manner and, you know, allow me to put them back in their vehicle....
>
> [4T14-1/8.]

Despite a few tries, Parker could not hold the position for more than eight seconds. *See* BWC; *see also* 4T14-10/25.

Arrest. Johnson wasn't sure yet whether Parker was under the influence because he had to bring him back to the station; but after placing him under arrest, Johnson searched Parker's car and found, inside of a gym bag, open containers with liquid that smelled of alcohol, and Johnson poured them out. 4T15-5/24; *see* 4T22-10/20, 35-21/36-24; *see* 5T12-22/13-6. Answering questions, Parker told Johnson that he had had two or three beers the evening before and was taking propranolol and Prozac for blood pressure, depression, and post-traumatic stress syndrome. 4T18-3/19-7; *see* 5T62-17/63-25, 72-24/73-24, 84-4/9; *see also* Da7a, 36a-38a.

Medications. Parker regularly takes prescribed antidepressants, with which he has had a lot of success, and is cognizant of not mixing these medications with alcohol. 5T58-15/18. He usually takes them once daily (5T64-2/6) early in the morning (5T84-12/18)—*i.e.*, 20 milligrams of Fluoxetine and the 10 milligrams of Propranolol (5T90-21/24). He skipped his medication on August 12, 2024, because he knew he would be drinking later that day. 5T87-7/12, 101-19/23. After a night

in Brooklyn and Manhattan (5T73-14/76-10, 90-3/20, 101-14/18), Parker took his prescribed medications on August 13, 2024 (5T59-2/15, 64-15/17, 90-21/91-1).

No Toxicological Samples. Parker agreed to submit breath samples because it was not intrusive, but, in his view, a request for urine was. 5T82-18/83-2. The breath test revealed an alcohol content of 0.00 percent at 11:40 a.m.; Parker declined to provide a urine sample as was his right, and Johnson decided to not call a DRE because doing so would have been a waste of time. 4T22-21/23-10; *see* 4T30-3/8; *see* 5T15-16/16-7, 40-14/20, 43-3/5. Nor did Johnson believe there was a need for a warrant. 4T28-13/15, 5T40-6/16. He just charged Parker based on observations and because he refused to provide urine. *See* 5T40-23/25.

Release. Johnson released Parker to a pharmacist at a Walgreen's Pharmacy in East Orange. 4T32-18/22; 5T16-13/24; *see* 4T34-5/9. In parting, Johnson told Parker, "Your best bet is to stay home and dry out," and Parker responded, "Stay home today and do a whole lot of nothing." BWC (*S-7*) at 12:45:57; 5T19-14/18.

STANDARD OF REVIEW

"[I]n prosecutions under *N.J.S.A.* 39:4-50 involving drugs..., the State must present evidence on a case-by-case basis that the driver actually was under the influence of such drugs." *State v. Olenowski*, 255 *N.J.* 529, 548 (2023). "[L]ay testimony about the *fact* of a driver's intoxication is always admissible, whereas lay

testimony ascribing the *cause* of intoxication is admissible only when the alleged cause is alcohol." *Id.* at 550 (emphasis in original).

This Court "does not weigh the evidence anew but merely determines whether the evidence supports the judgment of conviction. *State v. Johnson*, 42 *N.J.* 146, 157 (1964) (citation omitted). As our Supreme Court observed,

> It is not our function in reviewing the conviction in question to weigh the evidence anew and to make independent findings of fact as if we were sitting in first judgment on the case. Rather, our obligation is to determine whether there is adequate evidence to support the judgment rendered below.
>
> [*State v. Emery*, 27 *N.J.* 348, 353 (1958).]

"The aim of the review at the outset is rather to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." *State v. Johnson, supra* at 162. "When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." *Ibid.* However,

> if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction..., then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions. While this feeling of 'wrongness' is difficult to define because it involves the reaction of trained judges in the light of their judicial and human experience, it can well be said that that which must exist in the reviewing mind is a definite conviction that the judge went so wide of the mark, a mistake must have been made. This sense of 'wrongness' can arise in numerous

> ways—from manifest lack of inherently credible evidence to support the finding, obvious overlooking or underevaluation of crucial evidence, a clearly unjust result, and many others.
>
> [*Ibid.*]

The contention that the trial court erred in its determination of the facts, whether underlying or ultimate, may be urged on appeal in any nonjury case.... *Id.* at 161. "Although we generally defer to a court's fact findings based on its review of a recording, [*State v.*] *S.S.*, 229 *N.J.*[360,] 379 [(2017)], we are required to do so only where 'more than one reasonable inference can be drawn from the review of a video recording,'" *id.* at 380. "Where a recording does not support more than one reasonable inference, and a trial court's 'factual findings' based on its interpretation of a recording 'are so clearly mistaken—so wide of the mark—that the interests of justice demand intervention[,]' a reviewing court owes no deference to a trial court's fact findings drawn from the recording." *Id.* at 381 (brackets in original). The State has "a much steeper burden to prove a driver's guilt when it lacks corroborating proof from a toxicology report." *State v. Olenowski, supra* at 615.

In this appeal, Defendant Thomas Lee Parker asks this Court to review the record and video here and find that the only reasonable inference is that the State failed to prove his guilt beyond a reasonable doubt as a matter of law, inasmuch as breath testing ruled out the *cause* of intoxication as alcohol and no corroborating evidence established drugs as an intoxicating agent.

LEGAL ARGUMENT

I.
THE ABSENCE OF OBJECTIVE EVIDENCE ESTABLISHING A CAUSE OF DRUG OR ALCOHOL IMPAIRMENT WARRANTS DEFENDANT'S ACQUITTAL FOR DWI AS A MATTER OF LAW
[Da57a]

"Uncompromising enforcement of laws designed to rid our highways of the scourge of the drunk driver ranks only slightly behind the veneration of motherhood and probably slightly ahead of a robust hankering after apple pie in the hierarchy of values firmly embedded in our culture." *State v. Tischio*, 107 *N.J.* 504, 522 (1987) (Clifford, J., dissenting). "And that surely is as it should be." *Ibid.* *N.J.S.A.* 39:4-50 "prescribes an offense that is demonstrated solely by a reliable breathalyzer test administered within a reasonable period of time after the defendant is stopped for drunk driving...." *State v. Tischio, supra* at 522 (Clifford, J., dissenting). Such a breath test was administered for Defendant Thomas Lee Parker. But instead of demonstrating guilt as in *Tischio*, the 0.00 result ruled out alcohol as an intoxicating agent and established Parker's innocence.

"[L]ay testimony about the *fact* of a driver's intoxication is always admissible, whereas lay testimony ascribing the *cause* of intoxication is admissible only when the alleged cause is alcohol." *State v. Olenowski*, 255 *N.J.* 529, 550 (2023) (emphasis in original), quoting *State v. Bealor*, 187 *N.J.* 574, 577 (2006). Expert testimony remains the preferred *method* of proof where the intoxicating agent is

something other than alcohol. *See, e.g., id.* at 592 cited in *State v. Olenowski, supra* at 551. This is true, even though *N.J.S.A.* 39:4-50 "does not require that the particular narcotic be identified. It is enough if, from the subject's conduct, physical and mental condition and the symptoms displayed, a qualified expert can determine that he or she is 'under the influence' of a narcotic." *State v. Tamburro*, 68 *N.J.* 414, 421 (1975).

In *State v. Olenowski, supra*, our Supreme Court considered "whether expert testimony by a DRE is admissible to prove the cause of intoxication" in drugged driving cases. *Id.* at 552. Despite the significant "rigorous training requirements for DRE certification" (*id.* at 586), the Court "reject[ed] the notion that the DRE's opinion...establishes causation, *i.e.*, that particular drugs or categories of drugs were ingested by the driver and caused the driver to be impaired" (*id.* at 609). Trooper Johnson, despite his expired DRE training and 20 years of experience, was incompetent to render an opinion that Parker was under the influence of drugs. The evidence in the present case fails to establish that drugs or alcohol or a combination of the two was an impairing agent that would have *caused* impairment.

"[A] toxicology report corroborating a DRE's opinion is important evidence. The toxicology report can strengthen the State's case or, alternatively, undermine it." *State v. Olenowski, supra* at 612. In the present case, the only hint of drug involvement is Parker's admission to taking prescription medication. But without

toxicology or pharmacology testimony, this admission is meaningless. If Parker was impaired, it was impairment due to being tired, nervous, distracted, or other cause.

Even if we accept Judge Batista's finding that Parker appeared to be impaired, the State failed to present any evidence to establish that the cause of the impairment was either narcotics, hallucinogens, or habit-producing drugs. Johnson did not testify as a DRE. Nor did he seek to have a DRE examine Parker. Moreover, Johnson did not seek a warrant to compel Parker to provide a urine or blood sample. Johnson only decided to charge Parker because Parker exercised his right to decline to voluntarily provide a urine sample. All we have in this case is Parker's statement that he, like more than half the adult population, takes prescription medication.[5] Consequently, the State failed to prove that Parker violated the DWI statute.

II.
VIDEO EVIDENCE DEMONSTRATES THAT THE FACT FINDINGS BELOW THAT DEFENDANT WAS UNDER THE INFLUENCE OF ALCOHOL OR DRUGS BEYOND A REASONABLE DOUBT ARE SO WIDE OF THE MARK AS TO WARRANT REVERSAL

[Da57a]

Under the Influence Defined. "The language 'under the influence' used in the statute has been interpreted many times. Generally speaking, it means a

[5] More than 131 million people—66 percent of all adults in the United States—use prescription drugs. Georgetown University, McCourt School of Public Policy, Health Policy Institute, *Prescription Drugs*, https://hpi.georgetown.edu/rxdrugs/ (viewed June 9, 2025).

substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs," *State v. Tamburro, supra* at 420-21—"a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway," *State v. Johnson, supra* at 165; *see State v. Bealor*, 187 *N.J.* 574 (2006).

The evidence in the present case hardly shows a substantial deterioration or diminution of Parker's mental faculties or physical capabilities. As stated in *State v. Morton*, 74 *N.J.Super.* 528 (App.Div. 1962), *aff'd* 39 *N.J.* 512 (1963):

> It is to be conceded that there was evidence as to defendant's appearance, odor and behavior at or shortly after the arrest and as to his prior consumption of beer which might have supported an affirmative finding on the issue of his transgression of the statute. There were also, however, some indicia of normality of condition.
>
> [*Id.*, 74 *N.J.Super.* at 531.]

In *State v. Johnson, supra*, our Supreme Court explained the difficulty of relying on observational evidence in support of a DWI conviction:

> The criterion of operating 'under the influence of intoxicating liquor' always presented practical enforcement difficulties, both from the standpoint of the public interest intended to be protected and the accused defendant. Opinions based on objective-symptom observations and tests, whether lay or medical, were bound to be somewhat inexact in fairly applying such a broad statutory standard. On the one hand, many guilty defendants escaped conviction because all of the external manifestations of the effects of alcohol are not displayed by every person and, on the other, certain individual

> pathological conditions may cause a non-intoxicated person to manifest one or more of the symptoms also produced by the use of liquor.
>
> [*Id.* at 167.]

As the Hon. Nathan S. Kirsch, J.M.C. (Retired), put it when discussing DWI prosecutions:

> All the facts creating probable cause for the police stopping, interrogating, observing and eventually arresting the defendant may be perhaps the most important elements in the eventual determination of guilt or innocence of a defendant. A judge, after a detailed hearing of the facts surrounding this probable cause or overt act of the defendant, should ask the question, "Would the totality of these overt acts have occurred even if the defendant had not been drinking?" If the answer to this question is, "yes," then a reasonable doubt may exist as to a defendant's guilt.
>
> [Kirsch, Nathan S., Guide to Hearing Drunk Driving Cases, *N.J. Dept. of Health, Div. of Alcoholism, Intoxicated Driving Programs Unit* (1988) at p.1.]

Observational Evidence. Trooper Johnson relied on Parker's driving, speech, demeanor, and SFST performance when deciding to arrest Parker. But both testimonial and video evidence fail to prove that Parker was under the influence of alcohol or drugs. Video in this case is "equal or superior to testimonial evidence." *State v. Stein*, 225 *N.J.* 582, 596 (2016). This evidence establishes Parker's sobriety. We see how Parker drove. He drove that way from a combination of the need to cross the highway from the extreme left toll lane to the exit on the right and his surprise at seeing a State Trooper.

The "Jersey Slide." This Court can see what Judge Batista calls Parker's "Jersey slide." Da29a. While perhaps a violation of *N.J.S.A.* 39:4-88(b), this driving was, in part, a result of heavy traffic. But this Court can also determine *de novo* from video whether Judge Batista mischaracterizes other aspects of Parker's driving. While Judge Batista calls "the operation on the exit ramp atypical, although not rising to the level of a traffic offense," and pulling over "unnecessarily close to and appear[ing] to abrade the curb" (Da30a), video shows nothing unusual, atypical, or unnecessary. The driving after the initial "Jersey slide" is well within the norm.

Uncorroborated Odor. While Judge Batista found that Johnson's observation of an odor of alcohol was corroborated by the presence of "an open container of beer in the center console" (Da31a), this disregards the breath test result of 0.00. Even if there was such an odor, "[t]he presence or absence of an odor of ethanol on the breath is an unreliable means of ascertaining whether a person is intoxicated or whether ethanol has been consumed recently, even under laboratory conditions." *Goldfrank's Toxicologic Emergencies*, 7th ed., McGraw-Hill (2002), at p.956. As noted by the West Virginia Supreme Court of Appeals:

> What one smells on the drinker's breath are the aromatic materials which give to each type of beverage its characteristic odor; one may recognize a beer, wine, gin, or other beverage odor—but not an alcohol breath. While alcohol rapidly disappears from the mouth after ingestion, the aromatic materials of the beverages, like those of other foods, linger and are detectable for a relatively long time. The breath odor after drinking is, therefore, unrelated to the alcohol content

> of the blood and is a poor indicator of the alcoholic state of the individual.
>
> *Federoff v. Rutledge*, 175 *W.Va.* 389, 394 n.1, 332 *S.E.*2d 855 (1985), citing Gray, R., M.D., & Gordy, L., M.D., L.L.B., *Attorneys' Textbook of Medicine*, par.133.10 (3d ed. 1985).

SFST. Video shows Parker's driving, speech, and demeanor. Johnson testified to these observations as well as the odor but made no arrest and moved on to SFST. The purpose of SFST is not to prove the influence of alcohol but merely to assist an officer in making an arrest decision. SFST is used by the officer to "decide whether there is sufficient probable cause to arrest the driver for DWI." NHTSA, *2023 SFST Participant Manual* at 86, "pg.6, session 4." Putting HGN aside, a test Johnson administered incorrectly, we are left with W&T and OLS—tasks that require a subject to walk in abnormal ways that reduce the area over which a subject would distribute his weight and, in the case of OLS, to elevate his center of gravity as well. While Parker did well with W&T, he had difficulty with OLS, perhaps due to fear, nervousness, distraction, or the imbalance ordinarily induced by the abnormal ways of standing that OLS demands.

No Opinion of Alcohol or Drug Impairment. All of this evidence failed to establish that Parker was under the influence of alcohol or drugs or a combination thereof beyond a reasonable doubt. Trooper Johnson conceded this. He stopped Parker out of concern that there was a medical emergency or that Parker was falling asleep. 4T8-10/16. When Johnson first spoke with Parker at roadside, Johnson was

unsure if there was a medical issue. 4T9-16/17. With SFST, Johnson conceded that people "may actually not perform well on the test because they are afraid." 4T14-1/8. When Johnson made the arrest, he wasn't sure yet whether Parker was under the influence because he had to bring him back to the station. 4T15-16/17. There, breath testing ruled out alcohol as an impairing agent and no toxicology established drugs as an impairing agent.

Non-Admission. While Municipal Court Judge Pirone found Parker's statement that he would "[s]tay home today and do a whole lot of nothing" "form[ed] the independent evidence sufficient enough to prove that Parker was driving under the influence of some admitted combination of alcohol and drugs, notwithstanding his BAC" (6T16-13/16; *see* 6T15-16/16-16), at least Judge Batista declined to mention this, apparently placing little or no weight on this exchange.

Incorrect Factual Findings. Despite this, Judge Batista extended himself to draw an inference as "an average juror" that the State has met its burden of proof beyond a reasonable doubt" that Parker was DWI based on Parker's "admission to ingesting Prozac, propranolol and alcohol and reviewing evidence regarding [Parker]'s demeanor and performance on SFST...." Da46a. Specifically, Judge Batista listed these factors in support of his conclusion:

> (1) Parker's own admission to drinking alcohol (acknowledging his BAC was 0% at the time tested) and his need to "sober up" between 1:00 a.m. and 5:00 a.m.;

> (2) combined with his admission to taking alleged prescription medication (Prozac and propranolol[)] at 5:00 a.m....and
>
> (3) the admitted erratic operation of his motor vehicle...; and
>
> (4) the open container of alcohol found in this vehicle;
>
> (5) Trooper Johnson's observations, corroborated by video evidence, of Parker's swaying, staggering, slurred speech, flushed face and watery eyes;
>
> (6) his odd demeanor and sluggishness;
>
> (7) his difficulty in standing and walking;
>
> (8) his wholesale abysmal performance on the standard field sobriety tests; and
>
> (9) the municipal court judge's credibility findings.
>
> [Da47a (reformatted).]

Judge Batista reads too much into these innocuous observations and impresses his subjective incriminating spin on the testimony. Such findings included these:

> BWC "corroborates" that Parker had "slow and slurred speech" (Da31a) and that "[h]is speech is sluggish and labored" (Da36a).
>
> Parker's "demeanor and gaze" was "utterly peculiar" based on his "emotionless and aimless stare...." Da31a.
>
> Parker "sluggishly and unhurriedly exited the vehicle, with one hand on the driver's side door." Da31a.
>
> "As he walked to the front of the vehicle[,] he sways left into the middle of the street before being directed to the front of the vehicle." Da31a.
>
> Parker's performance on the W&T "was wholly unsatisfactory." Da33a.

> Parker "does not come anywhere close to completing [the OLS] test satisfactorily." Da35a; *see* Da34a.

These unwarranted findings by Judge Batista about Parker's speech, demeanor, gaze, and stare are highly subjective, excessive, and unfounded to the point of shifting the burden of proof as if Parker had the burden to disprove intoxication.

***De Novo* Review.** This Court can objectively determine from video evidence that Judge Batista's findings are so wide of the mark as to warrant this Court's *de novo* review. *State v. Johnson, supra* at 162; *State v. S.S., supra* at 380. Video shows nothing unusual about how Parker exited his car or walked to that place where Johnson did SFST. While SFST performance was less than perfect, video fails to establish alcohol or drug impairment. On the whole, Parker appears to understand the instructions and attempts to perform according to the instructions in good faith. Judge Batista reads too much into the deviations from perfection recorded on video and completely disregards the innocuous explanations of nervousness, tiredness, and distraction that account for these deviations. While such observations may suffice as a basis for finding probable cause, they fall far short of proof beyond a reasonable doubt that Parker was impaired by alcohol or drugs.

IN SUM, Judge Batista's findings are unsupported by any objective toxicological evidence, tainted by subjective misinterpretation, and so wide of the

mark as to warrant this Court's intervention so as to warrant vacating the DWI conviction he imposed.

III.
THE TRIAL JUDGE'S RELIANCE ON HGN TESTIMONY WAS PLAIN ERROR WARRANTING REVERSAL AND REMAND FOR A NEW TRIAL
[Da57a]

Despite acknowledging the existence of *State v. Doriguzzi*, 334 *N.J.Super.* 530 (App.Div. 2000), Da21a, Judge Batista placed significance on HGN in convicting Parker (*see* Da24a-27a, 31a-32a), finding it to be "unsatisfactory" (Da33a). In the present case, the defense did not challenge probable cause to arrest, inasmuch as no motion to suppress evidence pursuant to *R.* 7:5-2 was filed. While discussing HGN in the context of probable cause, Judge Batista treated HGN no differently than W&T and OLS, judging HGN as part of the overall SFST as a significant part of his finding that Parker was under the influence of something, despite the absence of any toxicological or other objective evidence to support the guilty finding. "Accordingly, a determination of harmless error is not available to us in the present matter." *Id.* at 547. Assuming this Court does not reverse Parker's DWI conviction, the remedy is to reverse and remand to the Law Division before a judge other than Judge Batista "for a trial de novo on the record without consideration of the HGN tests." *Ibid.*

IV.
THE PROOFS FAIL TO ESTABLISH THE WILLFULNESS NECESSARY TO SUSTAIN A CONVICTION FOR RECKLESS DRIVING
[Da57a]

Video shows Parker's car changing lanes as it moves from the left lane across the center lane and into the right lane. Johnson is right behind him in the right lane. Parker's car drifts into the center lane then back into the right lane before exiting the Parkway with his right turn signal activated. No other traffic is affected or endangered. At the end of the exit ramp, Parker makes a left turn with a signal and pulls to the right parallel to and within inches of the curb. For this driving, Judge Batista convicts Parker of reckless driving, a conviction merged into the DWI and unsafe lane changes.

N.J.S.A. 39:4-96 provides, "A person who drives a vehicle heedlessly, in willful or wanton disregard of the rights or safety of others, in a manner so as to endanger, or be likely to endanger, a person or property, shall be guilty of reckless driving...." In *State v. Moran*, 202 *N.J.* 311 (2010), , our Supreme Court defined "willfulness" in the context of reckless driving:

> In *N.J.S.A.* 39:4-96, the word "willful" bespeaks a *deliberate* or *intentional* disregard of the lives and property of others in the manner in which a driver operates a vehicle. In *N.J.S.A.* 39:5-31, the term "willful" suggests a *deliberate* violation of certain motor-vehicle statutes. A willful violation of the reckless-driving statute necessarily involves a state of mind and conduct that exceed reckless driving itself.
>
> [*Id.* at 323 (emphasis in original).]

In the present case, no willful driving appears on video. *Cf. State v. Lutz*, 309 *N.J.Super.* 317, 326 (App.Div. 1998) (an intoxicated driver involved in a head-on collision was not careless); *State v. Wenzel,* 113 *N.J.Super.* 215, 216-18 (App.Div. 1971) (an "otherwise unexplained jackknifing" tractor-trailer entering a construction area on wet pavement, crossing into the opposite lane, and broadsiding another truck, fatally injuring the truck's driver, did not establish careless driving). Of course, the way Parker drove was much less dramatic than the driving in either *Lutz* or *Wenzel*. But like the driving in both *Lutz* and *Wenzel*, the way Parker drove simply fails to establish willfulness, a necessary element of reckless driving. *State v. Roenicke*, 174 *N.J.Super.* 513 (Law Div. 1980). The driving seen on video undermines any finding of willfulness. This Court should acquit Parker of this charge and remove the possibility that the merger may have adverse insurance and administrative affects.

CONCLUSION

Judge Batista's finding that Defendant Thomas Lee Parker was guilty of DWI is unsupported and uncorroborated by any objective evidence and contrary to law. *See State v. Olenowski, supra*. Video demonstrates that Judge Batista's DWI finding is palpably wrong, warranting this Court's *de novo* review. Furthermore, his reliance on HGN testimony tainted the legitimacy of his conclusion concerning DWI. And while video may show that Parker had some difficulty maintaining a single lane while maneuvering from the left toll lane to the right-hand exit on the Garden State

Parkway, video clearly shows the absence of any willfulness. For these and other reasons expressed herein, this Court should vacate Parker's convictions and find him not guilty of DWI and reckless driving.

Respectfully,

/s/ *John Menzel*

John Menzel, J.D.

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LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
Trenton, New Jersey 08625

RE: STATE OF NEW JERSEY (Plaintiff-Respondent) v.
THOMAS L. PARKER (Defendant-Appellant)
DOCKET NO. A-00469-24T1

Criminal Action:	On Appeal From a Judgment of Conviction of the Superior Court, Law Division, Essex County.
Sat Below:	Hon. Arthur J. Batista, J.S.C.

Honorable Judges:

Pursuant to *R.* 2:6-2(b) and *R.* 2:6-4(a), this letter in lieu of a more formal brief is submitted on behalf of the State of New Jersey in response to defendant's brief in the above-entitled matter.

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COUNTERSTATEMENT OF PROCEDURAL HISTORY

On August 13, 2023, Thomas Parker, hereinafter the defendant, was cited by the New Jersey State Police with a number of motor vehicle offenses, including: driving while under the influence, contrary to N.J.S.A 39:4-50; reckless driving, contrary to N.J.S.A. 39:4-96; unsafe lane change, contrary to N.J.S.A. 39:4-88; possession of an open container of alcoholic beverage, contrary to N.J.S.A. 39:4-51(b); and consuming alcohol in a motor vehicle, contrary to N.J.S.A. 39:4-51(a). (Da 1-5).[1]

Trial began in the Bloomfield Municipal Court before the Honorable Vincent A. Pirone, J.M.C. on February 27, 2024. (4T). The trial continued on March 5, 2024 (5T) and April 23, 2024 (6T). At the conclusion of testimony, Judge Pirone found the defendant guilty of all charges except for consuming alcohol in a motor vehicle. (6T 17-4 to 9). Judge Pirone imposed the mandatory minimum sentence as follows: (1) fines and

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[1]Da refers to Defendant's Appendix;
Db refers to Defendant's Brief;
1T refers to the hearing transcript dated September 12, 2023;
2T refers to the hearing transcript dated October 10, 2023;
3T refers to the hearing transcript dated November 7, 2023;
4T refers to the trial transcript dated February 27, 2024;
5T refers to the trial transcript dated March 5, 2024;
6T refers to the trial transcript dated April 23, 2024;
7T refers to the municipal appeal transcript dated July 31, 2024.

penalties totaling $1070; (2) driver's license suspension until interlock device installation; (3) 90 days of an interlock device; and (4) 12 hours at the Intoxicated Driver's Resource Center. (6T 22-14 to 24).

Thereafter, the defendant filed a Notice of Appeal to the Law Division on or about May 2, 2024. (Da 11-13). After submission of briefs and oral argument on July 31, 2024 (7T), the Honorable Arthur J. Batista, J.S.C., issued a written opinion and order on September 6, 2024, finding the defendant guilty of DWI and other charges as the municipal court had found. He imposed the same sentence as the municipal court. (Da 14-58).

On October 16, 2024, the defendant filed a Notice of Appeal from the Law Division decision. (Da 59-60). This appeal follows.

COUNTER-STATEMENT OF FACTS

On August 13, 2023, Trooper Russell C. Johnson of the New Jersey State Police observed a vehicle having difficulty maintaining its lane near the Essex tollbooths on the Garden State Parkway (GSP). (4T 6-18 to 25). The trooper suspected that the driver was impaired or in the process of going through a medical emergency and initiated a vehicle stop near GSP exit 149. (4T 8-10 to 25).

The driver of the vehicle was defendant. (4T 6-14 to 16). During the initial interaction with the defendant, Trooper Johnson noticed that

the defendant exhibited signs of impairment and slurred speech noting that it seemed as if he was not all there. (4T 9-5 to 16). The trooper then administered several field sobriety tests to investigate the defendant's condition. (4T 9-5 to 9).

The first test administered was the Horizontal Gaze Nystagmus (HGN) test. The defendant, who requires glasses, was instructed to remove them. (4T 10-1 to 7). The trooper, during the HGN test, observed six out of six hits of impairment, which indicated a lack of smooth pursuit, distinct and sustained nystagmus, and the onset of nystagmus prior to 45 degrees in both eyes. (4T 10-1 to 7).

The second test administered was the walk-and-turn test. The trooper instructed the defendant to place his right foot in front of his left, hands at his side, and take nine steps back while counting aloud. (4T 12-1 to 10). The defendant had difficulty maintaining his balance, did not adequately follow the heel-to-toe instruction properly, and exhibited symptoms of impairment. (4T 12-22 to 13-2).

The third test administered was the one-leg stand test. The defendant was asked to raise his foot of choice six inches from the ground. (4T 13-10 to 19). Despite the trooper giving the defendant multiple opportunities to pass the test, he could not perform the test

satisfactorily. (4T 13-10 to 21). The defendant counted improperly, could not keep his foot up, and raised his arms. (4T 14-18 to 15-4).

Based on the trooper's experience, observations and the field sobriety test results, he arrested the defendant for driving under the influence. (4T 15-16 to 25). During a search of the defendant's vehicle, the trooper found open gym bottle containers that contained what the trooper described as smelling of alcohol. The trooper then poured out the bottle on video. (4T 15-5 to 36-24).

The defendant was then transported to the State Police Barracks to have the Alcotest administered. The defendant's breath samples all revealed a 0.0 blood alcohol content. (4T 22-23 to 25). Nevertheless, the defendant admitted to taking prescribed medications in the form of Popranol and Prozac for blood pressure, depression, and PTSD, respectively. He also admitted that he had consumed several alcoholic beverages the previous evening. (4T 18-13 to 19-7; 5T 62-17 to 73-24). Trooper Johnson concluded that the defendant was impaired in violation of the DWI statute based on his observations of the defendant's operation of his vehicle and field sobriety test results. (4T 23-6 to 14).

The defendant testified on his own behalf. Defendant testified that the night prior to his arrest he was in New York City at a bar with a

friend where he consumed multiple beers. The defendant stated that his last beer was consumed around 5 a.m. After approximately five hours from his last beer, the defendant and his friend made their way to Central Park where the defendant consumed his prescribed medication. The defendant then began his drive home from New York City at approximately 10 a.m. and was ultimately pulled over along the GSP. (5T 58-1 to 60-16).

LEGAL ARGUMENT

POINT I

THE RECORD IN THIS CASE SUPPORTS THE DEFENDANT'S CONVICTION FOR DRIVING WHILE INTOXICATED IN VIOLATION OF N.J.S.A. 39:4-50.[2]

The defendant contests the propriety of his DWI conviction in several respects that all maintain that the record in this case was insufficient to support a DWI conviction. According to the defendant, there was no objective evidence establishing drug or alcohol impairment; the video evidence submitted was insufficient to sustain a conviction for DWI; and the Law Division judge improperly relied on the trooper's testimony about the HGN test results in its finding that the defendant was under the influence in violation of the DWI statute. (Db 17-27). However, both the municipal

[2] This Point responds to Points I-III of Defendant's brief. (Db 17-27).

court and Law Division made correct findings of fact and conclusions of law when they held that the record in this case established the defendant did violate N.J.S.A. 39:4-50 by operating his motor vehicle while under the influence.

"[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. Hannah, 448 N.J. Super. 78, 94 (App. Div. 2016) (quoting State v. Palma, 219 N.J. 584, 591-92 (2014)). "In reviewing a trial court's decision on a municipal appeal, [the Appellate Division] determine[s] whether sufficient credible evidence in the record supports the Law Division's decision." State v. Monaco, 444 N.J. Super. 539, 549 (App. Div. 2016). We must "determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record. " State v. Johnson, 42 N.J. 146, 162 (1964). "When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete and it should not disturb the result. . . ." Ibid.

A review of a municipal court conviction by the Superior Court is conducted de novo on the record. R. 3:23-8. The Superior Court should defer to the municipal court's credibility findings. State v. Locurto, 157

N.J. 463, 470-71 (1999) (citing Johnson, 42 N.J. at 161-62). However, "[o]n a de novo review on the record, the reviewing court . . . is obliged to make independent findings of fact and conclusions of law, determining defendant's guilt independently but for deference to the municipal court's credibility findings." Pressler & Verniero, Current N.J. Court Rules, comment 1.1 on R. 3:23-8 (2021). Moreover, when the Law Division agrees with the municipal court, the two-court rule must be considered. "Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Midler v. Heinowitz, 10 N.J. 123, 128-29 (1952).

In the instant case, the defendant claims the municipal court and Law Division erred in finding that the defendant operated his motor vehicle in contravention of the DWI statute because there was an "absence of objective evidence establishing a cause of drug or alcohol impairment." (Db 17). According to the defendant, the only evidence in this case establishing the defendant ingested a substance was the defendant's admission to taking prescription medication. (Db 18). In addition, the defendant claims that the Law Division judge's fact findings based on the video evidence submitted "was so wide of the mark as to warrant reversal." (Db 19-27). Therefore, the

record was simply incapable of satisfying the standards required to prove the defendant operated his vehicle while under the influence beyond a reasonable doubt. However, the defendant misconstrues the credibly testified to facts of this case, the indisputable video evidence submitted, and the controlling case law that guides courts on the question of proofs necessary to find beyond a reasonable doubt a conviction for driving while under the influence in contravention of the DWI statute.

It is illegal to operate a motor vehicle "while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug[s]." N.J.S.A. 39:4-50(a). Accordingly, in cases where the State seeks to prove that a defendant was under the influence of a substance other than alcohol, the State must establish that "(1) the defendant was intoxicated[,] and (2) the cause of the intoxication was either narcotics, hallucinogens, or habit-producing drugs." State v. Olenowski (Olenowski II), 255 N.J. 529, 550 (2023).

The New Jersey Supreme Court has held that lay persons, including police officers, can testify that someone was intoxicated, but lay persons cannot opine as to the cause of the intoxication when the cause of the intoxication is not alcohol consumption. State v. Bealor, 187 N.J. 574, 577, 585 (2006). In short, the State must present evidence to establish beyond a

reasonable doubt that a defendant, while operating a motor vehicle, was under the influence of drugs. Id. at 589-90.

In State v. Olenowski (Olenowski I), 253 N.J. 133, 151-55 (2023), the Court adopted a "Daubert-type"[3] standard for determining the reliability of expert evidence in criminal and quasi-criminal cases. In Olenowski II, the Court held that Drug Recognition Expert (DRE) testimony could satisfy the modified Daubert criteria for admission, subject to certain limitations. 255 N.J. at 546. In that regard, the Court stated:

> If feasible, the State must make a reasonable attempt to obtain a toxicology report based on a blood or urine sample from the driver. If the State fails to make such a reasonable attempt without a persuasive justification, the DRE opinion testimony must be excluded. [Ibid.]

Relevant to this case, in Olenowski II, the Court reinforced Bealor's holding that testimony on intoxication due to drugs, whether expert or lay, requires corroborating evidence. 255 N.J. at 551. The independent evidence can include factual observations, a driver's admission, information about a driver's recent drug use, or drugs or paraphernalia found in the vehicle. Id. at 610.

It must be noted that "consumption of even a minimal amount of alcohol can lead to an 'under the influence' conviction if the defendant is

[3] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

also taking prescription or other medication that interacts with the alcohol, or if the defendant is especially susceptible to the effects of alcohol because of an illness or other physical condition. State v. Carey, 263 N.J. Super. 377, 380 (App. Div.), certif. denied 134 N.J. 475 (1993); State v. Corrado, 184 N.J. Super 561, 565, 567 (App. Div. 1982).

Given this legal framework, it is clear the record in this case fully supports the defendant's conviction for violating N.J.S.A. 39:4-50. The defendant's demeanor, performance of the field sobriety tests, admission of taking prescription drugs shortly before beginning his drive from New York City and changing story regarding his previous night's alcohol consumption established beyond a reasonable doubt defendant's conviction for DWI. The video evidence submitted corroborates all this testimony.

The Law Division found after meticulously reviewing and recounting the video evidence of the defendant's operation of his motor vehicle and performance of the field sobriety tests, that the defendant's performance on both the walk and turn test and one-legged stand test were "wholly unsatisfactory" and he "does not come close to completing this test satisfactorily". (Da 33; Da 35). Furthermore, once Trooper Johnson placed the defendant under arrest on suspicion of DWI and inquired whether he had taken any prescription medication, the defendant clearly states that he had,

and named "antidepressants" and "propranolol" as medication he recently ingested. (Da 36). This admission was further expounded on when the defendant was answering questions at the police station to complete the drinking driving questionnaire which included several statements about the defendant's alcohol intake the previous night in New York City. (Da 37-39).

In sum, the Law Division judge concluded that the credible evidence was sufficient to find the defendant violated the DWI statute. The defendant's self-serving testimony about when he began imbibing alcohol, took his prescription medication, his journey through New York City, and his admission that he needed to "sober up" were deemed to "make no sense to this court. It reads as if an excerpt from a Kerouacian carousal." (Da 40-42). Indeed, the defendant's entire account of the prelude to his arrest cements his own acknowledgment that he had to "sober up" to operate his vehicle back to his home in New Jersey. (5T 85-19 to 21).

Further, contrary to the defendant's assertion, the Law Division judge did not place undue significance on the HGN testimony submitted. Rather, this testimony was merely recounted to show that Trooper Johnson's ultimate finding of probable cause to arrest the defendant on suspicion of DWI was buttressed by the HGN testimony as permitted by controlling case

law. (Da 31-33). See State v. Doriguzzi, 334 N.J. Super. 530 (App. Div. 2000).

Given all of the evidence presented, and the controlling case law regarding proofs necessary in a DWI when the intoxicating substance is not alcohol, the State proved beyond a reasonable doubt that the defendant operated his vehicle while intoxicated in contravention of the DWI statute.

POINT II

THE RECORD IN THIS CASE SUPPORTS THE DEFENDANT'S CONVICTION FOR RECKLESS DRIVING IN VIOLATION OF N.J.S.A. 39:4-96.[4]

The defendant's final contention is that the record in this case failed to prove beyond a reasonable doubt that he operated his motor vehicle recklessly in violation of N.J.S.A. 39:4-96. According to the defendant, the evidence of his operation did not rise to the level of willful or wanton disregard required under the statute and his conviction should be vacated. However, the defendant misconstrues the overwhelming video evidence submitted in municipal court that showed the reckless operation of his motor vehicle on one of the busiest highways in Essex County in the middle of the day. Simply put, the record in this case is more than sufficient to sustain his conviction for reckless driving.

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[4] This Point responds to Point IV of Defendant's brief. (Db 28-29).

N.J.S.A. 39:4-96, the reckless driving statute, provides:

> A person who drives a vehicle heedlessly, in willful or wanton disregard of the rights or safety of others, in a manner so as to endanger, or be likely to endanger, a person or property, shall be guilty of reckless driving.

This statute has been interpreted to include two elements: 1) willful or wanton disregard of the rights or safety of others while driving; and 2) a resulting danger or likelihood of danger to person or property. See State v. Francis, 67 N.J. Super 377, 382 (App. Div. 1961). See also State v. Roenicke, 174 N.J. Super. 513, 517-518 (Law Div. 1980) (the essence of reckless driving is grossly improper operation of vehicle that threatens others); State v. Moran, 202 N.J. 311, 323 (2010) (in reckless driving statute, "willful" bespeaks deliberate or intentional disregard of lives or property of others).

In the instant case, the defendant's operation of his motor vehicle was captured by Trooper Johnson's dash-camera and is unassailable. This video showed that at approximately 11 a.m., along one of the busiest stretches of the GSP with dozens of vehicles sharing the roadway with the defendant, his vehicle unsafely veering from one lane of traffic to another. This was done without signaling and continued as the defendant veered towards the far-right exit lane and back into a traffic lane before finally coming to a stop in

response to Trooper Johnson's lights and siren. (4T 6-18 to 8-25; 5T 6-9 to 10-5).

Simply put, this manner of operation is emblematic of reckless driving. The defendant's vehicle was shown veering between lanes in a haphazard manner along the GSP in the middle of the day with dozens of other vehicles on the road. As the Law Division judge astutely observed after considering this evidence and the relevant statute,

> The manner in which [defendant] operated his vehicle on the public highway, with numerous other vehicles around, was heedless and in willful or wanton disregard of the rights or safety of others. Coupled with his operation under the influence, the [defendant] unquestionably placed Trooper Johnson and the dozens of other citizens using the roadway at the time in real danger of injury to persons, or their property.
>
> [Da 54].

Given the record in this case, and the applicable case law, the State's proofs were more than sufficient to sustain a conviction for reckless driving in violation of N.J.S.A. 4-96. Therefore, the defendant's conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Law Division's Order finding the defendant guilty of the charged offense be affirmed.

Respectfully submitted,

THEODORE N. STEPHENS, II
ESSEX COUNTY PROSECUTOR

/s/ Stephen A. Pogany

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ASSISTANT PROSECUTOR
ATTORNEY ID# 014882006

Cc: John Menzel, Esq.

September 2, 2025