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	: **SUPERIOR COURT OF NEW JERSEY**
STATE OF NEW JERSEY,	: **APPELLATE DIVISION**
	:
Plaintiff,	: Docket No. A-000610-24 T1
	:
	: On Appeal From:
v.	: Superior Court, Law Division, Monmouth
	: County
	: Dkt.No. Below: MA 24-015
SEAN GALLAGHER,	: Sat Below:
	: Hon. Michael A. Guadagno, J.S.C.
Defendant.	:
	: **DEFENDANT'S BRIEF**

TO: Honorable Judges of the Superior Court
Appellate Division Clerk's Office
Richard J. Hughes Justice Complex
25 West Market Street, Box 006
Trenton, New Jersey 08625-0970

–

TO: Raymond S. Santiago, Monmouth County Prosecutor
Attention: Melinda A. Harrigan, Assistant Prosecutor
132 Jerseyville Avenue
Freehold, New Jersey 07728

–

Date submitted: June 9, 2025
Date returnable: To be set.
On the Brief: John Menzel, J.D.

CONTENTS

TRANSCRIPTS:

JUDGMENTS, ORDERS, AND RULINGS:

[1] This Order mistakenly shows the year as 2023.

AUTHORITIES:

Cases:

Constitutions:

Statutes:

Court Rules:

ABBREVIATIONS:

ACCA ..... Armed Career Criminals Act
DWI ..... operating a motor vehicle while under the influence of alcohol
IDRC..... Intoxicated Driver Resource Center
IID..... breath alcohol ignition interlock device
MVC ..... New Jersey Motor Vehicle Commission
PCR..... post-conviction relief
refusal.....refusal to submit breath samples

PRELIMINARY STATEMENT

Defendant Sean Gallagher appeals from his sentence for refusing to submit to a breath sample ["refusal"] in Holmdel Township Municipal Court and the Superior Court, Law Division, Monmouth County, because both courts declined to accept any evidence, he proffered to rebut the existence of a driving abstract entry mistakenly attributed to him. The municipal court judge treated the abstract entry as irrebuttable proof of a DWI conviction and refused to consider any proofs Gallagher offered to rebut the entry. The Law Division judge simply affirmed the sentence.

A recent U.S. Supreme Court case recognized the occasional fallibility of old conviction records and suggests that the prosecution should bear the burden of proof beyond a reasonable doubt when the existence of a prior conviction is questioned. In a different context, our Appellate Division suggested the same idea. Given his proffers, Gallagher should either be sentenced as a first offender or given an opportunity to be heard with a view to resentencing him as a first rather than a second offender.

PROCEDURAL HISTORY

Complaints. On October 7, 2023, police charged Defendant Sean Gallagher on complaints 1318-E23-005033, E23-005034, E23-005035, E23-005036, E23-00507, E23-005038, and E23-005039 in Holmdel Township Municipal Court with operating a motor vehicle while under the influence of alcohol ["DWI"], refusal, reckless driving, careless driving, unclear license plate, an implied consent violation, and unsafe lane change in violation of *N.J.S.A.* 39:4-50, *N.J.S.A.* 39:4-50.4a, *N.J.S.A.* 39:4-96, *N.J.S.A.* 39:4-97, *N.J.S.A.* 39:3-33, *N.J.S.A.* 39:4-50.2, and *N.J.S.A.* 39:4-88, respectively. Da1a-7a.[2]

Appearances. The Hon. Valerie Avrin, J.M.C., presided over this matter in the municipal court, and Municipal Prosecutor Robert Cosgrove represented the State. Initially represented by attorney Michael Grasso, who was later relieved (4T9-21/10-8[3]), John Menzel, J.D., appeared as defense counsel with his letter of representation dated April 8, 2024 (Da8a-12a).

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[2] Citation to defendant's appendix is made as suggested by *R.*2:6-8--*e.g.*, pages one through seven of the appendix is cited as "Da1a-7a."

[3] Transcripts are cited to by page and line as suggested in *R.* 2:6-8—*e.g.*, a reference from page 9, line 21, to page 10, line 8, of the February 21, 2024, transcript is cited as "4T9-21/10-8," and a reference to page 3 from line 14 to line 17 of the April 10, 2024, transcript is cited as "6T3-14/17." Other transcripts are cited as needed with the volume numbers indicated in the tables.

Plea Agreement. On April 10, 2024, the matter was adjourned for discovery. 6T3-14/17, 4-17/18. By April 24, 2024, the parties arrived at a plea agreement. 7T3-10/4-1; 8T3-13/19. However, a question arose as to whether the refusal conviction would be considered a first or second offense. 7T4-2/5-5. After reviewing an abstract provided by the municipal court, Gallagher acknowledged the existence of a 2003 DWI conviction, but disavowed any knowledge of a 1990 DWI conviction. 7T5-9/12. Nonetheless, Judge Avrin affirmed the terms of the proposed plea agreement whereby Gallagher would plead guilty to refusal with dismissal of the remaining charges and credit for a breath alcohol ignition interlock device ["IID"] already installed. 7T7-7/25. The matter was adjourned to permit the defense to investigate the validity of the 1990 abstract entry with Gallagher maintaining the IID he had installed in his car on February 12, 2024. 7T10-13/19; *see* 7T7-20/8-2.

Investigation. As of June 5, 2024, the defense investigation had yielded no information about the 1990 DWI conviction through the municipal court portal, https://portal.njcourts.gov/webe41/MPAWeb/, no confirming records for what appears on the abstract, and only a proffer that Gallagher would testify that he was living in Florida in January 1990. 8T4-14/21. Judge Avrin also took judicial notice that there are "quite a few" Sean Gallaghers out there. 8T4-22/5-3. Cosgrove acknowledged that the State had not independently investigated the 1990

conviction on the abstract and that the issue was whether Gallagher should be sentenced as a first or second offender. 8T6-2/10.

Proffers. On June 19, 2024, the State relied solely on the abstract (9T5-1/3) and proffered a criminal history showing an arrest on June 22, 1990 (9T5-6/12). The defense offered to present evidence questioning the 1990 DWI conviction appearing on the abstract, which showed a violation on January 6, 1990, and a disposition on February 7, 1990. 9T7-20/8-6. The defense proffered a response to a subpoena served on the Bergen County Intoxicated Driver Resource Center ["IDRC"]:

> This office represents the County of Bergen Department of Health, Division of Mental Health and Addiction Services. We have reviewed the above reference[d] subpoena[,] and this letter is to follow-up on the two emails that were sent to you on June 14th, 2024 and June 18th[,] 2024 along with phone message on June 14th, 2024 to your office. Kindly note there is no documentation in the County of Bergen regarding same as the requested information dates back to 1990[. T]herefore[,] there would be no reason for an appearance from the County as there is no information to give.
>
> [9T5-19/6-5.]

The proffer continued:

- ☑ A subpoena was served on the New Jersey Motor Vehicle Commission ["MVC"] custodian of records, who declined to accept the subpoena. 9T6-6/9.
- ☑ Garfield City Municipal Court, the court to which the abstract referred, reported that they had no records at hand concerning this conviction, but indicated that there might be something in their basement that would take weeks to locate. 9T6-9/14.

- ☑ Garfield Police Department reported that it had no records of any event in 1990 involving Gallagher. 9T6-15/19.
- ☑ Gallagher would testify that he was in Florida at the time indicated on the abstract and returned to New Jersey in the spring of 1990, probably April, and had some involvement when he was accused of an arson under a statute which apparently is no longer in effect and is not reflected as a conviction on the criminal history, despite a "guilty" indication. 9T6-20/7-7. Gallagher categorically denies any DWI involvement in Garfield on January 6, 1990. 9T7-18/20; *see* 9T11-10/13.
- ☑ An internet search found more that 1,000 people named "Sean Gallagher." 9T8-8/12.[4]
- ☑ A search of the website of the Florida Department of Business Licensing has a record of a cosmetology license for Gallagher that expired June 30, 1990. 9T8-13/18.

Judge's Ruling. Judge Avrin declined the proffers, ruling that "this isn't the proper Court for it." 9T9-10. She suggested that a post-conviction relief ["PCR"] petition in Garfield City Municipal Court was the more appropriate procedure. 9T9-11/13. Defense counsel explained that Gallagher "did not do a [PCR] petition because we don't know if there is a Sean Gallagher out there who was convicted. The issue is not about whether this Sean Gallagher's rights were respected[;] it just wasn't him[. T]hat is our contention. There may be another Sean Gallagher out there...." 9T12-4/10. Judge Avrin expressed concern that the defense arguments "would literally allow every person who had a common name to come in here and toss everything on their abstract that predates record keeping"

[4] *See* https://www.spokeo.com/Sean-Gallagher as cited in the municipal court brief dated June 11, 2024, revealed 1,188 names.

(9T9-18/21) and denied Gallagher's application to be treated as a first offender (9T10-2, 11-21), ruling that the abstract created an irrebuttable presumption of validity and could not be challenged (*see* 9T10-6/12).

Plea and Sentence. Gallagher provided a factual basis (9T15-12/19-11; *see* Da13a) for his guilty plea to refusal (9T20-5/19; *see* 9T19-16/20-4). Judge Avrin sentenced him to pay a $507 fine, $33 court costs, and $100 Drunk Driving Enforcement Fund surcharge, to attend an IDRC for 48 hours, and to forfeit his New Jersey driving privilege for one year, followed by a two-year breath IID restriction minus a 124-day credit.

Appeal. With Judge Avrin's previous denial of a stay, Gallagher surrendered his driver's license. 9T22-18/23-2. He timely filed a Notice of Appeal with the Superior Court, Law Division, Monmouth County (Da14a-15a), which granted a stay of execution of sentence by its order entered July 8, 2024 (Da16a). Argument took place before the Hon. Michael A. Guadagno, J.S.C. (retired, on recall), on September 16, 2024. He affirmed Gallagher's sentence by his Order entered the same day. Da17a. Gallagher timely filed a Notice of Appeal (Da18a-19a) and Case Information Statement (Da20a-21a) with this Court, which docketed the appeal (Da22a). This brief follows.

FACTS

On October 7, 2023, Defendant Sean Gallagher was driving in Holmdel, where he was pulled over because something was blocking his license plate. 9T15-12/24. The officer asked Gallagher about drinking and had him get out of his car to do balance tests. 9T15-25/16-6. The officer arrested Gallagher on probable cause to believe he was DWI, brought him to the police station, and read a standard statement. 9T16-9/18-1; *see* Da13a. When asked to submit breath samples after both parts of the statement, Gallagher said, "No." 9T18-2/22. He refused to submit breath samples. 9T19-11.

LEGAL ARGUMENT

I.
THE COURT'S BELOW ERRED IN NOT GIVING DEFENDANT AN OPPORTUNITY TO BE HEARD CONCERNING THE CHALLENGE TO THE ACCURACY OF A DISPUTED ENTRY ON A MOTOR VEHICLE ABSTRACT USED TO ENHANCE HIS SENTENCE
[9T9-9/10-12, 10T16-2/17-20]

Gallagher disputes the entry on a driver's abstract showing the existence of the 1990 DWI conviction in Garfield as applied to him. Without a hearing, the courts below accepted the abstract entry as irrebuttable evidence of a prior DWI conviction and sentenced Gallagher as a second offender.

Prior DWI convictions enhance subsequent refusal convictions. *State v. Frye*, 217 *N.J.* 566 (2014). If more than ten years have passed since the prior DWI

or refusal conviction, the defendant is entitled to a step-down. *State v. Taylor*, 440 *N.J.Super.* 387 (App.Div. 2015). *N.J.S.A.* 39:4-50 provides:

> A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent offender in the complaint made against the person in order to render the person liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

If the 1990 DWI conviction had not been attributable to him, Gallagher would have been sentenced as a first offender.

Judge Avrin ruled:

> The abstract is presumed to [be] admissible and reliable [as] a business record under *State v. Luzhak*[, *infra*,] and it would wreak havoc on the system if we couldn't do that. So your argument stretches beyond any ability to operate the criminal justice system. It would literally allow every person who had a common name to come in here and toss everything on their abstract that predates record keeping.... So your argument here on this is denied....
>
> [9T9-13/10-2.]

Gallagher does not dispute the admissibility of the abstract on which the court relies, but he does dispute the use of that abstract entry to enhance his sentence. While Judge Avrin is correct that the "abstract is presumed to [be] admissible and reliable [as] a business record under *State v. Luzhak*," 445 *N.J.Super.* 241 (App.Div. 2016), her use of it to preclude Gallagher's proffers was

misplaced. The municipal court refused to consider proof proffered to discredit the 1990 abstract entry. In the context of limited PCR petitions pursuant to *R.* 7:10-2(g), our Supreme Court, in *State v. Patel*, 239 *N.J.* 424 (2019), set forth the proper procedure for determining "when notice of the right to counsel is not given in DWI cases." *Id.* at 443.

> The defendant must secure the relevant court documents or the electronic recording or transcript of the proceeding to establish a violation of the notice requirement. In the absence of documentary evidence or witnesses with a recollection, the defendant is in a position to do no more than file an affidavit or certification averring that he was not advised of his right to counsel and did not know that he could retain counsel....
>
> [*Id.* at 444.]

Gallagher exhausted all reasonable efforts to obtain documentation which no longer exists. *See* 8T10-6/7. He subpoenaed information directly from MVC and IDRC, the government agencies that should have the records necessary to corroborate the abstract entry. He has done the equivalent of the affidavit or certification referred to in *Patel* by proffering testimony.

While Judge Avrin questioned the accuracy of this proffer in light of the abstract entry, she believed Gallagher was credible, stating, "So in all of those appearances I have seen Mr. Gallagher, he has showed up, he has been here. He is respectful. I have every reason to find him credible." 8T10-21/24. With Judge Guadagno was required to give "due, although not necessarily controlling, regard

to the opportunity of the magistrate to judge the credibility of the witnesses," *State v. Johnson*, 42 *N.J.* 146, 157 (1964), he nonetheless affirmed the sentence, apparently accepting Judge Avrin's legal determination as correct on "plenary" review, *State v. Handy*, 206 *N.J.* 39, 45 (2011). This was error.

Gallagher's credible testimony and absence of other records were enough for the courts below to accept the non-existence of a 1990 conviction as attributable to him just as a PCR petitioner's testimony alone can suffice for certain types of PCR. *State v. Patel, supra*. This Court should remand this matter for Gallagher to be resentenced as a first offender.

II.
WHERE THE VALIDITY OF A PRIOR CONVICTION IS POTENTIALLY ATTRIBUTABLE TO A PERSON WITH A NAME THAT IS THE SAME AS OR SIMILAR TO THAT OF THE DEFENDANT, POST CONVICTION RELIEF IS AN INAPPROPRIATE PROCEDURE BY WHICH TO ACHIEVE A REMEDY

[9T9-9/10-12, 10T16-2/17-20]

Rule 7:10-2(a) provides, "A person convicted of an offense may, pursuant to this rule, file with the municipal court administrator of the municipality in which the conviction took place, a petition for post-conviction relief captioned in the action in which the conviction was entered." Although a "petition for post-conviction relief shall be the exclusive means of challenging a judgment of conviction...," *R.* 7:10-2(b)(3), this rule does not apply to Gallagher as to the 1990 entry on his abstract because the conviction on the 1990 abstract was not his—*i.e.*,

he was not the "person convicted of an offense" in 1990. This is why Gallagher had not petitioned the Garfield City Municipal Court for PCR because the issue is not whether someone named Sean Gallagher was convicted of DWI there in 1990 but whether *that* "Sean Gallagher" is *the* Sean Gallagher now before this Court.

III.
THE STATE FAILED TO PROVE THE ACCURACY OF AN ENTRY ON DEFENDANT'S MOTOR VEHICLE ABSTRACT
[9T9-9/10-12, 10T16-2/17-20]

Gallagher raises the question of the existence of the 1990 conviction as applied to him. He proffered corroborative evidence to support the proffer, including sworn testimony that, before returning to New Jersey in or about April 1990, he was in Florida when another person identifying as "Sean Gallagher" was charged with DWI in Garfield in January 1990 and adjudicated in February 1990. This proffer raises an affirmative defense in that Gallagher is challenging "the obligation of a party to introduce evidence when necessary to avoid the risk of a judgment or peremptory finding against him on an issue of fact." *N.J.R.E.* 101(b)(2). After the State offers a driver's abstract showing a 1990 DWI conviction, Gallagher comes forward with some evidence that the 1990 conviction is not his. Thus, the State must disprove this assertion, *N.J.S.A.* 2C:1-13(b)(1), even though the present refusal offense of which Gallagher was convicted does not arise under the New Jersey Code of Criminal Justice. *N.J.S.A.* 2C:1-13(c)(2); *see,*

e.g., State v. Romano, 355 *N.J.Super.* 21, 35 (App.Div. 2002) (necessity). The State must disprove this proffer beyond a reasonable doubt.

Applying the original meaning of the Fifth and Sixth Amendments to the United States Constitution, the U.S. Supreme Court "found that almost 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum' was understood at the time of the Nation's founding to be a fact a jury must find." *Ehrlinger v. United States*, 602 *U.S.* ___, 144 *S.Ct.* 1840, 1857 (2024), quoting *Apprendi v. New Jersey*, 530 *U.S.* 466, 490 (2000). This implies that the burden of proving the existence of a prior conviction leading to penalty enhancement rests on the State beyond a reasonable doubt. *See State v. Zingis*, 259 *N.J.* 1 (2024). *See also State v. Cummings*, 184 *N.J.* 84, 89 (2005).

A judge may "undertake the job of finding the fact of a prior conviction—and that job alone." *Ehrlinger v. U.S., supra*, 144 *S.Ct.* at 1853; *Almendarez-Torres v. United States*, 523 *U.S.* 224, 246-47 (1998) (concerning sentencing of aliens who returned to the United States after a previous removal). But this undertaking is "at best an exceptional departure from historic practice." *Ehrlinger v. U.S., supra*, 144 *S.Ct.* at 1853 (internal quotation marks omitted), quoting *Apprendi v. New Jersey, supra* at 487. It amounts to an "unusual...exception to the Sixth Amendment rule in criminal cases that 'any fact that increases the penalty for a crime' must be proved to a jury." *Ehrlinger v. U.S., supra*, 144 *S.Ct.* at 1853

(ellipses in original), citing *Pereida v. Wilkinson*, 592 *U.S.* 224, 238 (2021), quoting *Apprendi v. New Jersey, supra* at 490.

There persists a "narrow exception" permitting judges to find only "the fact of a prior conviction." *Alleyne v. United States*, 570 *U.S.* 99, 111, n.1 (2013) (plurality opinion). "Under that exception, a judge may 'do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.'" *Ehrlinger v. U.S., supra*, 144 *S.Ct.* at 1854, quoting *Mathis v. United States*, 579 *U.S.* 500, 511-12 (2016). "And to answer those questions, a sentencing court may sometimes consult 'a restricted set of materials,' often called *Shepard* documents, that include judicial records, plea agreements, and colloquies between a judge and the defendant." *Ehrlinger v. U.S., supra*, 144 *S.Ct.* at 1844; *see Shepard v. United States*, 544 *U.S.* 13, 20-21, 26 (2005). "To ensure compliance with the Fifth and Sixth Amendments, a sentencing judge may use the information he gleans from *Shepard* documents for the limited function of determining the fact of a prior conviction and the then-existing elements of that offense [and] no more...." *Ehrlinger v. U.S., supra*, 144 *S.Ct.* at 1854 (quotation marks and citations omitted).

"To determine what legal elements attached to Mr. [Gallagher]'s decades-old offenses, the court might have needed to consult *Shepard* documents to ascertain the jurisdiction in which they occurred and the date on which they happened." *Id.*

at 1855. The MVC abstract in his case is a *Shepard* document. "Even when *Shepard* documents do contain that kind of granular information, more still may be required." *Ibid.* The Fifth and Sixth Amendments contemplate that the fact-finder should find such facts beyond a reasonable doubt. *Ibid.* at 1858.

Shepard documents may be of "limited utility" and "prone to errors." *Id.* at 1855 (citations omitted). "The risk of error may be especially grave when it comes to facts recounted in *Shepard* documents on which adversarial testing was unnecessary in the prior proceeding." *Ibid.* (quotation marks and citations omitted). "[A] defendant may have no incentive to contest what does not matter to his conviction at the time." *Ibid.* (quotation marks and citations omitted). As the U.S. Supreme Court noted in the context of a sentencing under the Armed Career Criminal Act ["ACCA"]:

> Those realities counsel caution in the use of *Shepard* documents. At the time of his prior conviction, a defendant might not have cared if a judicial record contained a mistake about, say, the time or location of his offense. Back then, fine details like those might not have mattered a bit to his guilt or innocence. Contesting them needlessly, too, might have risked squandering the patience and good will of a jury or the judge responsible for pronouncing a sentence. Yet, years later and faced with an ACCA charge, those kinds of details can carry with them life-altering consequences.
>
> [*Id.* at 1856.]

The same is just as applicable to sentence enhancements for New Jersey DWI defendants like Gallagher when he dealt with his Weehawken DWI charge.

The presence of a 1990 DWI conviction would have been of no moment in 2003 when he was sentenced as a first offender.

While Judge Avrin was understandably concerned that introducing evidence beyond the MVC abstract might "wreak havoc [and] stretch[] beyond any ability to operate the criminal justice system" (9T9-15/18), as the U.S. Supreme Court noted,

> There is no efficiency exception to the Fifth and Sixth Amendments. In a free society respectful of the individual, a criminal defendant enjoys the right to hold the government to the burden of proving its case beyond a reasonable doubt to a unanimous jury of his peers regardless of how overwhelming the evidence may seem to a judge.
>
> [*Ibid.* (quotation marks and citations omitted).]

Putting all this together makes it plain that there is reason to question the narrow exception that presently permits judges to determine the existence of prior convictions as enhancers of subsequent DWI convictions by a preponderance of the evidence. *Id.* at 1844; *see id.* at 1857; *see also id.* at 1861 (Thomas, concurring).

CONCLUSION

If this Court accepts Defendant Sean Gallagher's proffers, he asks this Court to remand him for resentencing as a first offender. Failing this, he asks the Court to remand this matter to a judge—other than one of the trial judges below—for a hearing as to the attribution to him of the 1990 DWI conviction entry on the abstract, placing the burden in the State to prove the validity of that abstract entry beyond a reasonable doubt.

Respectfully,

/s/ *John Menzel*

John Menzel, J.D.
Attorney for Defendant

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0610-24T1

MUNICIPAL APPEAL NO. MA24-015
MISC. CASE NO. ML-24-06-00105

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	
v.	:	ON APPEAL FROM A FINAL JUDGMENT OF CONVICTION IN THE SUPERIOR COURT OF
SEAN GALLAGHER,	:	NEW JERSEY, LAW DIVISION (CRIMINAL), MONMOUTH COUNTY
Defendant-Appellant.	:	

SAT BELOW: Honorable Michael A. Guadagno, J.A.D. (ret. and t/a)

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Court Rules

Rules of Evidence

Administrative Code

COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

On October 7, 2023, defendant, Sean Gallagher, was charged by Holmdel Township Police with seven complaints: Operating a Motor Vehicle While Under the Influence of Alcohol (DWI), in violation of N.J.S.A. 39:4-50; (Da 1); Refusal to Submit to Breath Samples, in violation of N.J.S.A. 39:4-50.2a; (Da 2); Reckless Driving, in violation of N.J.S.A. 39:4-96; (Da 3); Carless Driving, in violation of N.J.S.A. 39:4-97; (Da 4); Unclear License Plate, in violation if N.J.S.A. 39:3-33; (Da 5); Consent to Take Breath Samples, in violation of N.J.S.A. 39:4-50.2; (Da 6); and Failure to Maintain Lane, in violation of N.J.S.A. 39:4-88; (Da 7).

On January 10, 2024, defendant's attorney, Mr. Michael Grasso, Esq. and defendant appeared in the Holmdel Municipal Court via Zoom proceeding.

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[1] 1T – Transcript of Proceeding, dated October 25, 2023;
2T – Transcript of Proceeding, dated January 10, 2024;
3T – Transcript of Proceeding, dated February 7, 2024;
4T – Transcript of Proceeding, dated February 21, 2024;
5T – Transcript of Proceeding, dated March 20, 2024;
6T – Transcript of Proceeding, dated April 10, 2024;
7T – Transcript of Proceeding, dated April 24, 2024;
8T – Transcript of Proceeding, dated June 5, 2024;
9T – Transcript of Proceeding, dated June 19, 2024;
10T – Transcript of Proceeding (Law Division), dated September 16, 2024;
Db – Defendant's Brief in Support of Appeal;
Da – Defendant's Appendix.

Mr. Grasso asked for an adjournment to allow him to receive discovery in the matter. (2T:3-15 to 4-7).

On February 7, 2024, Mr. Grasso and defendant again appeared via Zoom proceeding. Mr. Grasso informed the court that defendant was not communicating with him, thus he was inclined to be relieved as counsel. (3T:3-14 to 25). Defendant was having technical difficulties and could not respond, so the court adjourned the matter and ordered defendant to appear at the next court date in person with Mr. Grasso. (3T:4-8 to 5-17).

On February 21, 2024, defendant and Mr. Grasso appeared in person in the Holmdel Municipal Court. Mr. Grasso explained that defendant had not returned any of his phone calls or emails and that he recently filed a police report against defendant. As such, he asked to be relieved as counsel. When asked, defendant agreed that keeping Mr. Grasso as his attorney was not in his best interest. Considering the parties agreement, the court granted Mr. Grasso's motion to be relieved as counsel. (4T:6-12 to 10-9).

The court then encouraged defendant to hire replacement counsel, due to the serious nature of his charges. Defendant informed the court that he wanted to plead guilty to the refusal and the DWI charge and that the prosecutor told him a minimum sentence would be recommended. Defendant also told the court he wanted to "get it behind me and nothing like this will ever happen

again." (4T:18-16 to 21). However, the court insisted that he not rush into a plea. (4T:16-24 to 19-24). Although defendant was adamant that he wanted to plead guilty because he did not have the money to hire counsel to replace Mr. Grasso, in the end, the court adjourned the matter to encourage defendant to seek counsel prior to pleading guilty. (4T:20-14 to 25-5).

On March 20, 2024, defendant appeared, but had still not retained new counsel, so the court gave him one last adjournment. (5T).

On April 10, 2024, defendant appeared again – this time with his newly retained counsel, Mr. John Menzel, Esq. After Mr. Menzel entered his appearance, he asked for an adjournment to receive outstanding discovery. (6T:3-8 to 15).

On April 24, 2024, defendant and Mr. Menzel appeared and Mr. Menzel informed the court that a resolution had been reached. Defendant agreed to plead guilty to the refusal charge and the rest of the summonses would be merged and/or dismissed.[2] (7T:3-1 to 16). The question was then posed, and there was discussion, as to if this was a first or second offense for this

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[2] The record also reflects that while there was sufficient evidence for probable cause to arrest defendant for DWI, the municipal prosecutor determined, after speaking with the arresting officers, that there was not enough observational evidence to prove defendant guilty of the DWI, beyond a reasonable doubt. (7T:3-17 to 4-1).

defendant. Mr. Menzel stated that after a review of defendant's official Motor Vehicle Commission (MVC) abstract, defendant "does acknowledge the existence of the 2003 DWI conviction, [but] disavows any knowledge about the 1990 DWI conviction." (7T:5-8 to 12). However, Mr. Menzel asserted that defendant was prepared to plead guilty and be sentenced as a second offender. He further stated that he would investigate the 1990 conviction and would seek post-conviction relief in the county where the DWI originated, if necessary. (7T:5-16 to 24).

After placing the terms of the plea on the record, Mr. Menzel asked for the execution of the sentence to be stayed for 30 days (defendant's interlock was already in place on his vehicle) to "figure out what is going on in Hudson County [sic]." (7T:6-14 to 8-11). The court responded that it was not going to accept a plea and not sentence him on the same day. Once Mr. Menzel realized the sentence was not going to be stayed, he asked for an adjournment to investigation the 1990 conviction. (7T:8-12 to 10-5). The court granted the defense a 4-week adjournment. (7T:11-16 to 21).

On June 5, 2024, the parties appeared and arguments continued regarding defendant's sentencing status based on a 1990 DWI conviction. Mr. Menzel asserted that his office investigated the matter and he could not obtain any records – other than the official MVC abstract. (8T: 4-14 to 18).

Defendant's argument centered on the commonality of his name and further asserted that the 1990 DWI charge on his abstract did not belong to him, but in fact, belonged to another Sean Gallagher. Defendant also asserted that it was the State's burden to prove the accuracy of the 1990 conviction listed on defendant's abstract. (8T:4-22 to 7-22). In support of this argument, defense counsel claimed defendant's sworn testimony, elicited by the court in a hearing, without more, was sufficient to show it was not him and cited various cases related to post-conviction relief petitions. The State disagreed.

The court denied defendant's request to have defendant testify, stating if that was all that was necessary, any defendant could come into court with an old DWI and claim it was not theirs. (8T:7-23 to 10-13). And while the court noted that defendant had been very respectful in court and seemingly credible, the fact that there was no supporting documentation that the conviction belonged some other Sean Gallagher, combined with the fact that defendant had motor vehicle violations in 1989, an arson charge in June of 1990, and had paid the surcharges related to the DWI, this all called into question the credibility of his claim. Indeed, the court questioned as to why defendant would pay off surcharges and never contacted the MVC to ask as to why he had to pay a surcharge for an offense he did not commit. Mr. Menzel's response was that perhaps the other Sean Gallagher was paying his clients

surcharges. (8T:13-10 to 14-2). Ultimately the matter was again adjourned to allow further briefing and arguments.

On June 19, 2024, the parties appeared and continued to argue defendant's motion. The State's investigation revealed that according to defendant's criminal history, on June 22, 1990, defendant was in Rutherford, New Jersey and was arrested for arson. The State argued that is proof that goes against defendant's claim that he was not in the state in 1990 and thus, could not have been arrested for DWI. The State also noted that timeline of that criminal offense supported the accuracy of DWI conviction on defendant's abstract. (9T:4-20 to 5-12). The defense proffered the results of its investigation, claiming there are 1000 Sean Gallaghers in the United States, while admitting that defendant was in New Jersey and arrested in June of 1990. The defense also noted that when they reached out to the Garfield Municipal Court, that court stated it had no records confirming (nor denying) the 1990 conviction that it could put its hands on; however, it did have records in the basement, but noted it would likely take weeks to do a search of those records. (9T:5-13 to 8-24).

After hearing defendant's proffer, the court denied defendant's motion. In its reasoning, the court noted that the 1990 arson charged proved he was in the state in 1990 and since it was proffered that he was going thought a lot at

that time, his memory could have easily been thrown off. The court also noted that defendant's motion was actually improper because issues related to a previous conviction are adjudicated by a motion for post-conviction relief. As such, the proper court to file that motion would be in the Garfield Municipal Court, not in the Holmdel Municipal Court. Finally, the court cited to the controlling case law in this state that allows an abstract from the MVC to be presumed as admissible and reliable under our rules of evidence. The court further opined that none of the cases defendant cited negate those rules or law, or support the proposition he made. The court also stated that even if defendant was put under oath and testified the conviction was not his, his testimony was not a sufficient basis to grant his motion. The court then reminded defense counsel that the proper avenue to do what he wanted to do was a post-conviction motion in Garfield Municipal Court. In any event, the court held it needed more to accept the fact that the conviction did not belong to him than just defendant's word. (9T:8-25 to13-3).

The parties agreed to move forward and the court elicited a factual basis for defendant's plea to the refusal charge. (9T:15-12 to 21-7). After the court accepted his plea, he was sentenced to minimum penalties – a fine of $507, $33 court costs, $100 DDE, and 48 hours in the IDRC and a one-year license suspension. Since defendant had already installed the interlock device on his

vehicle, the court gave him 124 days credit for having it installed prior to his plea and sentencing. The remaining summonses were dismissed. Defendant asked for a stay of the sentence, which was denied. (9T:14-1 to 15-2; 21-8 to 24-1).

On June 21, 2024, defendant filed a Motion for Stay of Sentence Pending Appeal with the Law Division, which was granted on July 8, 2024. (Da 16).

Trial de novo was held on September 16, 2024. The court heard oral arguments and denied all of defendant's claims. (10T, Da 17). Thereafter, defendant asked for another stay of his sentence, including the license suspension. The State objected. The court, relying on State v. Robertson, 228 N.J. 138 (2017), denied the request. (10T: 18-21 to 22-13).

On October 30, 2024, defendant filed a Notice of Appeal to this Court. (Da 18-21). The State submits this letter brief in opposition to defendant's arguments.

COUNTERSTATEMENT OF FACTS

On October 7, 2023, defendant was driving in the vicinity of Laurel Avenue in Holmdel, New Jersey when he was pulled over by an officer because of the way he was driving and/or because something was blocking his license plate. (9T:15-12 to 24). Based on a suspicion that defendant was

under the influence of alcohol, officers asked him to step out of his vehicle to perform standard field sobriety tests (SFST). Defendant conceded, based on his review of the video discovery that he did not perform well on the SFST, thus giving the officer probable cause to arrest him and bring him back to the station for breath testing. (9T:16-4 to 19).

Once at the station, the officer read defendant the first nine paragraphs of the Standard Statement and afterwards asked defendant to submit to giving breath samples. Defendant refused. The officer then read the second part of the Statement and asked defendant again to submit to breath testing. Defendant again refused. His refusal was documented on the form and he was subsequently charged with refusal. (9T:16-17 to 19-11; Da 13).

LEGAL ARGUMENT

POINT I[3]

BECAUSE DEFENDANT FILED THE WRONG MOTION IN THE WRONG COURT, NEITHER THE MUNICIPAL COURT, NOR THE LAW DIVISION ERRED IN DENYING DEFENDANT A TESTIMONIAL HEARING.

On appeal from trial de novo, appellate court "review is limited to determining whether there is sufficient credible evidence present in the record

[3] This POINT responds to POINT I & POINT II of defendant's brief. (Db 12-16).

to support the findings of the Law Division judge, not the municipal court." State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005) (citing State v. Johnson, 42 N.J. 146, 161-62 (1964)). Also, in an appeal from trial de novo, the "trial court's legal rulings are considered de novo." State v. Robertson, 228 N.J. 138, 148 (2017)(citing State v. Kuropchak, 221 N.J. 368, 383 (2015)). Thus, "'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.'" Robertson, 228 N.J. at 148 (quoting State v. Locurto, 157 N.J. 463, 474 (1999)).

With those legal tenants in mind, defendant's appeal centers upon his claim, first to the municipal court and again in the Law Division, that a DWI charge from 1990 out of Garfield, New Jersey – listed on his certified MVC abstract – did not belong to not to him because he did not remember incurring that charge, so it must belong to some other Sean Gallagher. Thus, after he incurred a new charge of Refusal to Submit to Breath testing and other motor vehicle violations in Holmdel, New Jersey, he filed a motion in the Holmdel Municipal Court asserting his feigned recollection as to the 1990 charge and asked to be sentenced as a first offender. In support of his request, defendant sought an evidentiary hearing to present testimony – his own testimony – as to how and why he did not incur the 1990 DWI charge.

However, since defendant was actually seeking post-conviction relief for his 1990 conviction that happened in Garfield, New Jersey, the Holmdel Court denied defendant's request for a hearing, holding that he was seeking a remedy from an improperly filed motion – filed in the wrong court. (9T:11-9 to 13-9). The Law Division, on de novo review, also came to the same procedural and legal conclusion and denied all of defendant's claims to the contrary. (10T:13 23 to 18-2).

Rule 7:10-2(a) sets forth the procedure for a filing petition for post-conviction relief. "A person convicted of an offense may, pursuant to this rule, file with the municipal court administrator of the municipality in which the conviction took place, a petition for post-conviction relief captioned in the action in which the conviction was entered." Section (b)(3) states: "A petition for post-conviction relief shall be the exclusive means of challenging a judgment of conviction, except as otherwise required by the Constitution of New Jersey..." Thus, pursuant to the rule, and as both the municipal and Law Division courts properly held, a petition for post-conviction relief is the only proper means to challenge a judgment of conviction and it must be filed in the jurisdiction in which the conviction took place. (10T:17-19 to 20)(emphasis added).

Here, instead of filing a proper PCR motion in the proper jurisdiction pursuant to the Rule, defendant instead filed a motion – seemingly some sort of sentencing motion – in the Holmdel Municipal Court challenging a 1990 DWI conviction that happened in Garfield, New Jersey. (8T:15-3 to 7; 9T:3-1 to 13-3). Then, having no evidence in support of that motion, defendant asked the Holmdel Municipal Court to hold an evidentiary hearing so defendant could testify as to why and /or how this 1990 DWI conviction was not attributable to him. In essence, by challenging the prior conviction, itself, defendant was ultimately seeking relief in the form of a lesser sentence for his new charges. Yet, instead of filing a proper post-conviction motion in the Garfield Municipal Court where the prior charge he was challenging happened, defendant sought an end-run-around the proper legal procedure and asked the court of another jurisdiction to essentially vacate, for the purposes of sentencing, a conviction listed on his certified motor vehicle abstract. R. 7:10-2(a).

The municipal court, in recognizing this tactic, denied his motion and properly reasoned, "[A]nd even assuming that he was under oath with what you told me I don't find sufficient basis to grant your motion and if you want to bring a PCR then you need to do that back in Garfield, I believe we agree, right, where that conviction is from." (9T:11-12 to 19; 11-21 to 12-2). To try

and justify his improper motion to the wrong court, defense counsel specifically told the municipal court, "[W]e did not do a post-conviction relief petition because we don't know if there is a Sean Gallagher out there who was convicted. The issue is not about whether this Sean Gallagher's rights were respected, it just wasn't him, that is our contention." (9T:12-4 to 9).

Defendant made the same argument to the Law Division on de novo review. However, in support of that argument, defendant cited to and relied on State v. Patel, 239 N.J. 424 (2019), to stand for the proposition that he attempted to get evidence from the Garfield Municipal Court, but ultimately did not get what he asked for, thus he was entitled to an evidentiary hearing in order to present testimonial evidence – from the defendant – that the 1990 DWI conviction was not his. (10T:13-2 to 22). However, as the Law Division pointed out, Patel is wholly distinguishable from the instant case. (10T:17-21 to 24). In Patel, the New Jersey Supreme Court was faced with a Laurick[4] petition for post-conviction relief based on a denial of notice of the right to counsel in an earlier case. What is more, that defendant was allowed, and the court accepted, two certifications in support of his motion averring that that he was indigent at the time of his plea in 1994 and that he did not receive notice

[4] State v. Laurick, 120 N.J. 1 (1990).

of his right to counsel because at the time he filed the motion in 2016, no documents remained in the municipal court to disprove his certifications. Id. at 431. More specifically, the municipal court administrator advised that "after 15 years all DWI files were sent for destruction. No transcripts were available." Ibid. Thus, the Court ultimately held that due to the age of a case and because a defendant not being advised of the right to counsel is a structural error, a certification from a defendant stating he was not given proper notice of his right to counsel would establish his burden. The Court reasoned that he could do no more to satisfy his burden based on the circumstances. Ibid.

The instant case, as the Law Division properly found, is quite different, thus distinguishable from Patel. First and foremost, there was never a claim for Laurick relief, nor was defendant's claim to the municipal court or the Law Division even akin to that for which the remedy outlined in Laurick would be applicable. As such, the issue was not one of a structural or constitutional significance as established in Patel. (10T:17-21 to 24).

Next, while defendant claims, like Patel, that no documents existed in the Garfield Municipal Court to support and present as evidence of his claims, defense counsel's representation about the results of his "exhausted" (Db 14)

investigation say otherwise. To be sure, defense counsel told the municipal court:

> We contacted Garfield Municipal Court, we have been told by them that there were no records concerning this conviction, **they did indicate that there might be something in the basement that would take weeks to locate but they have nothing readily at hand, they didn't have a document.** (9T:6-9 to 14)(emphasis added).

As the Law Division properly found, a record of this conviction may still exist thus his claim under Patel, is legally misplaced. (10T:17-9 to 14). In fact, defense counsel's argument is that he did not receive any of the documents he requested, not that he was ever informed by the Garfield Municipal Court that they were lost or destroyed or could not be located at all. To the contrary, what the Garfield court stated was that they did not find anything "readily at hand," but that they might be in the basement. (Ibid.) As such, had defendant filed a proper post-conviction motion in the Garfield Municipal court, that court would have necessarily searched its own court file/records, including a search the basement files. However, defendant decided to file a sentencing motion in Holmdel instead.

As properly held by the Law Division, the circumstances of this case do not pose the same or similar circumstances where a certification or testimony from a defendant would be sufficient to prove his claim, such as in Patel. The

defendant in Patel was faced with that fact his records had been destroyed, thus the court found he could do no more than a certification. The defendant in this case has not exhausted all his options, nor has he demonstrated the records no longer exist. (10T:17-1 to 14). As well, it cannot be overlooked that the conviction is, and has been, on defendant's certified motor vehicle abstract since 1990. Yet, only now is defendant averring he has no recollection of the charge – or resulting conviction.

However, defendant feigning recollection as to only one singular DWI from 1990 is unpersuasive. Indeed, defendant's official driver's abstract is replete with moving violations in New Jersey from 1989, including Speeding, Careless Driving, surcharges for being a persistent violator – the challenged 1990 DWI – and then a seven-year period where there are no violations, until 1997 when he cited again for Careless Driving, as the municipal court noted on the record. (8T:11-17 to 12-6). Defendant did not dispute any of these other moving violations.

More importantly, the real problem with defendant's argument is that he paid all the surcharges imposed from the 1990 DWI violation without ever contesting – at that time – that "it was not me" "I did not do this," "why is it on my abstract," like he is claiming now. Indeed, from a common-sense perspective, it doesn't make sense that suddenly the 1990 DWI conviction is

not attributable to defendant. (8T:13-10 to 22). In other words, defendant did not contest the validity of the 1990 conviction when it made sense to do so. To be sure, along with his official certified abstract, there is also additional documentary evidence that belies defendant's now-convenient assertion that he was not in New Jersey in 1990. As his criminal record reflects, and defendant does not dispute, that he was arrested in Rutherford in June of 1990 for arson. (9T:5-6 to 11).

In sum, defendant's crafty, albeit, mischaracterization of the post-conviction relief he was seeking does not change the procedural avenue mandated under the rules to contest a conviction. Rule 7:10-2(b)(3). Nor does it the divest the Garfield Municipal Court of its jurisdiction over the 1990 DWI conviction. Thus, with the above legal tenants, evidentiary and factual clarifications in mind, both the Holmdel Municipal court and the Law Division on de novo review, did not err in foreclosing defendant's attempt at side-stepping proper procedure and in denying him an evidentiary hearing.

Defendant had a clear remedy in this case and had viable options to justify his claim of "it was not me." His claim could have been properly adjudicated, and with access to an evidentiary hearing, if he had simply filed the proper petition for post-conviction relief in the Garfield Municipal Court where the conviction he is challenging originated. The fact that his new

charge of Refusal lies Monmouth County does not bypass the rule and proper procedure defendant was to follow in this case. As such, the Law Division properly determined that a petition for post-conviction relief in Garfield – Bergen County, New Jersey, was the proper motion and venue in this case, thus properly found defendant guilty of Refusal and sentenced him accordingly. (10T:17-19 to 20; Da 17).

POINT II[5]

SINCE THE LAW IN THIS STATE IS THAT AN OFFICIAL MOTOR VEHICLE COMMISSION ABSTRACT IS SUFFICIENTLY RELIABLE TO BE ADMISSIBLE AS PRIMA FACIE EVIDENCE OF A FACT, THE STATE DID NOT NEED TO FURTHER PROVE THE ACCURACY OF DEFENDANT'S ABSTRACT.

Defendant argues that the official MVC abstract, relied upon by the State to prove defendant's prior DWI violations prior to sentencing on his current charge of Refusal, is inaccurate because he does not recall being convicted of DWI in 1990 (see 8T:13-1 to 8; 10T:4-24 to 6-5). As such, defendant argues that his loss of memory, in combination with his inability to obtain documentation to prove his assertion that the conviction on his abstract "is not him," somehow places an additional burden on the State to prove the accuracy of his abstract. To support his argument, defendant cites to various sentencing

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[5] This POINT responds to POINT III of defendant's brief. (Da 15-20).

cases from this State and the United States Supreme Court; however, none of these cases are applicable to the instant case and in fact, aptly demonstrate that defendant's argument is wholly misplaced. (10T:6-3 to 24; Db 16-18).

In State v. Luzhak, 445 N.J. Super. 241, 249 (App. Div. 2016) the Appellate Division held that not only was an MVC abstract admissible as a business record, pursuant to N.J.R.E. 803(c)(6), but it was also sufficiently reliable to be admissible as prima facie evidence of that fact. See also, State v. Pitcher, 379 N.J. Super. 309, 319 (App. Div. 2005)(citing to N.J.R.E. 803(c)(8); State v. Zalta, 217 N.J. Super. 209, 214 (App. Div. 1987)(emphasis added)). Despite this clear legal authority directly on point, defendant cites to several other cases to support his arguments that are simply are not applicable.

Defendant first relies on State v. Zingis to suggest that "the burden of the existence of a prior conviction leading to penalty enhancement rests on the State beyond a reasonable doubt." (Db 17)(citing State v. Zingis, 259 N.J. 1 (2024). However, defendant's reliance on the holding in Zingis, is very misplaced. The facts and holding in Zingis relate solely and exclusively to the "consequences that remain from the Sergeant Marc Dennis's certification of improperly conducted calibration checks of certain Alcotest machines 'used to determine whether a driver's blood alcohol content is above the legal limit,' which called into question over 20,000 Alcotest results." Zingis, 259 N.J. at 2;

State v. Cassidy, 235 N.J. 482 (2018). Due to the issues with Dennis cases that still remained, the Court in Zingis ordered the State, "when seeking an enhanced sentence based on a DWI conviction with an arrest date between November 5, 2008 and April 9, 2016, the State must inform the court, defendant, and defense counsel whether defendant's prior DWI conviction involved a Dennis-calibrated Alcotest." Id. at 17-19. Based on the clear holding in Zingis, its mandate that the State must prove a previous DWI is obviously limited only to Dennis-calibrated Alcotests.

Here, the DWI defendant challenges happened in 1990, thus is clearly not within the specific timeframe applicable in Zingis, nor is the 1990 DWI in any way related to or connected to Sgt. Marc Dennis. The State was ordered by the Court to provide proof of a prior DWI conviction to Cassidy-effected defendant only because of the misfeasance of Sgt. Marc Dennis – a state actor. Thus, contrary to defendant's complete mischaracterization of the holding in Zingis, the Court did not hold that in every case – past, present, and future – where there is a prior DWI, the State has the burden to produce confirming documents of a prior DWI.

Defendant next cites to Apprendi v. New Jersey, 530 U.S. 466 (2000) however, the U.S. Supreme Court in Apprendi specifically held that "any fact – *other than the fact of a prior conviction* – that increases the penalty for a

crime beyond the prescribed statutory maximum must be submitted to a jury." Id. at 489. Since the holding specifically exempts the fact of a prior conviction it does not, in any way, stand for the proposition that the State must verify the accuracy of said conviction. Indeed, the fact of a prior conviction is all that is needed to sentence a defendant convicted of DWI to the statutory mandated enhanced sentence pursuant to a subsequent conviction. So, the actual holding in Apprendi wholly negates defendant's claim that it applies to the instant case and that the State has any burden to prove that facts and circumstances surrounding his prior conviction. The fact that it is on his certified abstract is, as stated above, prima facie evidence of that fact. Nothing else is required. Luzhak, 445 N.J. at 249.

Defendant also cites to and relies on the newly decided United States Supreme Court case, Erlinger v. United States, 602 U.S. 821 (2024) seemingly for the same reasoning – that the State must put forth some evidence to prove a prior conviction. But, as with all the other cases defendant cited to stand for this proposition, Erlinger clearly does not apply. Erlinger decided whether a judge may determine that a defendant's past offenses were committed on separate occasions or if it must be decided by a unanimous jury. Interestingly, the Court's reasoning centered around our founding and the benefits of a jury trial and how under our constitution it was not merely a procedural formality.

See Id., 826-31. The Court ultimately held that facts of offenses that occurred on separate occasions, which have the effect of increasing the sentenced faced, are facts that must be determined by a jury. Id.

Erlinger does not apply to the instant case for several reasons. First, this case does not involve multiple prior convictions. Defendant is only challenging a singular conviction. Second, the conviction he is challenging is a quasi-criminal traffic violation, which is not adjudicated by a jury, but specifically by a judge, pursuant to the law and rules of this State. To be sure, the New Jersey Supreme Court has held:

> While other states may provide jury trials in at least some DWI cases,...New Jersey has historically addressed DWI as a motor-vehicle offense. A motor-vehicle offense is not included in a criminal history record, N.J.A.C. 13:59-1.1 and is not subject to expungement as a criminal record. N.J.S.A. 2C:52-28. The legislature has not enacted a statute guaranteeing a right to a jury trial for DWI offenses. Rather, the legislative response to repeat DWI conduct has been to increase the severity of the penalties focused on prevention and deterrence, thereby creating a law that is far less punitive than those found in many other states.

State v. Denelsbeck, 225 N.J. 103, 127-28 (2016). In speaking directly to New Jersey's DWI legislative classifications of DWI offenses (including second and third DWI offenses), the Court found that DWI offenders were not entitled to a jury trial and it did not violate a defendant's Sixth Amendment

right. As such, the fact-finder in a quasi-criminal DWI matter is always the judge.

Here, defendant's attempt to draw a corollary between the Erlinger decision and his quasi-criminal traffic ticket, which by our Supreme Court's decisions is a statutory penalty focused on prevention and deterrence and not in the same ballpark as a punitive sentence received in a criminal proceeding, is unpersuasive. Indeed, defendant claims that the State has the burden to prove the accuracy of an official driver's abstract by relying on a case that requires a jury to decide if multiple prior convictions happened on separate occasions. As stated in Denelsbeck, defendant's prior DWI conviction is not the type of offense to trigger the type of burden shift he is asserting. Denelsbeck, 225 N.J. at 127-28.

Finally, defendant's attempt to mischaracterize the evidence in this case – a certified driver's abstract – by using the Erlinger decision to characterize the abstract as a "Shepard" document is equally unavailing. (Db at 18-19). As stated above, the official, certified MVC abstract has been deemed, under the controlling law in this state, as "sufficiently reliable to be admitted as prima facie evidence of a fact." Luzhak, 445 N.J. Super. at 249(citing Pitcher, 379 at N.J. Super. at 319 (citing N.J.R.E. 803(c)(8); Zalta, 217 N.J. at 214). Thus, defendant's mischaracterization is legally inapt. To be sure, a certified MVC

abstract in a quasi-criminal DWI matter is not the type of "Shepard" document the Erlinger case warned of; therefore, like the two courts below, this Court should dismiss this argument out of hand.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully requests that this Court deny defendant's appeal and affirm the order entered by the Law Division.

Respectfully submitted,

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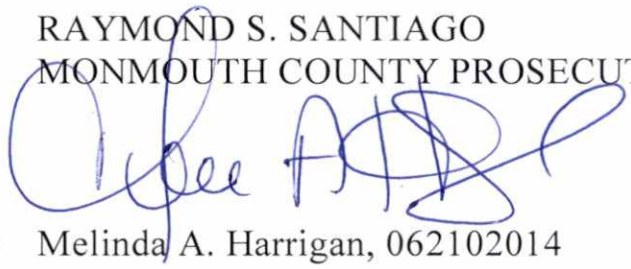

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