STATE OF NEW JERSEY Respondent, v. CHAZ DUNTON Appellant.	NEW JERSEY SUPERIOR COURT: APPELLATE DIVISION Docket No.: A-2941-22 Submission Date: February 14, 2024 Civil Action Sat Below: Hon. Robert M. Hanna, J.S.C. Municipal Appeal No. 22-018-RH

THE BRIEF OF APPELLANT CHAZ DUNTON IN SUPPORT OF HIS APPEAL

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PRELIMINARY STATEMENT

Appellant Chaz Dunton was arrested and charged with driving while intoxicated under N.J.S.A. 39:4-50(a) on November 5, 2019. Following a trial in the Denville Municipal Court, Appellant was found guilty of that offense and sentenced under the statute. Appellant then appealed that decision to the Superior Court of New Jersey, Law Division, Morris County, which similarly found Appellant guilty of driving while intoxicated following a trial de novo. Simply stated, the Law Division erred by finding that the arresting officer's initial stop of Appellant was permissible, by finding that the officer had probable cause to arrest Appellant, and by finding Appellant guilty of driving while intoxicated. As such, this Court should reverse the decision of the Law Division and vacate the judgment of conviction entered against Appellant under N.J.S.A. 39:4-50.

First, the Law Division erred in finding that the arresting officer's initial stop of Appellant was constitutionally permissible. While the court applied the community caretaking exception to the general rule that the officer must have a reasonable, articulable suspicion that a motor vehicle infraction has occurred before instituting a stop, same was inapplicable here. Contrary to the exception's requirements, there was nothing abnormal about Appellant being stopped on the

side of the road with the interior lights of his vehicle on during the morning in question.

Second, the Law Division improperly found that the State proved Appellant's operation of a vehicle beyond a reasonable doubt. The lone evidence adduced by the state to support operation of a motor vehicle was a statement allegedly made by Appellant which did not indicate that he had operated a vehicle, or intended to operate a vehicle, while under the influence of intoxicating liquor.

Third, the Law Division erred in finding that the arresting officer had probable cause to arrest Appellant. In so finding, the Law Division improperly credited the testimony of the arresting officer, the lone witness in support of the State's case against Appellant, as same was riddled with instances of forgetfulness and was otherwise inconsistent.

Fourth, the Law Division erred in finding that the State proved Appellant's guilt beyond a reasonable doubt under either theory of liability applicable to offenses occurring under N.J.S.A. 39:4-50. As with its finding of probable cause, the Law Division erred in crediting the testimony of the arresting officer to find that guilt was established solely by the officer's personal observations. Further, the Law Division erred in finding that the State proved Appellant's guilt under the per se standard of liability, as the State failed to adduce evidence that

the necessary procedures were followed when Appellant was given the alcotests used to support the State's case against Appellant.

Finally, even if this Court finds that the Law Division did not err in finding Appellant guilty of driving while intoxicated under N.J.S.A. 39:4-50(a), this Court should nonetheless remand this matter for re-sentencing, as the Law Division judge abused his discretion by sentencing Appellant, an indigent individual, to an unreasonable monthly payment plan.

PROCEDURAL HISTORY

Appellant was arrested in the Town of Denville, New Jersey on the morning of November 5, 2019, and charged with driving while intoxicated under N.J.S.A. 39:4-50, reckless driving under N.J.S.A. 39:4-96, and careless driving under N.J.S.A. 39:4-97.[1] (Aa092-095; 2T7:22-8:6).[2] Following his arrest,

[1] Aa__ refers to Appellant's Appendix.

[2] References to the February 27, 2020 transcript of adjournment follow the form 1T__-__. References herein to the February 25, 2022 probable cause hearing before the Denville Municipal Court follow the form 2T__-__. References to the April 29, 2022 trial before the Denville Municipal Court follow the form 3T__-__. References to the May 27, 2022 transcript of the decision of the Honorable Gerard Smith J.S.C. in the matter of State v. Dunton, Docket No. DEN243912, follow the form 4T__-__. References to the January 27, 2023 trial de novo before the Superior Court of New Jersey, Law Division follow the form 5T__-__. References to the February 17, 2023 trial de novo before the Superior Court of New Jersey, Law Division follow the form 6T__-__. References to the April 17, 2023 sentencing hearing before the Honorable Robert Hanna, J.S.C. follow the form 7T__-__.

Appellant filed two pre-trial motions in the Denville Municipal Court, "one asserting a lack of sufficient cause to conduct field sobriety tests and/or to arrest [Appellant], and the other asserting the State lacked proof that [Appellant] had operated the vehicle in question." (Aa010). On February 25, 2022, a probable cause hearing on Appellant's pre-trial motions was held in the Denville Municipal Court before the Honorable Gerard Smith, J.S.C. (2T). At that hearing, Judge Smith found that there was probable cause for Appellant's arrest on November 5, 2019. (2T28:8-30:13).

A trial was then held before Judge Smith on April 29, 2022 in the Denville Municipal Court. (3T). On May 27, 2022, Judge Smith found Appellant guilty of driving while intoxicated under N.J.S.A. 39:4-50, but not guilty of reckless driving under N.J.S.A. 39:4-96, or careless driving under N.J.S.A. 39:4-97. (4T13:8-17; Aa001).

Appellant then appealed Judge Smith's decision to the Superior Court of New Jersey, Law Division, Morris County. (See 5T; 6T). A trial de novo was initially scheduled to be held before the Honorable Robert Hanna, J.S.C., on January 27, 2023. (5T). On that date, Judge Hanna adjourned the trial de novo in order to give Appellant additional time to prepare his arguments. (5T31:20-23). The previously adjourned trial de novo was then held before Judge Hanna on February 17, 2023. (6T).

On April 3, 2023, Judge Hanna entered an Order Including Verdict Upon Trial De Novo, finding Appellant guilty of driving while intoxicated under N.J.S.A. 39:4-50(a), and scheduling a sentencing hearing for April 17, 2023. (Aa005-006). On April 17, 2023, a sentencing hearing was held before Judge Hanna in the Morris County Law Division. (7T). That same day, Judge Hanna entered a Judgment of Conviction and an accompanying Statement of Reasons. (Aa007-061).

On May 26, 2023, Appellant filed a Notice of Appeal with this Court, appealing the Judgment of Conviction entered by Judge Hanna on April 17, 2023. (Aa086-089).

STATEMENT OF FACTS

A. Appellant's Arrest

At approximately 2:18 a.m. on the morning of November 5, 2019, Patrolman Christopher Ordway ("Officer Ordway") of the Denville Township Police Department responded to a report of a disabled vehicle on Bloomfield Avenue in front of the Il Torrente pizzeria in Denville. (2T7:10-8:6).[3] Upon arriving at the scene, Officer Ordway observed a black Toyota Corolla parked across multiple parking stalls on the right side of the road. (2T8:8-12). The

[3] The record is unclear as to who reported the disabled vehicle in question, or how such report was made.

vehicle was occupied by Appellant, who was seated in the driver's side seat. (2T8:8-12, 11:2-11). Officer Ordway further observed that the vehicle was not on at the time, though the interior lights of the vehicle were on. Officer Ordway testified that in his experience this meant "[t]hat the keys were in the ignition and the vehicle was or could be operated." (2T9:2-15). Officer Ordway then approached the vehicle and spoke to Appellant who informed Officer Ordway that the vehicle was having an engine issue and was not on at the time. (2T9:2-7). Officer Ordway asked Appellant what the issue was, to which Appellant responded that he wasn't sure. (2T9:21-10:2). At the probable cause hearing on February 25, 2022, Officer Ordway testified that he "believe[s] the verbiage [Appellant] used was that [Appellant] was driving[,] the car petered out and he was able to get it into this spot." (Id.).

Officer Ordway also observed that the keys to the vehicle were in the ignition. (2T11:2-11). Officer Ordway asked Appellant to turn the vehicle on, but the car would not start. (Id.). Officer Ordway then asked Appellant where he was headed, to which Appellant responded that he was "coming from home and he was on his way to see a friend in Hackettstown." (2T11:12-14). As Officer Ordway and Appellant continued to converse, Officer Ordway testified he detected the odor of an alcoholic beverage on Appellant's breath, as well as slurred speech and droopy, bloodshot eyes. (2T11:16-23). According to his

testimony, at that point, Officer Ordway "believe[d] that it was possible [Appellant] was under the influence." (Id.).

Officer Ordway then requested that Appellant exit the vehicle and he spoke to Appellant about administering standard field sobriety tests. (2T12:9-14). Officer Ordway then proceeded to administer the horizontal gaze nystagmus test (the "HGN Test"), the walk-and-turn test, and the one-leg stand test. (2T15:18-16:25). When asked what he used as a stimulus to perform the HGN Test, Officer Ordway testified that he "believe[d]" he used his finger, as that is what he would usually use to administer that test, though he could not say definitively that he used his finger on the morning in question. (2T17:11-13). Officer Ordway testified that Appellant did not have any difficulty following Officer Ordway's instructions on the HGN Test. (2T18:2-10).

Officer Ordway then proceeded to perform the walk-and-turn test. (2T17:15-17). Officer Ordway testified that he "believe[d]" the walk-and-turn test was performed in front of the vehicle, but qualified that testimony by acknowledging that the events in question had occurred over two years prior. (2T18:19-19:2). Officer Ordway then testified that "if [he could] remember correctly," the walk-and-turn test would have been performed in front of Officer Ordway's vehicle. (Id.). Officer Ordway then proceeded to administer the instructional phase of the walk-and-turn test, whereby Officer Ordway had

Appellant place "his left foot down at the end of the line" and "his right foot in front of it" with Appellant's "arms at his side" while Officer Ordway goes through the instructions for the test and demonstrates the test to Appellant. (2T19:15-25). Officer Ordway testified that during the instructional phase of the walk-and-turn test, Appellant "did step out of line," (id.), but further testified that he could not recall what Appellant was wearing on his feet at the time, nor could he recall whether Appellant asked about taking off or changing his shoes. (2T20:13-19). Officer Ordway then testified that Appellant was able to get back into position, which he held until Officer Ordway finished the instructional phase of the walk-and-turn test. (2T20:21-21:3).

Officer Ordway then proceeded to perform the second portion of the walk-and-turn test. Regarding the second portion of the test, Officer Ordway testified:

> I don't remember specific steps that he missed stepping heel-to-toe with more than a two inch gap, I do know that while walking he did step off of the line on several times, he did miss stepping and placing his feet heel-to-toe with more than a two inch gap on several steps and he raised his arms for balance.
>
> [(2T21:14-20).]

Officer Ordway then proceeded to administer the one-leg stand test. (2T22:17-19). During the instructional phase of the test, Officer Ordway instructed Appellant to "keep his feet together at the end of the line [and] keep his hands at his side" while Officer Ordway demonstrated the test, which

Appellant was able to do. (2T22:25-23:9). When asked whether Officer Ordway gave Appellant the choice as to which leg to use for the test, Officer Ordway testified "[t]o my recollection I would say yes." (2T23:11-15). Officer Ordway then administered the one-leg test. On Appellant's first attempt, Officer Ordway testified that Appellant "raised his leg [and] ended up lifting his arms for balance" before ultimately placing his foot on the ground. (2T24:1-15). Officer Ordway then asked Appellant to perform the test again, testifying that Appellant "raised his leg and – and almost fell over." (Id.).

Based on his interaction with Appellant to that point, Officer Ordway believed that Appellant "was the operator of the vehicle, [Appellant] was under the influence of alcohol and [Appellant's] impairment was due to alcohol." (2T24:22-24). Based on the foregoing, Officer Ordway made the decision to formally place Appellant under arrest. (2T24:25-25:2). Upon arresting Appellant, Officer Ordway informed Appellant of his Miranda[4] rights. (3T15:10-12).

[4] Miranda v. Arizona, 384 U.S. 436 (1966).

B. Officer Ordway Attempts to Perform Three Alcotests on Appellant

Following Appellant's arrest, Officer Ordway transported Appellant to the booking room at the Denville police station to perform an alcotest.[5] Officer Ordway went through the necessary procedures for performing an alcotest in Denville, but the "end result was a control test failure." (3T9:11-25). Based on the control test failure, Officer Ordway was required to perform the alcotest using a different machine. (Id.). As such, Officer Ordway next transported Appellant to Rockaway Borough to perform an alcotest. (Id.). Officer Ordway performed the same procedure in Rockaway Borough, but again the result of the test was a control test failure. (Id.). As a result of the second control test failure, Officer Ordway transported Appellant to the Town of Boonton to perform an alcotest there. (3T10:2-3).

Following a twenty minute observation period, Officer Ordway proceeded to perform an alcotest on Appellant, instructing Appellant how to properly perform a breath sample. (3T12:8-12). Appellant then proceeded to provide his first breath sample, at which point Officer Ordway noted that the minimum volume for the breath sample was not achieved. (3T13:10-11). Officer Ordway

[5] As used herein, the term "alcotest" refers to a Breath Alcohol Test used to monitor the amount of alcohol in an individual's system at the time of the test's administration.

testified that he then waited an unspecified amount of time after the first test for the machine to clear and to take a second breath sample from Appellant. (3T13:13-15). Officer Ordway then performed a second test, achieving a sufficient body breath from Appellant to receive a reading. (3T13:21-23). Officer Ordway then again waited for an unspecified amount of time for the machine to clear before taking a third breath sample from Appellant. (3T13:25-14:4). The reading achieved from the second and third breath samples indicated Appellant had a .10 blood-alcohol content. (3T14:25-15:1).

Officer Ordway then asked Appellant questions from the drinking/driving questionnaire. (3T15:17-19; Aa079). At that point, Officer Ordway could not recall whether he re-advised Appellant of his Miranda rights. (3T15:13-15). Officer Ordway could not recall how much time had elapsed from the time of Appellant's arrest to the time Officer Ordway filled out the drinking/driving questionnaire, though the times indicated on the questionnaire and Officer Ordway's police report indicated that approximately three hours had passed. (3T17:8-14, 19:10-20:1).

C. The Probable Cause Hearing Before the Denville Municipal Court

At the probable cause hearing on February 25, 2022, Judge Smith heard the testimony of Officer Ordway regarding the arrest of Appellant. (See generally 2T). Following Officer Ordway's testimony, Appellant's trial counsel

argued that the State failed to establish that Officer Ordway had a reasonable, articulable suspicion to ask Appellant to exit his vehicle on the morning in question. (2T25:22-26:23). The State argued that Officer Ordway was attempting to render aid and, in the course of doing so, became suspicious that Appellant was under the influence of alcohol. (2T27:1-28:7). The State further argued that it established that Appellant had operated the vehicle because Appellant admitted "as to having just operated the vehicle and an intent to operate the vehicle once he remedied whatever caused him to stop in the first place." (Id.).

Based on the foregoing, Judge Smith held that Officer Ordway had a reasonable, articulable suspicion to ask Appellant to exit his vehicle, and further had probable cause to arrest Appellant. (2T28:8-30:13).

D. The Municipal Judge Finds Appellant Guilty of Driving While Intoxicated

At the municipal trial on April 29, 2022, the State called Officer Ordway as its lone witness to support the State's case in chief. (3T5:9-21:4). Judge Smith then heard the parties' summations. (3T21:13-25:25). Following summations, Judge Smith orally gave his decision on the issue of operation, finding that the State proved Appellant's operation of the vehicle on the morning of November 5, 2019 beyond a reasonable doubt. (3T26:16-27:1). Judge Smith reserved his decision on the remaining issues. (3T27:3-12).

Judge Smith orally gave the rest of his decision at a hearing on May 27, 2022. (4T). Judge Smith reiterated his finding that the State proved operation of the vehicle by Appellant beyond a reasonable doubt. (4T10:4-6). Judge Smith also found that the State proved beyond a reasonable doubt that Appellant was under the influence of alcohol on the morning of November 5, 2019. (4T13:8-13). In so finding, Judge Smith noted that he found Officer Ordway's testimony credible. (4T13:6-7). As such, Judge Smith found Appellant guilty of driving while intoxicated under N.J.S.A. 39:4-50.[6] (4T13:8-13).

E. The Law Division Judge Finds Appellant Guilty of Driving While Intoxicated

Appellant appealed Judge Smith's decision to the Superior Court of New Jersey, Law Division, Morris County. (See generally 5T, 6T). On February 17, 2023, a trial de novo was held before the Honorable Robert Hanna, J.S.C. (6T). At the trial, Judge Hanna heard oral argument from Appellant, representing himself pro se, and the State. (Id.). Following oral argument, Judge Hanna reserved his decision on the issue of whether Appellant was guilty of driving while intoxicated under N.J.S.A. 39:4-50. (6T18:16-19:7).

[6] Judge Smith found Appellant not guilty of reckless driving or careless driving because Officer Ordway "did not observe [Appellant] actually driving away." (4T13:14-17).

On April 3, 2023, Judge Hanna entered an Order finding Appellant guilty of driving while intoxicated under N.J.S.A. 39:4-50(a). (Aa005-006). That Order also scheduled Appellant's sentencing hearing for April 17, 2023. (Id.).

At the sentencing hearing on April 17, 2023, Appellant was sentenced to fines and penalties under N.J.S.A. 39:4-50, including the following: $300.00 fine; $7.00 in additional amounts set forth in N.J.S.A. 39:5-41d through h; $33.00 in court costs; $225.00 DWI Surcharge; $50.00 VCC assessment; and $75.00 Safe Neighborhood Assessment. (7T4:18-5:2; Aa007-009). Judge Hanna informed Appellant that the court could arrange a monthly payment plan in order for Appellant to pay the fines associated with his conviction. (7T4:10-14).

Thereafter, Judge Hanna and Appellant discussed Appellant's requirement to install an ignition interlock device. Appellant informed Judge Hanna that he did not own a vehicle. (7T7:5-7). Judge Hanna informed Appellant that he could indicate that fact on the certification Appellant was required to attest to following sentencing. (7T7:22-8:4). Judge Hanna then informed Appellant that Appellant would be required to install the interlock device if he were to obtain a vehicle in the near future. (7T9:1-4). Appellant informed Judge Hanna: "My financial circumstances do not permit the purchase of the car in the near future. Perhaps in five years I may be able to do so purchase a car, minimum three years." (7T9:9-12). Judge Hanna then stated that

sentencing Appellant to install the ignition interlock device should he procure a vehicle was a "mandatory" part of the court's sentencing under N.J.S.A. 39:4-50. (7T19:3-18).

On April 17, 2023, Judge Hanna entered a Judgment of Conviction, sentencing Appellant to various fines and penalties under N.J.S.A. 39:4-50(a). (Aa007-009). Judge Hanna also put Appellant on a monthly payment plan, requiring Appellant to pay "$50.00 every month beginning May 17, 2023 directly to Denville Township Municipal court until all amounts are paid in full." (Aa008 at ¶ 7). Included with the Judgment of Conviction was Judge Hanna's Statement of Reasons, discussing in detail his decision in finding Appellant guilty of driving while intoxicated under N.J.S.A. 39:4-50. (Aa010-061).

This appeal followed.

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

A. Appeals of Municipal Court Decisions to the Law Division

Generally, a municipal court decision is appealed to the Superior Court of New Jersey, Law Division. See R. 3:23-1; R. 7:13-1. "In the Law Division, the trial judge 'may reverse and remand for a new trial or may conduct a trial de novo on the record below.'" State v. Robertson, 228 N.J. 138, 147-48 (2017) (quoting R. 3:23-8(a)(2)). "At a trial de novo, the court makes its own findings

of fact and conclusions of law but defers to the municipal court's credibility findings." Id. at 147. "It is well-settled that the trial judge 'giv[es] due, although not necessarily controlling, regard to the opportunity of the' municipal court judge to assess 'the credibility of the witnesses.'" Id. at 148 (quoting State v. Johnson, 42 N.J. 146, 157 (1964)).

B. Appeals of Law Division Trials De Novo to the Appellate Division

On appeal of the Law Division's decision in a trial de novo from the municipal court, this Court's review "focuses on whether there is 'sufficient credible evidence . . . in the record' to support the trial court's findings." Robertson, 228 N.J. at 148 (quoting Johnson, 42 N.J. at 162). While "appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts," the trial court's legal rulings are nonetheless considered by this Court de novo. Id.

C. Appeals of Sentencing

"Any action taken by the court in imposing sentence shall be subject to review by an appellate court." N.J.S.A. 2C:44-7. An appellate court's review of a sentencing court's imposition of sentence is guided by an abuse of discretion standard. State v. Torres, 246 N.J. 246, 272 (2021). This court's jurisdiction to review sentences includes the power to make new findings of fact, to reach

independent determinations of the facts, and to supplement the record on appeal. State v. Jarbath, 114 N.J. 394, 412 (1989).

II. THE LAW DIVISION ERRED IN FINDING THAT OFFICER ORDWAY HAD A REASONABLE, ARTICULABLE SUSPICION SUFFICIENT TO EFFECT A STOP OF APPELLANT (Aa033-035).

The Law Division erred in finding that Officer Ordway's stop of Appellant on the morning of November 5, 2019 was a proper application of the community caretaking function. Generally, a police officer may stop a motor vehicle only where there is a reasonable, articulable suspicion that a motor vehicle violation has occurred. Delaware v. Prouse, 440 U.S. 648, 663 (1979); State v. Carter, 235 N.J. Super. 232, 237 (App. Div. 1989). One exception to that general rule is the community caretaking function, which permits an officer to perform a stop where "something abnormal [is observed] concerning the operation of a motor vehicle." State v. Smith, 251 N.J. 244, 262 (2022).

The Law Division improperly applied the community caretaking function exception in finding that Officer Ordway had a reasonable, articulable suspicion to stop Appellant on the morning of November 5, 2019. While Officer Ordway testified that he was responding to the report of a disabled vehicle when he came upon Appellant sitting in a black Toyota Corolla on Bloomfield Avenue in Denville, (2T7:10-8:6), Officer Ordway's testimony was wholly devoid of any information regarding what type of vehicle was purportedly disabled (i.e., the

make and model). Notably, the record is also absent of any information as to who made the report of the disabled vehicle. As such, to the extent the State may rely on the fact that Officer Ordway was responding to the report of a disabled vehicle when he came upon Appellant, same is insufficient to give rise to a proper application of the community caretaking function.

Further, there was nothing sufficiently abnormal about Appellant's vehicle being stopped on the side of Bloomfield Avenue which would give rise to proper application of the community caretaking function. Even assuming arguendo that Appellant's vehicle was stopped across multiple parking spots, as Officer Ordway testified, (2T8:8-12), Officer Ordway further testified "that the interior lights were on which, based on his experience, meant that the keys were in the ignition." (Aa035; 2T9:9-15). As such, there was no reason for Officer Ordway to think that the vehicle would remain parked over the stalls, nor was there any reason for Officer Ordway to think the vehicle was disabled, as, in his experience, the interior light of the vehicle being on meant that "the car was or could be operated." (2T9:14-15). Indeed, Officer Ordway did not testify to having any knowledge that the vehicle was actually disabled until Officer Ordway had already exited the vehicle and he engaged with Appellant. (2T9:21-10:2, 10:25-11:11).

In short, the Law Division improperly applied the community caretaking function to find that Officer Ordway had a reasonable, articulable suspicion to effect a stop of Appellant on the morning in question. While Officer Ordway was responding to a report of a disabled vehicle, there is nothing in the record indicating that he was looking for the black Toyota Corolla that Appellant was seated in on the morning of November 5, 2019. Moreover, there was nothing sufficiently abnormal about Appellant being stopped on the side of the road, especially where Officer Ordway admitted that, in his experience, the vehicle appeared to be operable before he exited his vehicle to engage with Appellant, such that the community caretaking function exception would be applicable in this case. See Smith, 251 N.J. at 262. As such, this court should reverse the decision of the Law Division and vacate the judgment of conviction against Appellant.

III. THE LAW DIVISION ERRED IN FINDING THAT THE STATE PROVED OPERATION OF THE VEHICLE BY APPELLANT BEYOND A REASONABLE DOUBT (Aa035-040).

The Law Division erred in finding that the State established beyond a reasonable doubt that Appellant operated the vehicle in question on the morning of November 5, 2019. (Aa035-040). A conviction for driving while intoxicated under N.J.S.A. 39:4-50 requires proof beyond a reasonable doubt that the defendant actually operated a vehicle while intoxicated or that the defendant had

the intent to operate a vehicle while intoxicated. State v. Morris, 262 N.J. Super. 413, 417 (App. Div. 1993). Operation may be proved by either direct or circumstantial evidence, such as by observation of the defendant inside or outside of a vehicle "under circumstances which indicate that the defendant had been driving while intoxicated." (Aa036 (citing State v. Ebert, 377 N.J. Super. 1, 10 (App. Div. 2005)).

Here, the State's lone evidence of operation is the testimony of Officer Ordway, who stated that when he engaged with Appellant, Appellant stated that he was "coming from home and he was on his way to see a friend in Hackettstown." (2T11:12-14). Officer Ordway's testimony gives no indication as to when Appellant had left his home, or when he planned to use the vehicle to go see his friend in Hackettstown. In fact, Officer Ordway acknowledged that he asked Appellant to turn on the vehicle, but that the vehicle would not start. (2T11:2-11). In other words, based on Officer Ordway's testimony, Appellant's vehicle was completely inoperable at the time Officer Ordway engaged with Appellant. Even assuming arguendo that Appellant was intoxicated at the time Officer Ordway engaged with him on the morning of November 5, 2019, there is simply nothing in the record which could allow the Law Division to find beyond a reasonable doubt that Appellant had operated a vehicle while intoxicated or intended to operate a vehicle while intoxicated.

In holding that the State proved operation beyond a reasonable doubt, Judge Hanna distinguished this matter from the Supreme Court's decision in State v. Daley, 64 N.J. 122, 124-25 (1973), where the Court held that operation could only be proved, even where the defendant was sitting in the driver's seat of a running vehicle while intoxicated, where a separate intent to drive is also established. Here, there is no such proof of intent. Not only was the car occupied by Appellant not running at the time Officer Ordway approached it, Officer Ordway admitted that the vehicle could not run. (2T11:2-11). While Officer Ordway testified that Appellant stated that he "was driving [and] the car petered out," (2T9:21-10:2), Officer Ordway's testimony gives no indication as to when Appellant's car allegedly petered out or whether Appellant was intoxicated at the time the car petered out. As such, the evidence on the record is insufficient to establish that Appellant was operating the vehicle while he was intoxicated at the time the car initially broke down.

Moreover, Appellant's alleged statement that he was on his way to Hackettstown does not prove that he intended "to drive or move the vehicle **at the time**." Daley, 64 N.J. at 125 (emphasis added). Indeed, Officer Ordway's testimony on that point gives no indication that Appellant planned to drive to Hackettstown at that moment, as is required under Daley, just that he intended to go to Hackettstown at some unspecified point in the future. Absent such proof

of present intent to operate, the State could not carry its burden of proving operation beyond a reasonable doubt.

In short, the evidence in the record is insufficient to prove that Appellant either operated a vehicle while intoxicated or that he intended to operate a vehicle while intoxicated. While Officer Ordway testified that Appellant stated he was coming from home and was going to Hackettstown to see a friend, that testimony gives no indication that such vehicular travel actually occurred, or was intended to occur, while Appellant was under the influence of intoxicating alcohol. As such, this Court should vacate the judgment of conviction against Appellant.

IV. THE LAW DIVISION ERRED IN FINDING THAT OFFICER ORDWAY HAD PROBABLE CAUSE TO ARREST DEFENDANT (Aa041-049).

The Law Division further erred in finding that the State proved that Officer Ordway had probable cause to arrest Appellant by a preponderance of the evidence. In New Jersey, probable cause "is a well-grounded suspicion that a crime has been or is being committed." State v. Moore, 181 N.J. 40, 45 (2004). "Probable cause exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." Id. at 46 (alterations in

original). When determining whether probable cause exists, courts look at the totality of the circumstances. Id.

The Law Division erred in crediting Officer Ordway's testimony in finding that Officer Ordway had knowledge of circumstances sufficient to create probable cause for an arrest. (Aa047). While the Law Division, in a trial de novo on appeal from the municipal court, is required to give due deference to the municipal judge's determinations regarding witness credibility, that deference need not be controlling. Robertson, 228 N.J. at 148. This is especially true where, as here, the witness's testimony is inconsistent and otherwise incredible. See id.

Here, Officer Ordway's testimony contained instances of forgetfulness such that Judge Hanna should not have credited same in finding that the State proved probable cause to arrest by a preponderance of the evidence. In fact, Judge Hanna acknowledged as much, noting that Officer Ordway's testimony regarding whether he gave Appellant a subsequent Miranda warning following the arrest was inconsistent. (Aa038-040). While Officer Ordway testified that he would have read Appellant his Miranda rights when he read Appellant the drinking/driving questionnaire following his arrest, (3T15:25), same is insufficient for the Law Division to find that Officer Ordway credibly corrected his inconsistent testimony.

Officer Ordway's testimony in the municipal court proceedings was otherwise unworthy of credit by the Law Division. For example, regarding the field sobriety test administered to Appellant, Officer Ordway could not even recall what he used as a stimulus when conducting the HGN Test, as he stated: "I believe I used my finger. That's what I usually use, the tip of my finger." (2T17:11-13). Shortly thereafter, Officer Ordway went as far as to admit he was having trouble recalling the events that occurred on the morning of November 5, 2019, given the amount of time that had passed. (2T18:21-19:2).

Officer Ordway's lack of credibility is further evidenced by his failure to recall specifics regarding the field sobriety test he conducted on Appellant, which ultimately led to Appellant's arrest. For example, Officer Ordway admitted that he could not recall what shoes Appellant was wearing, or whether Appellant requested to take off his shoes while performing the walk-and-turn test. (2T20:13-19). What's more is that, despite probable cause being based, at least in part, on Appellant's alleged failure of the field sobriety tests in question, Officer Ordway admitted the following with regard to Appellant's performance of the walk-and-turn test: "I don't remember specific steps that [Appellant] missed stepping heel-to-toe with more than a two inch gap." (2T21:14-20).

Officer Ordway's testimony evidenced forgetfulness in other instances, as well. For example, Officer Ordway testified that he "believe[d]" the walk-and-

turn test was performed in front of Appellant's vehicle, but qualified that testimony by acknowledging that the events in question had occurred over two years prior. (2T18:19-19:2). Officer Ordway then testified that "if [he could] remember correctly," the walk-and-turn test would have been performed in front of Officer Ordway's vehicle. (Id.). Regarding the one-leg stand test, when asked whether Officer Ordway gave Appellant the choice as to which leg to use for the test, Officer Ordway testified "[t]o my recollection I would say yes." (2T23:11-15). These further instances of forgetfulness and unsureness further evidence the lack of credibility in Officer Ordway's testimony.

In sum, Judge Hanna erred by crediting the testimony of Officer Ordway, which contained numerous instances of forgetfulness or was otherwise incredible, as noted above. Because the finding of probable cause to arrest was based on that incredible testimony, the Law Division erred by finding that probable cause to arrest Appellant existed on the morning of November 5, 2019. For that reason, this Court should vacate the judgment of conviction against Appellant.

V. THE LAW DIVISION ERRED IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT APPELLANT OPERATED A VEHICLE WHILE INTOXICATED BASED ON THE TESTIMONY OF OFFICER ORDWAY (Aa037).

For substantially the same reasons noted under Section IV of this brief, the Law Division also erred in finding that the State proved that Appellant violated N.J.S.A. 39:4-50 under the observational standard of proof based on the testimony of Officer Ordway and his observances on the morning of November 5, 2019. (Aa037). Judge Hanna's Statement of Reasons notes that "the State at trial – using non-BAC level proofs – proved beyond a reasonable doubt that [Appellant] drove while intoxicated based on [Officer] Ordway's credible testimony about his initial observations of [Appellant] . . . about [Appellant's] poor performance on the walk-and-turn test, and about [Appellant's] poor performance on the one-leg stand test." (Id.). Again, the Law Division's finding regarding the credibility of Officer Ordway's testimony was improper given the aforementioned non-credible testimony presented by Officer Ordway at the probable cause hearing on February 25, 2022, which was replete with instances of forgetfulness and which evidenced a lack of credible recollection of the events which occurred on the morning of November 5, 2019, by Officer Ordway. For those reasons, this Court should reverse the decision of the Law Division and vacate the judgment of conviction entered against Appellant.

VI. THE LAW DIVISION ERRED IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT APPELLANT OPERATED A VEHICLE WHILE INTOXICATED UNDER THE PER SE STANDARD (Aa041-049).

The Law Division erred in finding that the state proved Appellant drove while intoxicated under N.J.S.A. 39:4-50 under the per se, which relies on evidence of the defendant's blood alcohol content at the time of the arrest. See State v. Chun, 194 N.J. 54 (2008). The Court's decision in Chun explicitly requires that alcotest operators, like Officer Ordway, observe a two-minute lock-out period before acquiring additional breath samples from the testee in order to support a per se violation. See id. at 81 ("After a two-minute lock-out period during which the device will not permit another test, the instrument prompts the operator to read the instruction again to the arrestee and collect the second breath sample."). The State did not elicit any testimony during the municipal court proceedings which could enable Judge Hanna to find that Officer Ordway observed the necessary two-minute lock-out period in between the alcotests he administered to Appellant in the Town of Boonton on the morning of November 5, 2019. As such, the Law Division erred in finding that the State proved Appellant's guilt under N.J.S.A. 39:4-50 beyond a reasonable doubt based on the results of the alcotests administered to Appellant in Boonton.

According to Officer Ordway's testimony, following a twenty minute observation period, Officer Ordway proceeded to perform an alcotest on Appellant, instructing Appellant how to properly perform a breath sample. (3T12:8-12). Appellant then proceeded to provide his first breath sample, at which point Officer Ordway noted that the minimum volume for the breath sample was not achieved. (3T13:10-11). Officer Ordway testified that he then waited an unspecified amount of time after the first test for the machine to clear and to take a second breath sample from Appellant. (3T13:13-15). Officer Ordway then performed a second test, achieving a sufficient body breath from Appellant to receive a reading on the second test. (3T13:21-23). Officer Ordway then again waited for an unspecified amount of time for the machine to clear before taking a third breath sample from Appellant. (3T13:25-14:4). The readings achieved on the second and third breath sample were used by the State to establish a per se violation of N.J.S.A. 39:4-50.

At no point during the proceedings before the Denville Municipal Court did the State elicit testimony from Officer Ordway indicating that he observed the necessary two-minute lock-out period before administering the second and third alcotests to Appellant, which were ultimately used by the State in proving a per se violation of N.J.S.A. 39:4-50. (Aa062-078). Further, the State produced no documentary evidence indicating that the two-minute lock-out period was

observed as required under Chun. As such, the Law Division erred in finding that the State proved that Appellant violated N.J.S.A. 39:4-50 under the per se standard.

VII. THE LAW DIVISION JUDGE ERRED BY SENTENCING APPELLANT UNDER THE CURRENT VERSION OF N.J.S.A. 39:4-50 (7T5:3-20).

The Law Division erred by sentencing Appellant under the current version of N.J.S.A. 39:4-50. At Appellant's sentencing hearing before Judge Hanna on April 17, 2023, Judge Hanna sentenced Appellant to install an ignition interlock device on any vehicle he may obtain following his license suspension period. (7T5:3-20). At that hearing, Appellant raised this issue, as Judge Smith did not include the installation of the ignition interlock device on his Order and Certification dated May 27, 2022. (7T:16:9-17:5; Aa003). In rejecting Appellant's argument, Judge Hanna indicated that the installation of the ignition interlock device was a "mandatory" part of sentencing under N.J.S.A. 39:4-50(a)(1)(ii). (7T19:3-18). Specifically, Judge Hanna stated:

> In case of a person whose blood alcohol concentration is .1 percent or higher but less than [.15] percent the person shall forfeit the right to operate a motor vehicle over the highways of this state until the person installs an interlock, I'm sorry, ignition interlock device. Then it goes on to describe the vehicle, but it's mandatory, shall – okay. So there's no discretion. It's a mandatory part of the sentence.
>
> [(7T17:11-19).]

The above-quoted language used by Judge Hanna at Appellant's sentencing hearing was not included in the version of N.J.S.A. 39:4-50(a)(1)(ii) in effect on the date of Appellant's arrest, November 5, 2019. Indeed, under the version of the statute in effect on that date, there is no reference at all to ignition interlock devices under N.J.S.A. 39:4-50(a)(1)(ii), let alone the fact that same is a mandatory part of the sentence for an individual found guilty under that subsection of the statute. N.J.S.A. 39:4-50(a)(1)(ii) (Nov. 2019). In fact, guidance released by the Appellate Division on December 4, 2019, specifically notes that changes to ignition interlock sentencing under N.J.S.A. 39:4-50 applies "only to defendants charged with a DWI . . . on or after December 1, 2019." Administrative Directive #25-19, "Implementation of New DWI Law (L. 2019, c. 248) – Includes Expanded Use of Ignition Interlock Devices for First-Time Offenders (Dec. 4, 2019).

Because Judge Hanna erred by sentencing Appellant under the incorrect version of N.J.S.A. 39:4-50, this Court should remand this matter to the Law Division for re-sentencing in accordance with the version of the statute in effect on November 5, 2019.

VIII. JUDGE HANNA ABUSED HIS DISCRETION BY SENTENCING APPELLANT, AN INDIGENT INDIVIDUAL, TO AN UNREASONABLE MONTHLY PAYMENT PLAN (NOT RAISED BELOW).

In the event this Court upholds the decision of the Law Division with regard to Appellant's guilt under N.J.S.A. 39:4-50, this Court should nonetheless remand this matter for re-sentencing based on Appellant's indigent status. An appellate court's review of a sentencing court's imposition of sentence is guided by an abuse of discretion standard. Torres, 246 N.J. at 272. The appellate court's jurisdiction to review sentences includes the power to make new findings of fact, to reach independent determinations of the facts, and to supplement the record on appeal. Jarbath, 114 N.J. at 412. Here, based on the information before Judge Hanna, as well as the information now before this Court, Judge Hanna abused his discretion by sentencing Appellant to a $50.00 per month monthly payment plan.

Judge Hanna was presented with sufficient information regarding Appellant's precarious financial status, such that his imposition of a $50.00 monthly payment plan was an abuse of discretion which warrants re-sentencing. At the sentencing hearing on April 17, 2023, Appellant informed Judge Hanna, when discussing the possible installation of an ignition interlock device: "My financial circumstances do not permit the purchase of the car in the near future. Perhaps in five years I may be able to do so purchase a car, minimum three

years." (7T9:9-12). That testimony by Appellant, as well as the fact that he represented himself before the Law Division pro se, was sufficient for Judge Hanna to infer that a $50.00 monthly payment plan was untenable for Appellant based on his indigence.

Moreover, this Court now is presented with additional evidence in the appellate record evidencing Appellant's indigence sufficient to remand this matter for re-sentencing. See Jarbath, 114 N.J. at 412. On June 26, 2023, Appellant filed a motion with this Court seeking the assignment of pro bono counsel. (Aa096-115). That motion included a declaration by Appellant informing this Court that, at the time of filing, he maintained a bank account containing just $1,565.00. (Aa100-102). Moreover, Appellant has monthly expenses totaling $1,820.00, and is on administrative leave from his employment. (Id.). Ultimately, based on that information, this Court granted Appellant's motion for the assignment of pro bono counsel in this appeal. This is further evidence of Appellant's indigent status and his inability to pay the $50.00 monthly fee imposed by Judge Hanna.

Judge Hanna knew of Appellant's indigence and nonetheless sentenced him to an unreasonable monthly payment plan. In doing so, Judge Hanna abused his discretion in sentencing and, in the event this Court upholds Judge Hanna's findings on Appellant's guilt under N.J.S.A. 39:4-50, this Court should

nonetheless remand this matter for re-sentencing consistent with Appellant's indigent status.

IX. THE LAW DIVISION ERRED IN FINDING THAT THE STATE DID NOT COMMIT VIOLATIONS OF THE DISCOVERY RULES (Aa050).

The Law Division erred in finding that the State did not commit violations of the discovery rules when the State failed to provide video evidence of the administration of Appellant's alcotests by Officer Ordway in discovery. Under R. 3:13-3(b), the State is required to provide to criminal defendants in discovery exculpatory information and materials, as well as video and sound recordings in the possession of the prosecutor. By failing to provide such evidence to Appellant, the State violated R. 3:13-3.

Additionally, the Law Division erred by failing to find the State violated R. 3:13-3(b)(1), which requires the State to inform the defense of discoverable materials known to the State which have not been supplied to the defense.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the decision of the Law Division, vacating the judgment of conviction entered by the Law Division against Appellant for driving while intoxicated under N.J.S.A. 39:4-50. In the alternative, Appellant respectfully requests that this Court remand for re-sentencing consistent with the version of N.J.S.A. 39:4-50 in effect at the time of Appellant arrest and Appellant's indigence.

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Date: February 14, 2024

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
Docket No. A-002941-22T2

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

CHAZ DUNTON,

Defendant-Appellant.

Criminal Action
On Appeal from a Judgement of Conviction of the Superior Court, Law Division, Morris County

Sat Below:
Hon. Robert M. Hanna, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY
August 14, 2024

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COUNTER-STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

On November 5, 2019, Chaz Dunton (*hereinafter* defendant) was issued motor vehicle summonses for Driving While Intoxicated, in violation of N.J.S.A. 39:4-50 (Summons No. 1408-DEN-243912); Reckless Driving, in violation of N.J.S.A. 39:4-96 (Summons No. 1408-DEN-243913); and Careless Driving, in violation of N.J.S.A. 39:4-97 (Summons No. 1408-DEN-243914). (Aa92-Aa95).[2]

On February 25, 2022, a probable cause hearing was held before the Honorable Gerard Smith, J.M.C. (2T).

At the hearing, Officer Christopher Ordway[3] testified on behalf of the State. (2T7:7-8). Officer Ordway stated that while he was on duty on

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[1] Because the facts and procedural history are intertwined, the State has combined them for the Court's convenience.

[2] Db - Defendant's Brief
Aa - Defendant's Appendix
Sa - State's Appendix
"1T" refers to the February 27, 2020 transcript.
"2T" refers to the February 25, 2022 transcript.
"3T" refers to the April 29, 2022 transcript.
"4T" refers to the May 27, 2022 transcript.
"5T" refers to the January 27, 2023 transcript.
"6T" refers to the February 17, 2023 transcript.
"7T" refers to the April 17, 2023 transcript.

[3] At the time of the hearing, Officer Ordway had been employed by the Denville Township Police Department for approximately nine years and nine months. (2T7:18-20).

November 5, 2019 at approximately 2:18 a.m., he was dispatched to a report of a disabled vehicle outside of a pizzeria. (2T7:22 to 2T8:6).

When Officer Ordway arrived at the scene, he observed a black Toyota Corolla parked on the right-hand side of the road, parked across several parking spots. (2T8:8-12). The pizzeria was not open for business at the time. (2T8:14-16). Officer Ordway observed that the vehicle was not on. When he spoke with defendant, he was advised that there was an engine issue. (2T9:4-7). The interior and dashboard lights were on, while the exterior lights were not, which in Officer Ordway's experience meant that the keys were in the ignition and the vehicle was or could potentially be operated. (2T9:9-15). The hazard lights were also on at this time. (2T9:17-19).

Defendant told Officer Ordway that as he was driving, the vehicle petered out and he was able to get it into its current spot. (2T9:25 to 2T10:2). Officer Ordway spoke with defendant to get his name and the information was confirmed through the Division of Motor Vehicles via his police vehicle. (2T10:4-11).

Officer Ordway initially observed defendant in the driver's seat with the keys in the ignition. Since defendant indicated that he was having engine trouble, Officer Ordway asked defendant to turn the car on so he could attempt to diagnose what was wrong with the vehicle as part of his initial attempt to

assist. The vehicle did not start. (2T11:2-11). Defendant advised Officer Ordway that he was traveling home and on his way to see a friend in Hackettstown. (2T11:13-14).

As he continued to speak with defendant, Officer Ordway detected a strong odor of an alcoholic beverage on defendant's breath. Officer Ordway also observed that defendant was speaking with slurred speech and his eyes appeared droopy and bloodshot. (2T11:16-23). Officer Ordway believed that it was possible that defendant was under the influence. (2T11:21-23).

Officer Ordway testified that he then requested that defendant get out of his vehicle. He then administered the standard field sobriety tests (*hereinafter* SFSTs). (2T12:9-17). Officer Ordway testified that he completed the New Jersey State Police Field Sobriety training. (2T14:16-22; Aa75). Officer Ordway testified that in his past experiences, he has observed individuals under the influence of alcohol both in and out of the motor vehicle setting. (2T14:23 to 2T15:16).

Officer Ordway first conducted the horizontal gaze nystagmus (*hereinafter* HGN) test.[4] (2T15:18-23). Officer Ordway observed that defendant had glasses on and asked defendant whether he had any prior eye

[4] HGN tests are not admissible at trial to establish intoxication. State v. Doriguzzi, 334 N.J. Super. 530 (App. Div. 2000). The police can, however, use them to ascertain probable cause. Id. at 546.

surgeries or defects with his eyes. Defendant answered in the negative. (2T16:4-19). During the HGN test, Officer Ordway noticed all six indicators of nystagmus. (2T16:16-24). Officer Ordway testified that defendant did not have issues following directions or standing for the HGN test. (2T17:23 to 2T18:10).

Based on the results of the HGN test, Officer Ordway then conducted the walk and turn test. (2T17:15-17). Officer Ordway explained that proper procedure dictates that you must first rule out any medical problems that may affect the test, and then put the person into a particular stance. (2T17:19-22). Defendant indicated that he had a "neurological issue" but refused to elaborate further. (2T20:8-10). Defendant did not mention anything about any lower body issues that would prevent him from maintaining his balance. (2T20:10-11).

Officer Ordway did not recall if defendant had any difficulties keeping that position or following his instructions such as keeping his head still and following certain steps. (2T17:23 to 2T18:10). The test was conducted in an area that was smooth and without any obstructions. (2T18:14-17). Specifically, Officer Ordway believed that it was conducted to the right side of the vehicle in view of his Mobile Video/Audio Recording (*hereinafter* MVR)

system. (2T18:19 to 2T19:2). Officer Ordway testified that he had looked at the MVR recently, but not on the day of the hearing. (2T19:4-6).

For the first portion of the walk and turn test, Officer Ordway placed defendant's left foot down at the end of the line and his right foot in front of it with his arms at his side. (2T19:18-20). Officer Ordway had defendant listen to him and watch as he demonstrated the test. (2T19:20-22). During that portion of the test, defendant stepped out of line and position which was another indicator that Officer Ordway considered under the totality of the circumstances. (2T19:22-25).

For the second portion of the test, Officer Ordway demonstrated a portion of the test and defendant indicated that he understood. (2T21:4-11). Officer Ordway recalled that defendant stepped off the line several times and had to raise his arms for balance. (2T21:12-20). At one point, defendant stopped walking after performing an improper turn and asked how to complete the remaining portion of the test. (2T22:4-6). After being re-instructed, defendant again stepped off the line several times and needed to raise his arms for balance. (2T22:8-15).

Officer Ordway next conducted the one-legged stand test. (2T22:17-19). Defendant observed Officer Ordway demonstrate how to perform the test. (2T23:2-9). When defendant initially started the test, he raised his arms for

balance and placed his foot on the ground. (2T24:1-3). Defendant asked if he could redo the test. Officer Ordway once again demonstrated how to perform the test. (2T24:4-6). Once defendant began the test again, he almost immediately fell over before putting his foot down at the ten second mark. (2T24:8-12). By the time he was going to raise his leg to continue, defendant had already approached the 30 second mark, which was his limit. (2T24:12-15).

At this point in his investigation, Officer Ordway believed that defendant was under the influence of alcohol. (2T24:22-24). Defendant was subsequently placed under arrest. (2T24:25 to 2T25:2).

Michael A. Priarone, Esq., counsel for defendant, argued that there was a lack of probable cause for defendant's arrest. (2T25:3-7). Priarone was offered the opportunity to cross-examine Officer Ordway, but stated that he had no questions for him. (2T25:14-19). Priarone argued that there was no reasonable suspicion to ask defendant to get out of the car to conduct SFSTs. (2T25:22-25).

The municipal prosecutor argued that when Officer Ordway arrived on the scene, he was simply looking to render aid. (2T27:1-4). However, during the course of offering assistance, Officer Ordway was able to deduce via certain indications that defendant was under the influence. (2T27:10-17). The

State asserted that defendant admitted to operating the vehicle. (2T27:17-24). The municipal prosecutor noted that the MVR footage was available to be played if defense counsel or the court wanted to do so. (2T27:25 to 2T28:3).

Judge Smith found that there was reasonable articulable suspicion for Officer Ordway to have defendant perform the SFSTs, and the results of those tests as well as the other indicators of intoxication observed by Officer Ordway gave him probable cause to arrest defendant. (2T28:24 to 2T30:11). Thus, defendant's motion was denied. (2T30:12-13).

On April 22, 2022, a trial was held before Judge Smith. (3T). Judge Smith incorporated the record of the probable cause hearing into the record of the trial. (3T4:11-17; Aa14).

Officer Ordway then testified on behalf of the State and began his testimony where he left off during the pretrial hearing. Officer Ordway testified that he is a certified Alcotest operator. (3T7:4-19; Aa62-Aa63). Officer Ordway then testified that he reviewed the implied consent law with defendant and that defendant agreed to provide samples. (3T7:21 to 3T8:20; Aa64).

Officer Ordway originally attempted to complete the Alcotest in Denville, but the Alcotest machine had a control test failure. (3T9:11-20). Due to the control test failure, Officer Ordway could no longer use that

machine to perform another Alcotest, so he went to the next closest municipality which was Rockaway Borough. (3T9:19-22). Officer Ordway then got another control test failure. (3T9:22-25). He then went to the Town of Boonton to use their Alcotest. (3T10:2-10). Officer Ordway then obtained the Alcotest Chun[5] documents which indicated that the machine was working properly. (3T10:12-15). Officer Ordway was shown the package of Chun documents which all related to the machine in Boonton. (3T10:16-20).

At Boonton police headquarters, Officer Ordway took defendant into the booking room area and removed all electronics from the room. (3T11:16-18). He checked defendant's mouth to make sure that there were no foreign objects, provided him with the New Jersey standard statement refusal form verbatim, and began a 20 minute continuous and uninterrupted observation period. (3T11:18-2). During this time, defendant did nothing to impair the validity of the Alcotest readings. (3T11:24 to 3T12:3).

Officer Ordway then took a fresh mouthpiece and read the form next to the Alcotest and instructed defendant on how to properly provide a breath sample. (3T12:9-12). Defendant provided three samples. On the first sample, the minimum volume was not achieved, so Officer Ordway waited for the instrument to clear to take a second sample. (3T13:10-15). Officer Ordway

[5] State v. Chun, 194 N.J. 54 (2008).

obtained a fresh mouthpiece and again explained to defendant how to properly blow into the tube. Defendant then gave sufficient breath samples for the second and third samples. (3T13:13-24). Officer Ordway provided defendant with a fresh mouthpiece each time and allowed the test to clear and give the prompt before administering the next test. (3T13:25 to 3T14:12).

Officer Ordway allowed the machine to calculate and print the results. (3T14:13-15). He then entered the readings obtained on the State Police calculator to determine whether those readings were in the tolerated limit. (3T14:20-24). The reading achieved from the tests was a .10 blood alcohol content (*hereinafter* BAC). (3T14:25 to 3T15:5; Aa76-Aa78).

Defendant was then placed under arrest and advised of his Miranda[6] rights. (3T15:10-16). Officer Ordway stated that he asked defendant questions using the Drinking Driver Questionnaire after the final sample was taken and they returned back to Denville. (3T15:17-24; Aa79). Officer Ordway testified that he advised defendant again of his Miranda rights prior to asking these questions. (3T15:25 to 3T16:1; Aa79). Officer Ordway testified that he read defendant the first question of the questionnaire, which relates to doctors' care, and defendant answered his questions which was recorded on the top sheet of the questionnaire. (3T16:3-12; Aa79). Officer Ordway also read

[6] Miranda v. Arizona, 384 U.S. 436 (1966).

defendant the portion of the questionnaire that discusses the administration of Miranda rights. Defendant then agreed to answer his questions. (3T16:13-18; Aa79).

Officer Ordway then asked defendant questions relating to the consumption of alcohol. (3T16:19-21). Defendant told Officer Ordway that he drank one martini at a friend's house. (3T16:23-25; Aa79). Officer Ordway did not recall the time of the original arrest, but stated that he put it on his standard statement refusal form. (3T17:11-13). Officer Ordway estimated that it took several hours between the time of the arrest and the time of the questionnaire because he had to travel between three police departments for an Alcotest machine. (3T17:8-14). Officer Ordway testified that nothing changed his initial opinion that defendant was under the influence of alcohol during this time period. (3T16-19).

On cross-examination, Officer Ordway testified that since defendant said he only had one drink, he wrote his answer down verbatim. (3T18:11-16). Officer Ordway testified that defendant alleged that he consumed a martini at 6:00 p.m. (3T19:1-7). Officer Ordway refreshed his recollection that his initial encounter with defendant occurred at approximately 2:18 a.m. (3T19:14-22).

Officer Ordway testified that as far as he knew, the time that he administered the Boonton Alcotest was accurately recorded and he would accept what was represented in the Alcohol Influence Report (*hereinafter* AIR). (3T20:8-13).

Judge Smith reserved his decision at the end of the trial. (3T26:1-13; 3T27:3-12).

On May 27, 2022, Judge Smith found defendant guilty of DWI. Judge Smith found defendant not guilty of Reckless Driving and Careless Driving. (4T13:1-13; 4T13:14-17).

Defendant was sentenced, as a first time DWI offender, to mandatory fines and penalties, including a $307 fine, $33 court costs, $50 Violent Crime Compensation Board (VCCB) assessment, $75 Safe Neighborhood Services Fund (SNSF) assessment, $225 DWI surcharge, and 12 hours at the Intoxicated Driver Resource Center (IDRC). Defendant's license was suspended for seven months and he was also sentenced to an ignition interlock suspension period. (4T17:2-7; Aa1-Aa3).

Defendant appealed. On January 27, 2023, the Honorable Robert M. Hanna, J.S.C. held a trial de novo on the record below. (5T).

On February 17, 2023, the parties had an opportunity to give oral summations. (6T). Judge Hanna reserved his decision and indicated on the record that he would provide a written decision. (6T18:14 to 6T19:9).

On April 3, 2023, Judge Hanna issued an Order and corresponding Statement of Reasons, finding defendant guilty of DWI. (Aa5-Aa6; Aa10-Aa61).

On April 17, 2023, defendant was sentenced to mandatory fines and penalties, including a $307 fine, $33 court costs, $50 Violent Crime Compensation Board (VCCB) assessment, $75 Safe Neighborhood Services Fund (SNSF) assessment, $225 DWI surcharge[7], and 12 hours at the Intoxicated Driver Resource Center (IDRC). Defendant's license was suspended for seven months and he was also sentenced to a seven month ignition interlock suspension period. (7T3:20 to 7T6:23; 7T22:1 to 7T23:10; Aa7-Aa9; Aa111-Aa113; Aa120).[8]

Defendant attested that he did not own, lease, or operate a motor vehicle on the Ignition Interlock Information and Notification form. (Aa121).

This appeal follows. (Aa80-Aa89).

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[7] The Order and Certification, dated April 17, 2023, incorrectly lists the DWI surcharge as $125. (Aa120).

[8] Defendant appears to attach his Judgment of Conviction, dated April 17, 2023, twice to his appendix. The State has included both citations. (Aa7-Aa9; Aa111-Aa113).

STANDARD OF REVIEW

In this case, defendant requested a de novo review in the Law Division, which "provides a reviewing court with the opportunity to consider the matter anew, afresh (and) for a second time." In re Phillips, 117 N.J. 567, 578 (1990). The court conducting a de novo review must give due, although not necessarily controlling, regard to the opportunity of the municipal court to judge the credibility of the witnesses. State v. Johnson, 42 N.J. 146, 157 (1964).

Appellate courts should defer to trial court's credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record. State v. Locurto, 157 N.J. 463, 474 (1999). The reviewing court must give deference to the findings of the trial judge which are substantially influenced by his or her opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy. State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000).

This Court's deference is made more compelling where "two lower courts have entered concurrent judgments on purely factual issues. Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of fact and credibility determinations made by two lower

courts absent a very obvious and exceptional showing of error." Locurto, 157 at 474. In this case, both lower courts have entered concurrent judgments. (4T13:1-13; 4T17:2-7; 7T3:20 to 7T6:23; 7T22:1 to 7T23:10; Aa1-Aa3; Aa5-A6; Aa111-Aa113; Aa120).

Additionally, both courts found the police testimony to be credible. Judge Smith noted that he found the testimony of Officer Ordway to be "extremely credible." (4T15:10-11). On de novo review, Judge Hanna gave reference to Judge Smith's findings, and agreed with his assessment of the testimony provided by Officer Ordway and found his testimony to be credible. (Aa15; Aa34; Aa37).

An appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are "supported by sufficient credible evidence in the record." State v. Elders, 192 N.J. 224, 243-44 (2007) (citing Locurto, supra, 157 N.J. at 474); see also State v. Slockbower, 79 N.J. 1, 13 (1979) (concluding that "there was substantial credible evidence to support the findings of the motion judge that the investigatory search [was] not based on probable cause"); State v. Alvarez, 238 N.J. Super. 560, 562-64 (App. Div. 1990) (stating that the standard of review on appeal from motion to suppress is whether "the findings made by

the judge could reasonably have been reached on sufficient credible evidence present in the record." (citing Johnson, supra, 42 N.J. at 164)).

LEGAL ARGUMENT

POINT I

DEFENDANT IS GUILTY OF DWI BEYOND A REASONABLE DOUBT.

(Addressing Points II, III, IV, V, and VI of defendant's brief)

The State submits that defendant is guilty of DWI beyond a reasonable doubt.

I. Officer Ordway had a reasonable, articulable suspension that defendant operated the vehicle while intoxicated before requesting defendant to exit the vehicle and perform SFSTs.

Defendant argues that the court below erred in finding that Officer Ordway had a reasonable articulable suspicion sufficient to effectuate a stop. (Db17-Db19). Defendant is wrong.

The administration of the SFSTs is "more analogous to a Terry[9] stop than to a formal arrest, and therefore may be justified by a police officer's reasonable suspicion based on particularized, articulable facts suggesting a driver's intoxication." State v. Bernokeits, 423 N.J. Super. 365, 374 (App. Div. 2011). (Aa33).

At the pretrial hearing, Officer Ordway testified, without any cross-examination or objection, that on November 5, 2019, at approximately 2:18

[9] Terry v. Ohio, 392 U.S. 1 (1968).

a.m., he responded to a report of a disabled vehicle and found defendant parked on the right-hand side of the road across several parking spots near a closed pizza shop. Officer Ordway approached defendant's vehicle, looking to render possible aid, and observed that the interior lights were on. Officer Ordway testified that in his past experience, this meant that the key was in the vehicle's ignition. (2T7:22 to 2T8:16; 2T9:4-7; 2T9:9-19; Aa34).

In the course of providing assistance, defendant told Officer Ordway that he was going to visit a friend in Hackettstown. While further speaking with defendant, Officer Ordway detected a strong odor of an alcoholic beverage on defendant's breath and noted that defendant's speech was slurred and his eyes were bloodshot and droopy. Based on these observations, Officer Ordway requested that defendant exit the vehicle and perform SFSTs. (2T11:2-23; 2T19:9-17; Aa33-Aa34).

The court below appropriately found that Officer Ordway was dispatched and came upon defendant "to provide assistance as a proper application of the community caretaking function," "which may be implicated where police observe 'something abnormal . . . concerning the operation of a motor vehicle.'" State v. Smith, 251 N.J. 244, 262 (2022) (citing State v. Cohen, 347 N.J. Super. 375, 378 (App. Div. 2002)). The court below found that Officer Ordway credibly testified at the pretrial hearing that he found

defendant's vehicle parked across multiple parking spots in such a way that other vehicles could not pull in. Officer Ordway further credibly testified that the interior lights were on which, based on his experience, meant that the key was in the vehicle's ignition. These observations clearly indicated that the vehicle and/or its driver were experiencing difficulties. (Aa35).

Moreover, when Officer Ordway continued with his investigation, he observed several indicia of intoxication, including a strong odor of an alcoholic beverage on defendant's breath, slurred speech, and bloodshot and droopy eyes. As the court below correctly found, these observations gave rise to a reasonable articulable suspicion that defendant had operated the vehicle while intoxicated. (Aa35).

Thus, Officer Ordway had reasonable, articulable suspicion justifying his requests that defendant exit the vehicle and perform SFSTs.

II. The State has established beyond a reasonable doubt that defendant operated the vehicle.

Defendant argues that the court below erred in finding that the State proved operation of the vehicle by defendant beyond a reasonable doubt. (Db19-Db22). Defendant is wrong.

A DWI conviction requires proof beyond a reasonable doubt that a defendant either actually operated the vehicle while intoxicated or the defendant had the intent to operate the vehicle while intoxicated. State v.

Morris, 262 N.J. Super. 413, 417 (App. Div. 1993). Direct evidence and/or circumstantial evidence may be used to prove either. State v. Ebert, 377 N.J. Super 1, 10 (App. Div. 2005). Operation of the vehicle may be proved by observation of the defendant inside or outside of the motor vehicle under circumstances which indicate that the defendant had been driving while intoxicated, Id.; see also State v. Mulcahy, 107 N.J. 467, 476 (1987); Morris, 262 N.J. Super. at 419-20; State v. Sweeney, 77 N.J. Super. 512, 521 (App. Div. 1962), or by the defendant's own admission, State v. Hanemann, 180 N.J. Super. 544, 547 (App. Div. 1981).

In State v. Daly, 64 N.J. 122 (1973), our Supreme Court upheld the reversal of a DWI conviction where the defendant's testimony established that he realized he had too much to drink and decided to "sleep it off." The defendant got in his vehicle, reclined the driver's seat, and fell asleep. He was awakened by the cold and started the engine to get heat in the vehicle. The defendant was sound asleep when an officer tapped on the vehicle's window and shined a light into his vehicle. The defendant told the officer that he had no intention on driving. The defendant was placed under arrest and taken to the police barracks. Id. at 124-25.

Our Supreme Court found that, notwithstanding the risk involved, the "statutory sanction is against 'operating' a motor vehicle while intoxicated"

and therefore concluded that in addition to starting the engine, "evidence of intent to drive or move the vehicle at the time must appear." Id. at 125.

Defendant attempts to liken the present case to Daly, arguing that his statement that he was on his way to visit a friend in Hackettstown did not prove that he intended "to drive or move the vehicle *at that time*." (Db21-Db22) (emphasis in original). Defendant is wrong.

Here, the court below correctly found that defendant drove his vehicle before it ultimately stopped outside of a closed pizzeria. Based on defendant's own admissions, he clearly had the intent to drive, and in fact did drive, the vehicle. The fact that the vehicle ultimately experienced malfunctions is not proof itself that the vehicle was completely inoperable, as Officer Ordway credibly testified during the pretrial hearing that defendant stated that he had driven the vehicle before Officer Ordway came to assist him. (2T11:3-6; Aa37). Defendant also admitted that, before his car petered out, he was on his way to visit a friend in Hackettstown. (2T11:12-14; Aa37).

Thus, the State has proven beyond a reasonable doubt that defendant operated his motor vehicle while intoxicated.

III. The State met its burden of establishing probable cause to arrest for DWI by a preponderance of the evidence and further proved at trial that defendant drove while intoxicated beyond a reasonable doubt.

Defendant argues that the court below erred in finding that the State proved beyond a reasonable doubt that he operated a vehicle while intoxicated under the per se standard. (Db27-Db29). Defendant is wrong.

Pursuant to N.J.S.A. 39:4-50, a person may be found guilty of DWI when that person "operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% of more by weight of alcohol in the defendant's blood[.]"

There are two independent bases for liability under N.J.S.A. 39:4-50.

The first, the per se standard, is where a breathalyzer sample is used, a motorist will be found guilty of DWI if he drives with a BAC of 0.08% or more, regardless of whether his ability to drive is affected.

The second, the "under the influence standard," does not require a breathalyzer reading. Under this standard, a motorist may be convicted of DWI if an officer determines, based on his own observations, or based on the balance and coordination tests, that the motorist has driven while under the influence of alcohol. State v. Cleverley, 348 N.J. Super. 455 (App. Div. 2002).

The State submits that the evidence proves that defendant drove his vehicle while intoxicated under both the per se and under the influence standards.

First addressing the per se standard, our Supreme Court has held that the results from a breathalyzer machine are scientifically reliable and may form the basis of a conviction for DWI. Romano v. Kimmelman, 96 N.J. 66 (1984). However, before the results of a breathalyzer may be admitted into evidence, the State must establish three foundational requirements. First, that the machine was in proper working order, demonstrated by periodic inspections. Second, that the test was performed by a qualified, certified operator. Third, that the test was given in accordance with established procedure. Id. at 82.

In order to admit certain results from an Alcotest into evidence, the State is required to submit certain core foundational documents. Apart from the Alcohol Influence Report ("AIR"), the State must submit the operator's current certification card, evidence that the showings are within the tolerance, as well as "(1) the most recent calibration report prior to defendant's test, with control tests, linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; (3) the certificate of analysis of the 0.10 simulator solution used in defendant's control tests." Chun, 194 N.J. at 145. Even one missing

document is sufficient to bar admissibility of the Alcotest results. State v. Kuropchak, 221 N.J. 368 (2015).

Here, as the court below correctly recognized, attempts were made in three different municipalities to administer the Alcotest to defendant. The Alcotest machines in Denville and Rockaway Borough both experienced control test failures, so Officer Ordway transported defendant to Boonton to use their Alcotest machine. Once a properly functioning machine was secured, the test was administered according to official procedure. Officer Ordway allowed for the requisite waiting period between tests, removed all electronics from the room, checked defendant's mouth to ensure that there were no foreign objects, and continuously observed defendant during the 20 minute waiting period to make sure that defendant did not do anything to impair the validity of the Alcotest readings. (3T11:16 to 3T12:3; Aa46).

The court below noted that all records of these tests, including the additional foundational documents required by Chun and the Drinking Driver questionnaire, were properly admitted into evidence without any objection from defense counsel. The court also acknowledged that Officer Ordway was properly certified to operate the Alcotest machine and his certification was entered into evidence without objection from defendant's attorney. (3T6:7 to 3T7:19; Aa46; Aa62-Aa79).

Defendant argues that Officer Ordway did not wait the proper time between each test. (Db27-Db29). The court below properly found that the Alcotest was properly administered and was satisfactory under Chun. Officer Ordway credibly testified regarding the procedures he followed administering the test on defendant. Not only did Officer Ordway perform all of the procedural safeguards as outlined above, he further testified that he properly waited for the Alcotest instrument to clear before taking another sample after the first and second uses of the Boonton Alcotest. (3T13:10 to 3T14:9; Aa47).

During the waiting period of the Alcotest, our Supreme Court explained in Chun that "[a]fter a two-minute lock-out period during which the device will not permit another test, the instrument prompts the operator to read the instruction again to the arrestee and collect the second breath sample." 194 N.J. at 81. Here, Officer Ordway credibly testified that he waited until the machine cleared, re-read defendant the instructions, and performed another test. This is all that Chun requires.

The results of the Alcotest performed was a 0.10% BAC and was within tolerance, and was therefore evidence that a per se case was established. (3T14:13-15; 3T14:20 to 3T15:5; Aa48; Aa76-Aa78).

Further, there are other safeguards in place to ensure Alcotest results are accurate. First, the Alcotest instrument has a slope detector, which detects

alcohol in the mouth, if any. If the slope detector detects mouth alcohol, it tells the instrument to abort the test. As stated in Chun, 194 N.J. at 77, if there is mouth alcohol detected, it would cause an interference or create a "spike" in the readings on the Alcotest.

In this case, two valid breath samples were given and both were accepted by the instrument and were within acceptable tolerance. (3T13:13 to 3T15:5). This indicates that defendant's test was properly administered.

Second, another safeguard in the instrument are the two breath tests requirement. The instrument requests that two tests be conducted before it gives the reported breath test result, or the lower of the two tests.

Third, defendant never asserted that any alcohol entered his mouth while he waited for the Alcotest to be administered. Again, any presence of alcohol in the mouth as a result of regurgitation, burping, belching, or further alcohol consumption, not in the presence of the officer or that the officer might not have noticed, would cause the Alcotest to abort or would cause one of the test results to be significantly higher. There would be no readings or there would be a significant spike in the readings, if any mouth alcohol was detected by the instrument.

Any interference would cause the Alcotest to abort and/or cause any reported readings to be out of tolerance with other readings taken. Chun, 194

N.J. at 81. The Alcotest provides safeguards for detecting mouth alcohol and provides the Alcotest operator with a lesser role than the breathalyzer.

Based on all of the State's proof plus the additional safeguards inherent in the instrument, the Alcotest results were properly admitted.

Thus, sufficient credible evidence exists in the record to support the court below's findings. Further, there is ample credible evidence in the record to sustain the judge's finding that the State established a violation of the DWI statute beyond a reasonable doubt.

Moreover, defendant is guilty of DWI beyond a reasonable doubt under the "under the influence standard." He performed all of the SFSTs unsatisfactorily, smelled of the odor of an alcoholic beverage, had slurred speech, and had bloodshot and droopy eyes. (2T21:16-20; 2T24:1-15; Aa42-Aa43). Defendant also admitted that he had one martini, though Officer Ordway was skeptical that defendant had truthfully disclosed the extent of his drinking that evening. See State v. Moskal, 246 N.J. Super. 12, 21 (App. Div. 1991) ("[T]he yardstick for making [an] arrest for driving while under the influence of intoxicating liquor . . . is whether the arresting officer 'had reasonable grounds to believe' that the driver was operating a motor vehicle in violation [of N.J.S.A. 39:4-50]." (alteration in original) (quoting Strelecki v. Coan, 97 N.J. Super. 279, 284 (App. Div. 1967))).

Thus, based on the totality of the circumstances as well as their training and experience, Officer Ordway believed that defendant drove his vehicle while under the influence.

POINT II
DEFENDANT'S CLAIMS THAT THE STATE VIOLATED THE RULES OF DISCOVERY ARE WITHOUT MERIT.

(Addressing Point IX of defendant's brief)

Defendant argues that the court below erred in finding that the State did not commit violations of the discovery rules when the State allegedly failed to provide video evidence of the administration of defendant's Alcotests performed by Officer Ordway in discovery. (Db33). Defendant is wrong.

On appeal, this Court determines "whether the findings made [by the Law Division] could reasonably have been reached on sufficient credible evidence presented in the record." Johnson, 42 N.J. at 162; Locurto, 157 N.J. at 471. Review of legal determinations is plenary. State v. Handy, 206 N.J. 39, 45 (2011).

Defendant's assertion that a video would have provided "exculpatory evidence" is simply not supported by the record below. Here, there was testimony available from Officer Ordway who gave his lay opinion with respect to defendant's condition and expressed his opinion with respect to

whether defendant was under the influence. State v. Gordon, 261 N.J. Super. 462, 465 (App. Div. 1993).

The court below properly found that defendant made "bald assertions that he was not provided with purported exculpatory evidence including video from the police station booking room[. . .]" (Aa50). There is no reason to disturb those findings that "could reasonably have been reached on sufficient credible evidence in the record." Johnson, 42 N.J. at 162; Locurto, 157 N.J. at 471. The court below also correctly found that defendant provides no proof that any such videos exist or that any such discovery request was raised in the municipal court. (Aa50).

Further, the State has no affirmative obligation to create a videotape of defendant's failed sobriety tests. Gordon, 261 N.J. Super. at 464-66. "[A] prosecutor is not obligated to create tangible items of evidence; he [or she] is only required to turn over items 'within the possession, custody or control of the prosecuting attorney.'" Id. at 465 (citing R. 3:13-3(a)(4), (6) and (8)).

Thus, defendant's claim that the State violated discovery rules are without merit.

POINT III
THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN SENTENCING DEFENDANT TO A MONTHLY PAYMENT PLAN.

(Addressing Point VIII of defendant's brief)

Defendant argues that Judge Hanna abused his discretion by sentencing defendant to an allegedly unreasonable monthly payment plan. (Db31-Db33). Defendant is wrong.

An appellate court should not substitute its own judgment for that of the lower court, and a sentence imposed by a trial court is not to be upset on appeal unless it represents an abuse of the lower court's discretion. State v. Gardner, 113 N.J. 510, 516 (1989). Our Supreme Court has cautioned that "[w]hat we seek by our review is not a difference in judgment, but only a judgment that reasonable people may not reasonably make on the basis of the evidence presented," and that "[w]hen conscientious trial judges exercise discretion in accordance with the principles set forth in the Code and [relevant case law], they need fear no second-guessing." State v. Roth, 95 N.J. 334, 365 (1984).

Here, the following colloquy took place regarding defendant's monthly payment plan:

> THE COURT: All right. And the other thing, Mr. Dunton, is if you do need a monthly payment plan, you should let me know. Sound like you -- you do, but were you –
>
> DEFENDANT: Your Honor –

THE COURT: -- were you able to afford?

DEFENDANT: I would need as long as possible, perhaps over two -- two years would be –

THE COURT: Well, I need to set a monthly amount. *So can you pay $50 a month?*

DEFENDANT: *Yes.*

THE COURT: Okay. We'll make it $50 a month.

[(7T34:2-14) (emphasis added).]

The record below shows that Judge Hanna suggested a monthly payment plan as opposed to one lump sum to defendant. While it is true that defendant advised Judge Hanna that his financial circumstances did not permit the purchase of a vehicle in the near future, the record below clearly shows that defendant advised the court that he was able to pay a $50 monthly payment.

Thus, Judge Hanna did not abuse his discretion in sentencing defendant.

POINT IV
JUDGE HANNA HAD DISCRETION TO SENTENCE DEFENDANT TO AN IGNITION INTERLOCK SUSPENSION PERIOD.

(Addressing Point VII of defendant's brief)

Defendant's offense date is November 5, 2019. At the time of his offense, N.J.S.A. 39:4-50 gave courts discretion to impose an interlock device requirement for first-time drunk driving convictions. (Sa1-Sa10).

As of December 1, 2019, N.J.S.A. 39:4-50 *requires* an interlock device for first-time offenders. (Sa11-Sa20).

Defendant was sentenced by Judge Hanna on April 17, 2023. His sentence included a seven month ignition interlock suspension period. Defendant now argues that Judge Hanna erred by sentencing him to this ignition interlock suspension period because Judge Hanna stated that it was a "mandatory" part of sentencing. (Db29-Db30).

While the record suggests that Judge Hanna was mistaken that imposition of an ignition interlock suspension period was in fact mandatory, Judge Hanna still was given discretion under the applicable version of N.J.S.A. 39:4-50 to impose such ignition interlock suspension period.

Thus, the State defers to this Court as to whether a remand is necessary for resentencing to address the ignition interlock suspension period of defendant's sentence.

CONCLUSION

WHEREFORE, for the reasons stated above, the State of New Jersey respectfully submits that defendant's conviction and sentence be AFFIRMED.

Respectfully submitted,
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Dated: August 14, 2024

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Jonathan E. Kohut, Esq. (*via* eCourts)

STATE OF NEW JERSEY Respondent, v. CHAZ DUNTON Appellant.	NEW JERSEY SUPERIOR COURT: APPELLATE DIVISION Docket No.: A-2941-22 Submission Date: August 28, 2024 Civil Action Sat Below: Hon. Robert M. Hanna, J.S.C. Municipal Appeal No. 22-018-RH

REPLY BRIEF OF APPELLANT CHAZ DUNTON

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PRELIMINARY STATEMENT

Respondent the State of New Jersey's ("Respondent") brief in response to this appeal ("Resp. Brief") fails to adequately rebut the arguments contained in Appellant Chaz Dunton's ("Appellant") brief in support of his appeal of his conviction and sentencing by the Law Division for allegedly driving while intoxicated in violation of N.J.S.A. 39:4-50 ("App. Brief").

First, Respondent's argument that Patrolman Christopher Ordway ("Officer Ordway") had a reasonable, articulable suspicion sufficient to effect a stop of Appellant on the morning of November 5, 2019 is without merit. Indeed, Respondent fails to address key testimony by Officer Ordway from the probable cause hearing conducted on February 25, 2022, which establishes that there was nothing sufficiently abnormal about Appellant's situation on the morning of his arrest which would implicate the community caretaking function under the applicable case law. Absent application of that function, there was no reasonable basis for Officer Ordway to even conduct a stop of Appellant in the first instance.

Second, Respondent did not, and still cannot establish that Appellant operated the motor vehicle in question beyond a reasonable doubt. While Respondent relies on Officer Ordway's testimony regarding statements Appellant allegedly made on the morning of his arrest regarding where he was

heading to when Officer Ordway came upon him, Respondent fails to address that the factual record before this Court does not evidence other key facts needed to establish operation of the vehicle beyond a reasonable doubt. These other key facts include information on when Appellant left his home in the vehicle, when Appellant again planned to drive the vehicle, and what occurred during the interim period between when Appellant left his home and when he was stopped by Officer Ordway.

Third, Respondent did not meet its burden of proving that Appellant operated a vehicle while intoxicated beyond a reasonable doubt under either the per se or observational standards of liability. With regard to the per se standard, Respondent fails to address that the factual record does not support a finding that Officer Ordway waited for the mandatory two-minute lock-out period when performing breath tests of Appellant, as required under State v. Chun, 194 N.J. 54 (2008). In arguing that it proved DWI under the observational standard beyond a reasonable doubt, Respondent also fails to address the numerous instances of forgetfulness and inconsistent testimony by Officer Ordway, which was incorrectly credited by the Law Division.

Fourth, contrary to Respondent's assertions, Appellant's claim that Respondent violated the relevant discovery rules is a compelling reason to overturn the conviction in this matter. Indeed, Appellant maintains a good faith

belief that video evidence of his alcotests being performed does exist, but was not provided to him in discovery at the trial level. Because Respondent had an affirmative duty to provide such evidence to Appellant under R. 3:13-3(b), the state violated the discovery rules.

Fifth, Respondent is incorrect in arguing that this matter should not be remanded for re-sentencing based on the Law Division's decision to sentence Appellant to an unreasonable monthly payment plan. The evidence of Appellant's indigence now before this Court is more than sufficient to show that the monthly payment plan currently applicable to Appellant is unreasonable and, to the extent Appellant's conviction is not reversed, this Court should remand for re-sentencing on this issue.

Finally, as Respondent itself acknowledges, the record illustrates that the Law Division judge sentenced Appellant under the wrong version of N.J.S.A. 39:4-50. This error led to the Judge Robert Hanna sentencing Appellant to an ignition interlock suspension period, which Judge Hanna erroneously referred to as a "mandatory" part of Appellant's sentence. The ignition interlock device was not, in fact, mandatory under the version of N.J.S.A. 39:4-50 in effect at the time of Appellant's arrest on November 5, 2019. For this reason, this Court should remand this matter for re-sentencing in the event Appellant's conviction under the statute is not reversed.

LEGAL ARGUMENT

I. RESPONDENT'S ARGUMENT THAT OFFICER ORDWAY HAD A REASONABLE, ARTICULABLE SUSPICION SUFFICIENT TO EFFECT A STOP OF APPELLANT IGNORES CRUCIAL TESTIMONY ESTABLISHING THAT THE COMMUNITY CARETAKING FUNCTION WAS INAPPLICABLE.

In arguing that Officer Ordway had a reasonable, articulable suspicion sufficient to effect a stop of Appellant on the morning of November 5, 2019, Respondent admits that when Officer Ordway approached Appellant's vehicle, he "observed that the interior lights were on," which, in Officer Ordway's experience "meant that the key was in the vehicle's ignition." (Resp. Brief at 16). Respondent's argument ignores that Officer Ordway also testified that, in his experience, this fact meant that Appellant's vehicle "was or could be operated." (2T9:2-15).[1] This point, which Respondent's brief wholly fails to address, is crucial to the issue now before this Court. If Officer Ordway

[1] References to the February 27, 2020 transcript of adjournment follow the form 1T__-__. References herein to the February 25, 2022 probable cause hearing before the Denville Municipal Court follow the form 2T__-__. References to the April 29, 2022 trial before the Denville Municipal Court follow the form 3T__-__. References to the May 27, 2022 transcript of the decision of the Honorable Gerard Smith J.S.C. in the matter of State v. Dunton, Docket No. DEN243912, follow the form 4T__-__. References to the January 27, 2023 trial de novo before the Superior Court of New Jersey, Law Division follow the form 5T__-__. References to the February 17, 2023 trial de novo before the Superior Court of New Jersey, Law Division follow the form 6T__-__. References to the April 17, 2023 sentencing hearing before the Honorable Robert Hanna, J.S.C. follow the form 7T__-__.

believed, at the time he came upon Appellant on the side of the road on the morning of November 5, 2019, that Appellant's vehicle was operable, and Officer Ordway admitted as much at the probable cause hearing on February 25, 2022, then there would have been no reason for Officer Ordway to render aid under the community caretaking function. See State v. Smith, 251 N.J. 244, 262 (2022) (community caretaking function "may be implicated where police observe something abnormal . . . concerning the operation of a motor vehicle.") (quotation marks omitted). Based on Officer Ordway's own testimony, the community caretaking function was inapplicable in the instant case.

Even if Respondent's argument relies on Officer Ordway's testimony that Appellant's "vehicle [was] parked across multiple parking spots in such a way that other vehicles could not pull in," this does not "clearly indicate[] that the vehicle and/or its driver were experiencing difficulties," as Respondent asserts. (Resp. Brief at 17). Indeed, Officer Ordway admitted that at the time he came upon Appellant's vehicle he believed, based on approximately ten years of experience as a police officer with the Denville Township Police Department, that Appellant's vehicle could be moved out of that spot by way of operation. (2T7:17-20, 9:2-15). The fact that it was approximately 2:18 a.m. when Officer Ordway came upon Appellant, (2T7:25-8:2), at which time Officer Ordway observed that the pizzeria in front of which Appellant's vehicle was stopped was

not open for business and that there were no other vehicles in the parking lot, (2T8:14-19), further evidences the fact that Appellant's vehicle being stopped where it was was not abnormal. Considering the circumstances (i.e., the time of day and the lack of other foot or car traffic), that Appellant may have temporarily pulled his vehicle over across multiple parking stalls is not so abnormal so as to implicate the community caretaking function.

Because Appellant's vehicle, which Officer Ordway admitted he believed was operable, being stopped on the side of the road is not sufficiently "abnormal" as to implicate the community caretaking function, Respondent cannot establish that Officer Ordway had a reasonable articulable, suspicion to effect a stop of Appellant.

II. RESPONDENT DID NOT ESTABLISH THAT APPELLANT OPERATED A VEHICLE BEYOND A REASONABLE DOUBT.

Respondent claims that based on Appellant's "own admissions, he clearly had the intent to drive, and in fact did drive, the vehicle" in question. (Resp. Brief at 19). In so arguing, Respondent relies solely on Officer Ordway's testimony that Appellant informed Officer Ordway that he was on the way to visit a friend in Hackettstown when the vehicle petered out on the side of the road. (Id.) Respondent's argument, however, fails to address that Officer Ordway's testimony does not elucidate on several key facts needed to establish

operation beyond a reasonable doubt, including: (1) at what time Appellant allegedly left his home in his vehicle, (2) at what time Appellant again planned to use his vehicle to complete his trip to Hackettstown, or (3) what occurred during the interim period from the time Appellant left his home to the time he was stopped by Officer Ordway at 2:18 a.m. on the morning of November 5, 2019. (App. Brief at 20). Absent these crucial facts, which were not contained in the factual record before the Law Division, Respondent cannot establish that Appellant operated a vehicle beyond a reasonable doubt.

III. RESPONDENT DID NOT MEET ITS BURDEN OF ESTABLISHING THAT APPELLANT OPERATED A VEHICLE WHILE INTOXICATED BEYOND A REASONABLE DOUBT UNDER EITHER THE PER SE OR OBSERVATIONAL STANDARDS OF LIABILITY.

Regarding the Law Division's finding that the State proved beyond a reasonable doubt that Appellant operated a vehicle while intoxicated, Respondent argues that Officer Ordway performed the alcotest[2] of Appellant on November 5, 2019 in accordance with established procedures, as required under State v. Chun, 194 N.J. 54 (2008) and its progeny. In so arguing, Respondent, without support from the factual record, states that "Officer Ordway allowed for

[2] As used herein, the term "alcotest" refers to a Breath Alcohol Test used to monitor the amount of alcohol in an individual's system at the time of the test's administration.

the requisite waiting period between tests." (Resp. Brief at 22). Respondent does not even attempt to argue that Officer Ordway waited for the entirety of the "**two-minute** lock-out period" before administering subsequent alcotests, as required under the plain language of Chun. Chun, 194 N.J. at 81 (emphasis added). Because Officer Ordway's testimony, which did not give any indication as to the amount of time that elapsed between alcotests performed on Appellant, was insufficient to establish that Officer Ordway observed the mandatory two-minute lock-out period, the Law Division erroneously found that Respondent proved Appellant's intoxication beyond a reasonable doubt under the per se standard of liability.

Regarding the per se standard, Respondent's argument also relies heavily on the assertion that the results of alcotests, like the one performed on Appellant, are accurate and reliable. In so arguing, Respondent cites the Chun pre-requisites, as well as other "safeguards", such as the use of slope detectors and the fact that multiple breath samples are taken from each subject when alcotests are performed. (Resp. Brief at 23-24). Respondent's argument fails to recognize that, no matter how many safeguards are in place to ensure the accuracy and reliability of alcotest results, those safeguards are irrelevant where, as here, the tester fails to abide by the established procedures set by the Supreme Court in Chun. For this additional reason, Respondent's argument that the Law

Division did not err by finding Appellant guilty under the per se standard of liability is misplaced.

Respondent's argument that it proved DWI beyond a reasonable doubt under the observational, or "under the influence", standard is similarly misguided. Respondent argues that the Law Division properly found Appellant guilty under the observational standard because Officer Ordway testified that, before performing field sobriety tests on Appellant, he "smelled the odor of an alcoholic beverage, had slurred speech, and had bloodshot and droopy eyes," and because Appellant further admitted to Officer Ordway that he previously drank one martini on the evening in question. (Resp. Brief at 25). Respondent does nothing to address the arguments contained in Appellant's brief to this point; namely, the fact that the trial court erred in crediting Officer Ordway's testimony considering the fact that Officer Ordway's testimony was replete with instances of forgetfulness and further evidenced a lack of credible recollection by Officer Ordway. (App. Brief at 23-26). Indeed, when examined Officer Ordway provided inconsistent testimony regarding whether he gave Appellant a subsequent Miranda[3] warning following his arrest, (App. Brief at 23; Aa038-

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

040)[4], and Officer Ordway could not recall what he used as a stimulus when conducting the horizontal gaze nystagmus test on Appellant, (App. Brief at 24; 2T17:11-13). In addition, Officer Ordway could not recall what shoes Appellant was wearing or whether Appellant requested to take off his shoes while performing the walk-and-turn test. (App. Brief at 24; 2T20:13-19). In fact, Officer Ordway himself acknowledged that his memory of the events on November 5, 2019 was unclear given the fact that those events had occurred over two years prior to Officer Ordway providing testimony in this matter. (App. Brief at 24-25; 2T18:19-19:2). Despite Respondent's contentions about the sufficiency of the evidence under the observational standard, the Law Division erred in crediting Office Ordway's testimony. Accordingly, the Law Division erred in finding that Respondent proved DWI beyond a reasonable doubt under the observational standard.

In sum, Respondent is incorrect in arguing that the Law Division properly found that Appellant committed DWI beyond a reasonable doubt under both the per se and observational standards of liability. Not only does Respondent fail to acknowledge the arresting officer's failure to abide by the Chun pre-requisites for alcotesting, Respondent further fails to address the arguments put forth by

[4] Aa__-__ refers to Appellant's Appendix.

Appellant, which establish that the Law Division further erred in crediting the testimony of Officer Ordway. For these reasons, the Law Division's decision with respect to finding Appellant guilty of DWI under N.J.S.A. 39:4-50 should be reversed.

IV. APPELLANT'S CLAIM THAT THE STATE VIOLATED THE DISCOVERY RULES IS NOT WITHOUT MERIT.

Respondent argues that the Law Division "properly found that [Appellant] made 'bald assertions that he was not provided with purported exculpatory evidence including video from the police station booking room.'" (Resp. Brief at 27 (quoting Aa50)). However, Appellant maintains a good faith belief that such evidence does (or did) exist and was not provided to him during the course of discovery at the trial level.

To support its argument, Respondent notes that it does not have "an affirmative obligation to create a videotape of" Appellant's alcotest being conducted. (Resp. Brief at 27). Appellant does not argue that this is the case. Rather, Appellant correctly argues that Respondent **does** have an affirmative obligation to provide exculpatory evidence to a criminal defendant in discovery under R. 3:13-3(b). By failing to provide the video evidence of Appellant's alcotest, which Appellant maintains a good faith belief exists, Respondent violated R. 3:13-3.

V. IF THE COURT DOES NOT REVERSE APPELLANT'S CONVICTION, THE COURT SHOULD REMAND FOR RE-SENTENCING TO A MORE REASONABLE MONTHLY PAYMENT PLAN.

Respondent's argument that the Law Division did not err in sentencing Appellant to an unreasonable monthly payment plan focuses on the information presented to Judge Hanna at sentencing in the court below, but fails to address the additional evidence of Appellant's indigence now before this Court. This evidence, namely Appellant's bank account statement and summary of monthly expenses filed as part of Appellant's motion for the assignment of pro bono counsel, (Aa100-102), is sufficient for this Court to remand this matter for re-sentencing in the event the Court does not reverse Appellant's conviction.

VI. THE LAW DIVISION'S SENTENCING OF APPELLANT UNDER THE INCORRECT VERSION OF N.J.S.A. 39:4-50 IS SUFFICIENT FOR THIS COURT TO REMAND THIS MATTER FOR RE-SENTENCING.

Regarding Judge Hanna's decision to sentence Appellant to an ignition interlock suspension period under N.J.S.A. 39:4-50, Respondent's argument relies on the fact that, under the version of the statute in effect at the time of Appellant's arrest on November 5, 2019, Judge Hanna had the discretion to assess an ignition interlock device as part of Appellant's sentence. (Resp. Brief at 30). Regardless of what discretion Judge Hanna may have had, the fact remains that Judge Hanna clearly sentenced Appellant under the wrong version

of the statute, as evidenced by Judge Hanna's own words at the sentencing hearing on April 17, 2023, when he referred to assessment of the ignition interlock period as a "mandatory" part of Appellant's sentence. (App. Brief at 29; 7T17:11-19). However, Administrative Directive #25-19, "Implementation of New DWI Law (L. 2019, c. 248) – Includes Expanded Use of Ignition Interlock Devices for First-Time Offenders (Dec. 4, 2019), as cited in Appellant's brief, makes clear that the new version of the statute, which makes assessment of the ignition interlock device mandatory, applies "only to defendants charged with a DWI . . . on or after December 1, 2019." (App. Brief at 30). Because Appellant was charged with DWI on November 5, 2019, (Aa010), Judge Hanna was required to sentence him under the version of N.J.S.A. 39:4-50 in effect as of that date.

Indeed, Respondent admits that Judge Hanna erred in sentencing Appellant under the current version of N.J.S.A. 39:4-50, (see Resp. Brief at 30 ("[T]he record suggests that Judge Hanna was mistaken that imposition of an ignition interlock suspension period was in fact mandatory[.]")), and further defers to the Court on the issue of whether remand for re-sentencing is necessary, (id.). Appellant posits that because he was impermissibly sentenced under the wrong version of the statute, both as a matter of fact and a matter of

law, remand is absolutely necessary in the event his conviction under the statute is not reversed.

CONCLUSION

For the reasons stated above, and for the reasons stated in Appellant's merits brief, Appellant respectfully requests that this Court reverse the decision of the Law Division, vacating the judgment of conviction entered by the Law Division against Appellant for driving while intoxicated under N.J.S.A. 39:4-50. In the alternative, Appellant respectfully requests that this Court remand for re-sentencing consistent with the version of N.J.S.A. 39:4-50 in effect at the time of Appellant arrest and Appellant's indigence.

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Date: August 28, 2024