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PRACTICE LIMITED TO:
CRIMINAL DEFENSE
DWI
MUNICIPAL COURT
DOMESTIC VIOLENCE
APPELLATE PRACTICE

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January 31, 2025

Honorable Judges of the Appellate Division
New Jersey Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v.
Joseph Vizcaya (Defendant-Appellant)
Docket No. A-003467-23
Appellate Division Appeal from the Somerset County Law Division-Criminal Part (Honorable Angela F. Borkowski, J.S.C.)

Dear Sir(s)/Madam(es):

Pursuant to New Jersey Court Rule 2:6-2(b), please accept the within Amended Letter Memorandum of Law in lieu of a more formal brief in support of the within Defendant-Appellant's appeal.

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TABLE OF JUDGEMENTS, ORDERS, & RULINGS

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On April 9, 2023, Joseph Vizcaya, hereinafter referred to as Defendant, was operating a motor vehicle in Branchburg Township, New Jersey when he was stopped by Branchburg Township Police Officer Ryan Russoniello for an alleged violation of N.J.S.A. 39:4-125 (Illegal U-Turn). Pursuant to said motor vehicle stop, Officer Russoniello began an investigation of the Defendant for an alleged violation of N.J.S.A. 39:4-50 (DWI). Eventually, Branchburg Township Police Officer Corey Neiper arrived on the scene in a backup capacity to Officer Russoniello.

Defendant was ultimately issued summons for alleged violations of N.J.S.A. 39:4-50 (DWI), N.J.S.A. 39:4-96 (Reckless Driving), N.J.S.A. 39:4-97 (Careless Driving), N.J.S.A. 4-125 (Illegal U-Turn), N.J.S.A. 39:3-29a (Failure to Exhibit Driver's License), N.J.S.A. 39:3-29b (Failure to Exhibit Registration), and N.J.S.A. 39:3-29c (Failure to Exhibit Insurance Card), respectively, returnable to the Branchburg Township Municipal Court. (DA1).

On December 18, 2023[2], Defendant appeared for trial in the Branchburg Township Municipal Court, which meets at the Hillsborough Township Municipal

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[1] The Statement of Facts and Procedural History have been combined into one section of the within Letter Memorandum of Law in the interest of brevity and clarity.

[2] T1 refers to the Certified Transcript of Proceedings in the Branchburg Township Municipal Court on December 18, 2023.
T2 refers to the Certified Transcript of Proceedings in the Somerset County Law Division on July 9, 2024.

Court. Defendant was represented by predecessor Defense counsel.

At the inception of the proceedings, the Trial Municipal Court made two references to the matter being a Special Session[3] proceeding (T1:3-5 to 3-6; 3-14).

The Trial Municipal Court asked if there were "any preliminary matters" that had to be addressed. At this point, the Municipal Prosecutor advised the Trial Municipal Court that the State was not seeking to introduce the alleged Alcotest results in the within matter and that the Trial would be based on "observation only." It should be noted that while the Municipal Prosecutor referenced a "malfunction with the Alcotest," no specific explanation was given for why the State was not seeking to utilize the alleged Alcotest results in the within matter. (T1:4-2 to 4-9).

Therefore, Defendant had an Observation-prong DWI trial without an objective B.A.C. in his 3rd offense trial in the Trial Municipal Court.

Two police officers testified for the State in its case-in-chief (the arresting officer followed by the backup officer).

The Defense only presented an expert witness in its case-in-chief.

Defendant was never addressed by the Trial Municipal Court at any time during his entire trial. In a third offense DWI trial on observation proofs only, no

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[3] A Special Session is a convention of New Jersey municipal court practice. It is typically reserved for a DWI trial wherein the municipal court will only schedule one case on its calendar docket.

one, not the Trial Municipal Court, not predecessor Defense counsel, and not the Municipal Prosecutor, ever questioned the Defendant with regard to whether or not he wished to avail himself of his constitutional right to testify on his own behalf. It never happened.

Eventually, the Trial Municipal Court adjudicated Defendant guilty of DWI, N.J.S.A. 39:4-97 (Careless Driving); N.J.S.A. 39:4-125 (Illegal U-turn), N.J.S.A. 39:3-29a (Failure to Exhibit Driver's License), and N.J.S.A. 39:3-29b (Failure to Exhibit Registration). (T1:89-2 to 106-15).

In the Trial Municipal Court's sentence, Defendant's 8-year driver's license suspension for his 3rd offense DWI conviction was not stayed. (T1:107-16 to 107-24). However, Defendant's mandatory 180-day jail term as a DWI third offender was stayed by the Trial Municipal Court. (T1:108-4 to 108-8).

Current Defense counsel was retained to represent Defendant and timely filed a municipal appeal on his behalf on January 5, 2024. (DA5).

On April 30, 2024, current Defense counsel filed a Letter Memorandum of Law in support of Defendant's trial de novo. In Point I of the Legal Argument, current Defense counsel articulated the following:

> **DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO TAKE THE WITNESS STAND AND TO TESTIFY IN HIS OWN DEFENSE IN THE TRIAL MUNICIPAL COURT. THIS CONSTITUTIONAL IMPERATIVE IS AN INHERENT PART OF SUBSTANTIVE AND**

PROCEDURAL DUE PROCESS GUARANTEED BY BOTH THE FEDERAL AND NEW JERSEY STATE CONSTITUTIONS.

On July 9, 2024, Defendant's trial de novo was heard before the Honorable Angela F. Borkowski, J.S.C. presiding in the Somerset County Law Division – Criminal Part (hereinafter referred to as the Law Division).

During same, current Defense counsel offered substantive argument in support of Defendant's trial de novo. (T2:3-25 to 22-21).

The State only offered brief argument in opposition during Defendant's trial de novo. (T2:23-1 to 24-6).

The Law Division then stated the following into the record:

> THE COURT: All right. I will render a decision today, but I do need about a half an hour. So what time is it now? 10:53. I will try and be back here by 11:15 and render the decision. (T2:24-7 to 24-10).

According to the Certification from the Certified Transcriber, the Law Division returned to the bench 24 minutes; 19 seconds later in time and stated on the record that "the Court has prepared a written decision." (T2:24-19 to 24-20).

The Law Division's written decision is 10 pages long in single and a half spacing with an accompanying 2-page Order. (DA6). Since it is not possible to type a 10-page decision and 2-page Order in less than 24 ½ minutes, it would strongly appear that the Law Division both prejudged and predetermined Defendant's trial de novo.

The Law Division's oral decision adjudicated Defendant guilty of DWI and the same four underlying motor vehicle offenses as the Trial Municipal Court. (T2:24-19 to 29-11).

Therein ensued a fairly lengthy hearing on Defendant's request for a stay of his jail term pending appeal to the Appellate Division. (T2:29-15 to 48-1; 50-23 to 51-8).

Ultimately, the Law Division denied the Defendant's request for a stay of his 180-day jail term as a consequence of his 3rd offense DWI conviction. (T2:46-22 to 47-15). (DA18).

Defendant filed a Notice of Appeal to the Appellate Division on July 10, 2024. (DA19). On that same date, current Defense counsel filed an Application for Permission to File Emergent Motion seeking a stay of the jail penalty of Defendant's sentence and/or bail pending appeal. (DA22).

On that same date, the Appellate Division granted the Defendant's Application for Permission to File Emergent Motion. (DA35).

Defendant filed a formal Motion for Emergent Relief dated July 15, 2024 and the State responded on July 22, 2024.

On July 23, 2024, the Appellate Division granted Defendant's application and stayed the imposition of the Defendant's 180-day jail sentence, remanding the matter to the Law Division for a hearing to determine if "bail and other conditions

should be imposed pending the appeal." (DA37). In its Order, the Appellate Division wrote, "Without deciding whether defendant is in fact presenting a question of first impression, we are satisfied that there is a question that should be determined by this court before defendant is required to serve his jail sentence."

On July 24, 2024, the Law Division issued an Order releasing the Defendant on his own recognizance pending the within appeal wherein the Law Division also noted that the Defendant was entitled to seventeen (17) days jail credit. (DA39).

LEGAL ARGUMENT

POINT I

DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE DURING HIS 3RD OFFENSE DWI TRIAL IN MUNICIPAL COURT. THIS CONSTITUTIONAL IMPERATIVE IS AN INHERENT PART OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS GUARANTEED BY BOTH THE FEDERAL AND NEW JERSEY STATE CONSTITUTIONS. (DA6, T2:24-19 TO 29-11).

Defendant's filed Appellate Division appeal presents an issue of first impression in New Jersey municipal court law/trial de novo practice.

As current Defense counsel argued during the trial de novo, there is no New Jersey published case (or unpublished case for that matter) that specifically addresses whether a trial municipal court is required to advise a DWI defendant at trial that they have a constitutional right to testify on their own behalf.

However, there should be.

The within direct appeal is challenging Defendant-Appellant's adjudication of guilt in the Law Division after trial de novo of multiple motor vehicle offenses, including a 3rd offense DWI conviction.

In reviewing the Second trial court's decision(s) after trial de novo, the Appellate Division determines whether there is sufficient credible evidence in the record supporting such decision(s). State v. Johnson, 42 N.J. 146, 162 (1964). As

distinguished from the Second trial court, which conducts a trial de novo on the record pursuant to R. 3:23-8(a)(2), the Appellate Division does not independently assess the evidence. State v. Locurto, 157 N.J. 463, 471 (1999).

Under the two-court rule, only "a very obvious and exceptional showing of error" will support setting aside the Second trial court's and First trial court's "concurrent findings of fact." Locurto at 474.

Notwithstanding same, when issues on appeal are decided on purely legal determinations, the Appellate Division's review is plenary. State v. Adubato, 420 N.J. Super 167, 176 (App. Div. 2011) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)), certif. denied, 209 N.J. 430 (2012). Also, See Crespo v. Crespo, 395 N.J. Super 190, 194 (App. Div. 2007) for the same proposition of appellate law.

Clearly, the within appeal presents a purely legal issue that is subject to de novo review.

Here, the right to testify on one's own behalf is a constitutional right protected under our New Jersey Constitution at Article I, Paragraphs 1 and 10.

Obviously, it is beyond argument that Defendant was never addressed at any time during his 3rd offense DWI trial by the Trial Municipal Court.

R. 7:14-1 Opening Statement subsection (a) states:

> Required Open Statement. The judge shall give an opening statement prior to the commencement of the court

> session concerning court procedures and rights of defendants. This statement shall not, however, be a substitute for the judge advising individual defendants of their rights prior to their respective hearings.

In addition, NJCourts(.gov) has published a Model Opening Statement Listing of Basic Rights and Advisements (In-Person Criminal and Traffic Sessions). This A.O.C. promulgated judicial branch document lists 24 such advisements.

The NJCourts(.gov) Model Opening Statement for municipal courts in New Jersey provides a more detailed outline of the foregoing such advisements. Paragraph 12 entitled Not Guilty Plea sets forth:

> Sample: If you plead not guilty, you then have the right to have a trial, where you or your attorney may call or subpoena witnesses on your behalf **and you may testify or make a statement if you choose to do so. If you have a trial, I will explain the trial procedure to you before the trial begins.** (Emphasis added.)

Please note that there is no distinction made in Paragraph 12 in this advisement concerning whether a given defendant in municipal court is represented by counsel, or not.

Most specifically, the Honorable Louis J. Belasco, P.J.M.C. has recorded a Municipal Court Opening Statement promulgated by the A.O.C. which is utilized by most municipal courts throughout the State as *its* required remarks. As an aside, current Defense counsel has probably watched Judge Belasco's Opening

Statement while sitting in a municipal court in excess of 1,000 times.

Judge Belasco's Opening Statement is 12 minutes; 8 seconds long. It is available on YouTube.njcourts. At the 4-minute mark of Judge Belasco's Municipal Court Opening Statement, he says, "If you plead not guilty, you then have the right to have a trial where you or your attorney may call or subpoena witnesses on your behalf, **and you may testify** or make a statement if you choose to do so. **If you have a trial, I will explain the trial procedures to you before the trial begins.**" (Emphasis added.)

None of the foregoing occurred before Defendant's 3rd offense DWI observation-prong trial before the Trial Municipal Court. As previously stated, and to reiterate, Defendant appeared for a Special Session DWI trial. Therefore, and by osmosis, it is beyond argument that no opening statement was played before Defendant's trial began and the Trial Municipal Court did not explain any trial procedures to him before his trial began. Or, at any other time thereafter.

The Law Division's pre-written decision adjudicating Defendant guilty of DWI on trial de novo cites four New Jersey cases in articulating that Defendant was not denied substantive due process when the Trial Municipal Court failed to advise him that had a right to testify on his own behalf.

Each of the Law Division's cited cases is at least 25 years old. None of them are directly on point.

State v. Savage, 120 N.J. 594 (1990) is a murder case that was reversed by the New Jersey Supreme Court on grounds of deficient defense counsel performance.

State v. Bogus, 223 N.J. Super 409 (App. Div. 1988) was a two-count aggravated manslaughter trial wherein Defendant testified in his own defense. The Appellate Division's holding was that the trial court did not have a duty to advise Defendant that he had a right to not so testify at trial.

State v. Dwyer, 229 N.J. Super 531 (App. Div. 1989) was a municipal court trial wherein defendant was convicted of two counts of simple assault when he was unrepresented at trial. The Appellate Division reversed defendant Dwyer's convictions by holding that the municipal court judge had an obligation to advise this unrepresented Defendant of his right to remain silent.

Finally, the Law Division cited the PCR version of State v. Bey, 161 N.J. 233 (1999). Inexplicably, the Law Division cited page 311 of this New Jersey Supreme Court opinion even though that was in Justice Handler's dissent therein. And for whatever it may be worth, this cited dissent by the Law Division actually supports Defendant's substantive legal argument below.

R. 7:14-1, the NJCourts(.gov) Model Opening Statement, and Judge Belasco's videotaped Opening Statement all represent the New Jersey judiciary. It is the duty of the judicial branch to advise quasi-criminal defendants of their

constitutional rights in our Municipal Courts. Here, that did not happen prior to, or during, Defendant's 3rd offense DWI trial below.

During Defendant's trial de novo below, current Defense counsel articulated aloud how Defendant's prospective testimony on his own behalf could have resulted in raising the requisite reasonable doubt for a Not Guilty finding:

> MR. REISIG: So what could the defendant have testified about that nobody else could have brought forth? Well, here's just a flavor. Only he could have testified about his prior alcohol consumption. What was the testimony? Two beers and a shot, six hours before he came in contact with the police.
>
> So the established burn-off rate was devised by a Kenneth Dubowski, D-U-B-O-W-S-K-I. He testified in this landmark breathalyzer case in New Jersey called State v. Downie. It's D-O-W-N-I-E, 117 N.J. 450. And he devised this burn-off rate, which is after cessation of drinking you have -- you will burn off and your BAC will be reduced by .015 every hour.
>
> So if we believe the evidence in this case -- and nobody disputed it -- the defendant went six hours after having his last drink. So that math is .09 below what he was when he stopped drinking. So he only admitted to two beers and a shot. That can't be a DWI. It's not possible, because he's 5'10", 225. That's in our record. But there's no discussion of that in the Court's decision. He never references how in the world can a guy be under the influence of intoxicating liquor on an observation prong case if he had two drinks -- two beers and a shot six hours before the police came in contact with him.
>
> But the defendant could have testified about what he drank, how big those beers were, what the shot was. Only he could have done that, but he didn't testify because

> nobody told him he had a right to. Only he could testify about his two injured knees. That's on the BWC. Only he could have testified about his basketball concussion the week before. That's on the BWC. Only he could have testified about how cold he was during the administration of the field sobriety test. So it all ties in.
>
> This is an observation prong trial, third offense. It's subjective in nature. We don't have the Alcotest. All the defendant need do is raise reasonable doubt. It's the State's burden. Not any doubt, reasonable doubt. So the question is if the defendant had testified and edified the record as to what he drank, how big those drinks were, and about the nature of his injured knees, and his basketball concussion and how they were impacting his ability to perform field sobriety tests, about how cold he was during the field sobriety tests, because he says it multiple times on the BWC that's in evidence, would that have raised the requisite reasonable doubt? And here's the answer. We don't know because it didn't happen. (T2:14-17 to 16-17).

Accordingly, Defendant respectfully requests that the Appellate Division reverse his conviction for DWI, et al. and remand to the Law Division for a further remand to a conflict municipal court for retrial.

CONCLUSION

Defendant submits that the within appeal represents an issue of first impression relative to municipal court law/trial de novo practice in the context of a contested DWI trial. In light of the foregoing legal argument and in reliance upon the authority cited therein, Defendant respectfully requests that the Appellate Division reverse his conviction for DWI, et al. and remand the matter to the Law Division for a further remand to a conflict municipal court for retrial.

Respectfully submitted,

MATTHEW W. REISIG, ESQ.

Cc: Alyssa Biamonte, Assistant Prosecutor, Somerset County
Mr. Joesph Vizcaya

THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-3467-23

STATE OF NEW JERSEY,	:	
	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	
	:	One Appeal from a Final Judgement
v.	:	of Conviction of the Superior
	:	Court, Law Division,
JOSEPH VIZCAYA,	:	Somerset County
	:	
	:	Sat Below:
Defendant-Appellant	:	Hon. Angela F. Borkowski, J.S.C.
	:	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

JOHN P. MCDONALD
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COUNTER-STATEMENT OF PROCEDURAL HISTORY

The State adopts Defendant's recitation of this case's procedural history. (Db1).

COUNTER-STATEMENT OF FACTS

On April 9, 2023, Defendant was charged with Driving While Intoxicated in violation of N.J.S.A. 39:4-50; Reckless Driving in violation of N.J.S.A 39:4-96; Careless Driving in violation of N.J.S.A. 39:4-97; Illegal U-Turn in violation of N.J.S.A. 39:4-125; Failure to Exhibit Driver's License in violation of N.J.S.A. 39:3-29a; Failure to Exhibit Registration in violation of N.J.S.A. 39:3-29b; and Failure to Exhibit Insurance Card in violation of N.J.S.A. 39:3-9c. (Db1).

On December 18, 2023, the Honorable Francesco Taddeo, J.M.C., presided over the Defendant's trial in Branchburg Municipal Court. Ibid. Prior to testimony, the Municipal Court Prosecutor advised Judge Taddeo that there was a malfunction in the Alcotest that was used on the Defendant on April 9, 2023, so the state would not be utilizing its readings. (Db2). During trial, the Municipal Court Prosecutor called Officer Russoniello as the State's first witness. (T1:5-2 to 3).[1] Officer Russoniello testified that he observed a vehicle making an illegal U-turn from Route 22 East onto Route 22 West. (T1:8-23 to 9-1). Officer Russoniello activated his overhead lights and conducted a motor vehicle stop in a nearby Quick Check parking

[1] The State adopts the Defendant's citation conventions. (Db 1, n. 2).

lot. (T1:10-20 to 22). The driver was identified as the Defendant, and while Officer Russoniello was speaking to the Defendant, he detected the odor of alcohol. (T1:10-24 to 11-5). Officer Russoniello asked where the Defendant was coming from and Defendant responded, "the Royal Bar." (T1:11-6 to 14). Officer Russoniello observed that the Defendant had bloodshot and watery eyes, there was an odor of alcohol, and the Defendant was rambling. (T1:12-6 to 10).

Officer Russoniello then made the Defendant perform a series of field sobriety tests, which he performed poorly on. Officer Russoniello stated that he requested the Defendant to recite the alphabet from letter E to P (T1:13-9 to 12). Defendant started to recite the alphabet, but he had to interrupt himself to ask which letter he had to stop at. Ibid. Officer Russoniello further asked the Defendant to recite the number system backwards from 94 to 73. (T1:13-19 to 21). Defendant proceeded to continue to count past number 73. Ibid. Defendant was then asked out of the vehicle to continue the tests. (T1:14-7 to 8). Officer Russoniello then performed the Horizontal Gaze Nystagmus ("HGN") test on the Defendant. (T1:14-17 to 20). Before performing the HGN test, Officer Russoniello asked the Defendant if he was able to perform the test. (T1:14-22 to 23). The Defendant stated that he had gotten a concussion the week prior, as well as injuries to both his knees, but never indicated he could not do the test. (T1:14-24 to 15-1 to 13). Officer Russoniello testified to how the HGN test works and what its purpose is. (T1:16-5 to 20). During the HGN

Officer Russoniello kept detecting a strong odor of alcohol from Defendant's breath. (T1:16-22 to 24).

After the HGN test was done the Defendant then performed the walk and turn test. (T1:18-6). While Officer Russoniello was giving the Defendant instructions he kept speaking over the Officer and losing his balance. (T1:18-10 to 11). After Officer Russoniello gave him the instructions the Defendant walked a total of 18 steps in one direction before the officer advised him to stop. (T1:19-16 to 22). Lastly, Officer Russoniello asked the Defendant to perform the one leg stand. (T1:20-10 to 11). Officer Russoniello explained the instructions and demonstrated what he wanted the Defendant to do. (T1:20-14 to 20). The Defendant, after 15 seconds, put his foot down. (T1:20-23 to 25). When Officer Russoniello asked the Defendant to raise his leg back up, he refused. (T1:21-1). Due to Defendant's poor performance on the tests, and the odor of alcohol, he was then placed under arrest for Driving While Intoxicated. (T1:21-6 to 7).

Officer Corey Neiper was the next person to testify at trial. (T1:69-5). In his testimony he stated he was the backup officer at the traffic stop, he witnessed the Defendant perform the field sobriety tests, and he observed the Defendant's behavior on the way to the police station. (T1:70-22 to 75-25). Officer Neiper stated that on the way back to the police station, Defendant was slamming his head against the partition in the back of the cop car and using vulgar language. (T1:75-18 to 78-1).

When they arrived at the station, Defendant began singing "Hey There Delilah" and became very uncooperative. Ibid. During trial, the body camera footage of the stop was played, but the portion of the video showing Defendant's behavior after his arrest was not shown. (T1:26-1).

After his conviction in Municipal Court, Defendant appealed to the Law Division and on July 9, 2024, the Law Division held a trial de novo. (T2). Before the Court there were two legal issues: 1) Whether the Defendant was denied his constitutional right to testify due to the Municipal Court's failure to advise him of his rights; and 2) Whether the HGN test was admissible at the time of trial. (Da 9). After oral argument, the Honorable Angela F. Borkowski, J.S.C., found the Defendant guilty of Driving Under the Influence as well as the four other motor vehicle violations listed above. (Da15). Judge Borkowski then sentenced the Defendant to 180 days in jail, 8-year license suspension, and 4-year ignition lock installation once Defendant's license is restored. Ibid.

At the time of sentencing the Defendant asked for a stay of the 180-day jail sentence to appeal. (T2:29-15 to 22). After a lengthy oral argument Judge Borkowski denied his motion for the stay of his jail sentence. (T2:50-23). The next day, Defendant, through counsel, filed an application for permission to file an emergent motion, which was granted. (Da 22, Da 35). Defendant's motion was granted on July 22, 2024, and Defendant was released from jail. (Da 37-39). Defendant has now

appealed his conviction in the Law Division, and the State's response follows.

LEGAL ARGUMENT

POINT I

DEFENDANT WAS NOT DENIED ANY OF HIS CONSTITUTIONAL RIGHTS

Defendant argues that because he was never advised of his right to, or not to testify, he was deprived of his constitutional rights. (Db3). Defendant claims that because this was his third DWI arrest, it was imperative Defendant testify on his own behalf. (Db7).

On appeal from a Municipal Court to the Law Division, the review is de novo on the record. R. 3:23-8(a). The Law Division judge must make independent findings of facts and conclusions of law based upon the evidentiary record of the Municipal Court and must give due regard to the opportunity of the Municipal Court judge to assess the credibility of witnesses. State v. Johnson, 42 N.J. 146, 157 (1964). On appeal from a Law Division decision, the issue is whether there is "sufficient credible evidence present in the record" to uphold the findings of the Law Division. Id. at 162. The Appellate Division "do[es] not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." State v. Barone, 147 N.J. 599, 615 (1997).

The reviewing court must "give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses

and to have the 'feel' of the case." State v. Locurto, 157 N.J. 463, 471 (1999); State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000). "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (citing In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). Moreover, "under the two-court rule," only "a very obvious and exceptional showing of error" will support setting aside "concurrent findings of facts and credibility determinations made by" the Law Division and the Municipal Court. Locurto, 157 N.J. at 474.

In Rock v. Arkansas, 483 U.S. 44, (1987), the United States Supreme Court explicitly recognized the constitutional right to testify, finding its roots firmly established in several provisions of the federal constitution. The Court explained that the right emanates from the fourteenth amendment: "It is one of the rights that [is] 'essential to due process of law in a fair adversarial process.'" Id. at 51, (citing I v. California, 422 U.S. 806, 819 n. 15, (1975)). "The right to testify is also the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call 'witnesses in his favor.'" Id. at 483 U.S. at 52. The Court explained that a defendant's right to call witnesses on his own behalf "logically include[s]" the right to testify. Ibid.

The right to testify in New Jersey is guaranteed by statute. N.J.S.A. 2A:81-8. Early courts in New Jersey, however, also viewed it as a "civil right," protected

under the fourteenth amendment to the federal constitution:

> It may be suggested that the civil rights protected by this clause of the constitution are only those which were recognized when the constitution was framed, and that, therefore, the right of the litigant to be a witness from himself having been created since that time, it is not among those thus secured. But it would, I think, be unreasonably cramping this provision thus to confine it.

Percey v. Powers, 51 N.J.L. 432, 435, (Sup. Ct. 1859).

In State v. Bogus, 223 N.J. Super. 409, (App. Div. 1989), the Appellate Division held that when a defendant is represented by counsel, the trial court does not have a duty to advise the defendant of his or her right not to testify or to explain the consequences that the testimony may produce. Id. at 426. The court reasoned that the decision to testify is a strategic choice, and it is therefore the duty of counsel, not the trial court, to advise a defendant on whether to testify. Id. 223 N.J. Super. at 423-24. "We hold that when a defendant is represented by counsel, the trial court is not required to inform defendant of his right to testify or explain the consequences of that choice." State v. Savage, 120 N.J. 594, 630 (1990). In Siciliano v. Vose, the court succinctly stated:

> To require the trial court to follow special procedure, explicitly telling defendant about, and securing an explicit waiver of, a privilege to testify … could inappropriately influence the defendant to waive his constitutional right not to testify, thus threatening the exercise of this other, converse, constitutionally explicitly, and more fragile right. 834 F.2d 29, 30 (1st Cir. 1987) (emphasis in original).

"We find that it is the responsibility of a defendant's counsel, not the trial

court to advise defendant on whether or not testify and to explain the tactical advantages and disadvantages of doing do or not doing so." Savage, 120 N.J. at 630 (citing State v. Bogus, 223 N.J. Super. at 423) (emphasis added). Counsel's responsibility includes advising a defendant of the benefits inherent in exercising that right and the consequences inherent in waiving it. Id. at 631. Thus, if a defendant's counsel fails to inform him of certain rights, the Defendant may be able to assert an ineffective assistance of counsel claim. State v. Bey, 161 N.J. 233, 271 (1999).

Defendant argues that there is no New Jersey published or unpublished case that specifically addresses whether a trial municipal court is required to advise a DWI defendant at trial that they have a constitutional right to testify on their own behalf. (Db 7). He further argues that because the Defendant was not advised by anyone in the municipal court of his right to or not to testify, he was denied his constitutional right. Ibid.

That is not correct. As shown in Bogus, the trial court does not have a duty to advise the Defendant of his constitutional right to testify or not to testify. It is up to Defendant's trial counsel to provide Defendant with that information. In the instant case, Defendant did not take the witness stand. Defendant makes the argument that if he did take the witness stand it would have tipped the scales of justice towards an acquittal; only the Defendant could say what the effects of his alleged concussion

were, how large the beers were, and what the shot of alcohol he took was.

Defendant is clearly mistaken in his argument. Not only is it not the trial court's duty to inform a Defendant of their right to or not to testify, but during the traffic stop, Officer Russoniello did inquire about the Defendant's concussion. (T1:14-23 to 15-13). Officer Russoniello asked the Defendant when and how Defendant got the concussion, what day it currently was, and what time it currently was. Ibid. Satisfied with his answers, Officer Russoniello went forward with the field sobriety tests, which the Defendant performed poorly on. (T1:67-11 to 13). Further, during the stop the Defendant admitted to drinking two beers and one shot. (T1:91-19 to 20). If the Defendant had such a bad concussion that it was affecting his balance and his overall actions, then he certainly should not be drinking alcohol or even driving. Also, on his way to the police station Defendant was banging his head on the partition inside the police car. (T1:75-22 to 24). Once again, if the Defendant had such a bad concussion he would be in pain and would certainly not be banging his head against anything, let alone a hard piece of metal.

It also should be noted that Defendant did put on a case. Defendant called Mr. Herbert Leckie, who was stipulated by both parties to be an expert on field sobriety tests. (T1:79-5 to 11). In sum, Mr. Leckie stated that all tests performed on this Defendant were not reliable due to certain conditions during the test. (T1:79-1 to 83-21). While Defendant is correct that he did not take the witness stand, it is apparent

that this was a strategic choice to have an expert witness testify as to the tests rather than the Defendant who is less qualified.

Given the above, there has been no showing by the Defendant that there is a "very obvious and exceptional showing of error" that supports setting aside the second trial court's and first trial court's "concurrent findings of fact." Locurto, 157 N.J. at 474.

Defendant further makes the argument that he was never advised of his rights because the recorded video of the Honorable Louis J. Belasco, J.M.C., was not played prior to his trial. (Db9-10). This video is utilized by the Municipal Court to advise Defendants of their rights. This video is typically shown during a Defendant's first appearance on their charges. Considering that this Defendant went to trial, it can be assumed that he had a first appearance and was shown the video. It is of no significance that this video was not shown before trial, because once again, it is defense counsel's duty to advise the Defendant of his rights.

Lastly, Defendant makes the arguments that Judge Borkowski prejudged and predetermined the trial de novo and the only "evidence" he provides for this grand claim is that Judge Borkowski had a written opinion ready after defense counsels lengthy argument and a 25-minute break in the proceedings. Defendant has absolutely no evidence that Judge Borkowski prejudged this proceeding. During the entire trial de novo, Judge Borkowski was engaged, and asked questions for

clarification when needed. (2T:13-1 to 17-3). It is a common practice among Judges to be prepared, and read all papers related to motions prior to them being held. Judge Borkowski should not be admonished because she was well prepared for the Defendant's appeal.

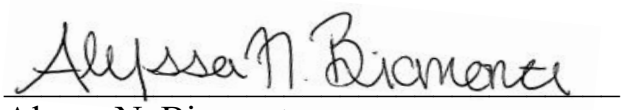
For the foregoing reasons, the Defendant's constitutional rights were not violated and his conviction for Driving While Intoxicated should be affirmed.

CONCLUSION

For the above reasons and authorities cited in support thereof, the State respectfully urges this Court to affirm the conviction and sentence entered below.

Respectfully submitted,

JOHN P. MCDONDALD
SOMERSET COUNTY PROSECUTOR

By: 
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