NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0905-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

THOMAS ZINGIS,

Defendant-Appellant.

APPROVED FOR PUBLICATION

April 25, 2022

APPELLATE DIVISION

Argued November 30, 2021 – Decided April 25, 2022

Before Judges Currier,[1] DeAlmeida and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Municipal Appeal No. 20-04.

Michael B. Cooke argued the cause for appellant.

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

The opinion of the court was delivered by

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[1] Judge Currier did not participate in oral argument. She joins the opinion with the consent of counsel. R. 2:13-2(b).

DeALMEIDA, J.A.D.

Defendant Thomas Zingis appeals from the October 20, 2020 order of the Law Division convicting him after a trial de novo of driving while intoxicated (DWI), contrary to N.J.S.A. 39:4-50. In addition, defendant appeals his sentence, arguing that the court erred when it considered his conviction to be a second DWI offense for sentencing purposes. We affirm defendant's conviction. However, because the State did not prove beyond a reasonable doubt that defendant's prior DWI conviction was not based on Alcotest breath sample test results rendered inadmissible by the holding in State v. Cassidy, 235 N.J. 482 (2018), we vacate his sentence, and remand for resentencing as a first offense.

I.

After a trial, a municipal court judge found the following facts based on what he determined to be the credible testimony of Berkeley Township Patrolman Justin Heffernan. On August 27, 2018, at approximately 1:20 a.m., Heffernan was in his patrol car when he observed defendant, who was operating a motorcycle, make an illegal U-turn onto Route 9 North. Defendant stopped briefly on the shoulder before pulling out directly in front of an SUV traveling on the highway, causing the SUV driver to "slam on its brakes and lay on the horn." Defendant then took off at "a high rate of speed." Heffernan

gave chase and stopped defendant, who had no difficulty dismounting his motorcycle and retrieving documents from the seat compartment.

Heffernan immediately smelled alcohol emanating from defendant. After defendant removed his fully enclosed motorcycle helmet, the odor of alcohol became "extremely strong." The officer observed defendant's flushed face, droopy eyelids, and bloodshot, watery eyes. Defendant's speech also appeared slow, although he did not slur or stutter. When Heffernan asked if defendant had been drinking, he responded that he had consumed one beer.

Heffernan then administered three field sobriety tests: (1) a walk-and-turn test, (2) a one-legged-stand test, and (3) an alphabet test. Defendant displayed signs of intoxication during each test. During the walk-and-turn test, defendant did not comply with the physical aspects of the test by failing to hold the heel-to-toe position while being given instructions, crossing his legs while walking, leaving gaps between his heel and toe, and stumbling backwards. In addition, he failed to follow Heffernan's instructions when, after walking in one direction, he stopped instead of turning around and returning to the starting point.

During the one-legged-stand test, defendant was unable to keep his lifted leg straight. His knee was bent and not lifted to the appropriate height. In

addition, his foot touched the ground several times. Defendant also failed to count out loud, as instructed by the officer.

Finally, defendant could not complete the alphabet test. Although he had completed high school, defendant could not recite the alphabet from D to V. He quickly recited only "D-E-F," before falling silent. Because the alphabet test is not a standard field sobriety test, the court gave defendant's performance on this test "very limited" weight.[2]

As a result of his observations, Heffernan charged defendant with DWI, and careless driving, contrary to N.J.S.A. 39:4-97.

The court issued an oral opinion convicting defendant of both offenses. The court found Heffernan's opinion credible, based on his observation of defendant's performance during the field sobriety tests and his experience and training, that defendant was alcohol impaired while operating the motorcycle. The court noted the officer's testimony was corroborated by a body camera recording of his interactions with defendant.[3] The judge also concluded that defendant was guilty of careless driving.

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[2] Heffernan also conducted a horizontal gaze nystagmus (HGN) test and later administered Alcotest instrument breath tests. Heffernan did not testify about the HGN test results. The court suppressed the Alcotest results.

[3] The body camera recording, which we have viewed, was played during trial.

The court rejected defendant's claim that his medical condition raised reasonable doubt as to whether his inability to perform the field sobriety tests was the result of intoxication. Prior to starting the tests, defendant informed Heffernan that he had disc issues in his neck and back for which he took pain medication. He also stated that his leg "goes a little numb." At trial, however, defendant did not produce an expert report or other evidence regarding his medical condition or its effect on his ability to perform physical tasks. The court concluded it was "not going to give any probative value to the medical conditions raised by the [d]efendant without any other further evidence or scientific testimony." The court also noted that defendant's operation of a motorcycle "would take some physicality."

At sentencing, defendant, although previously convicted of DWI in Camden County in 2012, moved to be sentenced as a first-time offender. See N.J.S.A. 39:4-50 (setting forth the penalties for first, second, and third DWI offenses). He argued the court should disregard the 2012 conviction because the State failed to produce documentary evidence that it was not based on an Alcotest breath sample test result rendered inadmissible by the holding in Cassidy. That case arose from the misconduct of State Trooper Marc W. Dennis. Id. at 486. For several years, Dennis falsely certified that he had calibrated Alcotest instruments using a NIST-traceable thermometer. Ibid.

The Court held that the false certifications rendered the results of breath sample tests administered on Alcotest instruments calibrated by Dennis inadmissible. Id. at 497-98. The holding in Cassidy called into question the validity of thousands of past DWI convictions. Id. at 486, 497-98. Defendant's 2012 conviction happened during the time Dennis was filing false certifications.

In support of his argument, defendant relied on two documents issued while Cassidy was pending before the Court:

(1) the November 28, 2017 supplemental order of the Hon. Joseph F. Lisa, P.J.A.D. (retired and t/a on recall), who had been appointed by the Supreme Court as the special master in Cassidy, directing that

> [i]n any proceeding in any court involving a prosecution for an offense in which a prior DWI conviction constitutes a predicate offense to enhance the . . . applicable punishment in [a] subsequent prosecution for another charge . . . it shall be the affirmative obligation of the prosecutor in that proceeding to determine whether or not the defendant provided a breath sample on an Alcotest device that had been calibrated by . . . Marc Dennis in that prior DWI case, and to produce documentary evidence of that determination to the defendant and the court[;]

and (2) the June 29, 2018 letter issued by a Deputy Attorney General on behalf of the Attorney General to all county prosecutors, implementing Judge Lisa's November 28, 2017 supplemental order as follows:

> The only definitive way to determine whether or not Sergeant Dennis calibrated the Alcotest instrument used to take a breath sample from a defendant is to obtain the relevant calibration documents . . . for that particular Alcotest instrument. These calibration documents should be turned over to the defendant by the State in discovery. The Supplemental Order does not allow the prosecutor to make an oral and/or written representation to defendant and the court that defendant's name is not on the State's list of individuals who provided breath samples on Alcotest instruments that were calibrated by Dennis. Nor does the Supplemental Order allow the prosecutor to make an oral and/or written representation that the Alcotest instrument in question is not located in a municipality or county on the State's list of where Dennis calibrated instruments.
>
> . . . .
>
> [U]ntil a superseding order is issued by the Court, please make sure that prosecutors in your offices are producing these documents in discovery.

The municipal prosecutor argued the State's obligation to produce the documentary evidence referenced in the supplemental order and Attorney General letter had

> been supplanted by the new protocol that's been implemented or that's going to be implemented where if the [d]efendant has received notice that his prior case was a Cassidy case, he can then make an application and say look – he can petition to have the prior conviction removed.
>
> . . . .

> I have direct instruction from the Attorney General, from the County Prosecutor, that the way a [d]efendant knows if his prior conviction has been affected by Cassidy, he has to have received notice that you can now appeal your prior conviction.
>
> Of course, that's simply a proffer from me, [y]our Honor, but that is why it hasn't been provided in this case. If [y]our Honor is inclined to sentence the [d]efendant as a first offender, the State would require an additional opportunity to gather those documents, contrary to the current Directive from the Attorney General, as well as the County Prosecutor.

The municipal prosecutor told the court that Ocean County had "over 900 Cassidy cases," that he was "well familiar with all of the facts," and that defendant's prior conviction "is not a Cassidy Dennis case." He also proffered that "there were no Dennis cases in Camden County" and that "it's been published on the New Jersey Attorney General's website. All of the cases were limited for [sic] Middlesex, Monmouth, Ocean, Somerset, and Union" counties.

The trial court responded that "[w]hat I think we should do is get that publication. We'll have it marked as part of the – " The municipal prosecutor interrupted the court to say, "I can print it right now if we want to do it today." After a break, the municipal prosecutor stated:

> I did have a chance to visit the Office of the Attorney General website. I've printed a screen cap [sic] from that. I've provided a copy to [defense counsel]. I'm going to provide a copy to [y]our Honor. As I've

> noted, the prior conviction was . . . out of Camden County. And as I've already stated, there were no Camden County Dennis cases.
>
> I was able to call my local municipal liaison . . . who's well familiar with the process. She advised exactly what I have already advised you, [y]our Honor, that the way a [d]efendant knows if they have a Cassidy case is if they had received notice from the Attorney General's Office as mandated by law. The prior procedure has been replaced, in my opinion at least by proffer, was extremely inefficient to try to get all of these back documents [sic]. This is a step the Attorney General has taken to alleviate that.

The "screen cap" referenced by the municipal prosecutor was not entered into evidence, nor were the contents of the website he reported to have reviewed, or the website's internet address. It is not possible, therefore, for this court to determine what evidence was presented to the municipal court to prove Dennis did not calibrate the Alcotest instrument involved in defendant's 2012 conviction or that no DWI conviction from Camden County was called into question by Dennis's misconduct. In addition, the State offered no evidence, other than the hearsay statement of the liaison and the municipal prosecutor's opinion, that the June 29, 2018 letter had been superseded by a directive from the Attorney General regarding the proof necessary to establish that a prior DWI conviction was not tainted by Dennis's malfeasance.

Defendant maintained his position that the State is required by Judge Lisa's supplemental order, and the June 29, 2018 letter, to produce

documentary evidence that defendant's prior conviction was not tainted by a false calibration certification executed by Dennis.

In an oral opinion, the court agreed with the State:

> The [c]ourt is of the opinion that the issue in this matter is outside of what was contemplated by Judge Lisa in the Directive [sic], that the case is not subject to a ruling under that, as it is not affected by the Cassidy matter or the Trooper Dennis matter as there was no involvement in Camden County.
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> . . . .
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> Therefore, the [c]ourt is going to sentence with regards to this matter as a second offense under the law . . . .[4]

[4] The municipal prosecutor also referenced defendant's driver's license abstract, noting that his driving privileges were restored three months after the 2012 conviction. He argued that "while that doesn't necessarily mean that there was not a reading in the case, it is indicative that he would have been sentenced the same either way in that case should he have been found guilty." He did not elaborate on this argument, the import of which is not readily apparent. The court found that "the underlying first offense . . . was not an Alcotest conviction for a per se violation. It was an observation, either plea or trial . . . and not subject to any scrutiny under the Cassidy matter . . . ." Because the abstract was not admitted as evidence, we are unable to review it to determine the basis for these conclusions. The State does not address this point in its brief. We deem the argument that the 2012 conviction was not based on an Alcotest breath test result to be waived. "[A]n issue not briefed is deemed waived." Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2022); accord Telebright Corp. v. Dir., N.J. Div. of Tax'n, 424 N.J. Super. 384, 393 (App. Div. 2012).

The court merged the careless driving conviction into the DWI conviction and sentenced defendant to a two-day jail term to be served at the Intoxicated Driver Resource Center, a two-year loss of driving privileges, three years of an ignition interlock device on his vehicle, and thirty days' community service.

Defendant appealed his convictions to the Law Division. On October 20, 2020, the judge after having reviewed the municipal court record, found Heffernan's testimony to be credible. He concluded the State had established beyond a reasonable doubt that defendant was operating his motorcycle while intoxicated and engaged in careless driving.

At sentencing, the court found as follows:

> [W]ith respect to the issue of the Dennis Cassidy [sic], I do not read the order as broadly as [defendant's counsel]. I find that the reference to Middlesex, Monmouth, Ocean, Somerset, and Union to be the geographic context in which the parameters of Dennis' defalcations occurred.[5]
>
> [A]nd I understand the argument with respect to the scope of Cassidy may be such that Dennis may have been implicated elsewhere, but I also find that the [d]efendant did not receive any notification and yet, the trial took place a year after the Cassidy opinion was released. Defendant did not receive any such notice.

[5] The November 28, 2017 supplemental order does not refer to any counties by name. The basis for the court's observation is not clear from the record.

> So I'm going to find that this is, in fact, a second violation by the [d]efendant. It's the [c]ourt's intent to impose the same sentence as imposed below.

On October 20, 2020, the trial court entered an order denying defendant's request to vacate his municipal court convictions and sentence.

This appeal follows. Defendant makes the following arguments.

> POINT I
>
> THE LAW DIVISION COURT ERRED IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT DEFENDANT OPERATED HIS MOTORCYCLE WHILE UNDER THE INFLUENCE OF ALCOHOL.
>
> POINT II
>
> THE LAW DIVISION COURT ERRED IN SENTENCING DEFENDANT AS A SECOND OFFENDER UNDER N.J.S.A. 39:4-50, BECAUSE THE STATE DID NOT MEET ITS BURDEN TO PROVE DEFENDANT'S PRIOR CONVICTION WAS NOT TAINTED BY TROOPER DENNIS'S FALSIFICATION OF RECORDS.

II.

The Law Division reviews municipal court determinations de novo on the record. R. 3:23-8(a)(2). That court gives no deference to a municipal court's findings of facts or conclusions of law but should generally defer to a municipal court's credibility findings. See State v. Robertson, 228 N.J. 138, 147 (2017). We review "de novo verdict[s] after a municipal court trial . . . 'to

determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering the proofs as a whole." State v. Ebert, 377 N.J. Super. 1, 8 (App. Div. 2005) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

We also give deference to the trial court's factual determinations that are "substantially influenced by [its] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Johnson, 42 N.J. at 161. Moreover, we give greatest deference when the municipal court and Law Division make concurrent factual findings, unless there is a "very obvious and exceptional showing of error." State v. Locurto, 157 N.J. 463, 474 (1999). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

New Jersey prohibits a person from operating a motor vehicle "while under the influence of intoxicating liquor . . . , or . . . with a blood alcohol concentration [(BAC)] of 0.08% or more by weight of alcohol in the defendant's blood. . . ." N.J.S.A. 39:4-50(a). The statute provides two alternative methods by which driving while intoxicated may be proven: by observation or per se BAC reading. See State v. Kashi, 360 N.J. Super. 538,

545 (App. Div. 2003). Ultimately, "[t]he vital requirement of [the statute] is operation 'under the influence of intoxicating liquor.'" Johnson, 42 N.J. at 164.

Impairment may be proven observationally through a defendant's "slurred speech, loud and abrasive behavior, disheveled appearance, red and bloodshot eyes [or a] strong odor of alcoholic beverage on [the] breath . . . ." State v. Cryan, 363 N.J. Super. 442, 455-56 (App. Div. 2003). The "erratic manner or result" of a defendant's driving is also admissible as evidence of illegal impairment. Johnson, 42 N.J. at 165. In considering these factors, a trial court may rely on the "observations and opinion of experienced officers" about a defendant's condition and behavior to determine guilt. Id. at 166. Any factor alone may be insufficient to carry the State's burden, but, in combination, can "more than ampl[y] . . . support the conclusion that [a] defendant was driving under the influence of alcohol . . . ." State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007).

III.

A.

We have carefully reviewed the record, including the body camera recording of defendant's performance during the field sobriety tests, and find no basis to conclude there is an "obvious and exceptional error" in the

concurrent findings of the municipal court and Law Division judges regarding defendant's impairment at the time of his arrest.

We are not persuaded that defendant's claimed medical conditions raise reasonable doubt with respect to the cause of his poor performance on the tests. Defendant offered no evidence establishing the nature of his medical conditions or the effect they may have on his ability to perform the psychophysical tests administered by Heffernan. The record contains only defendant's self-serving statement shortly after his arrest that he feels numbness in his leg on occasion. Our review of the body camera recording revealed no obvious physical impairment preventing defendant from following the officer's instructions or performing the tests. Notably, at no point during his interaction with the officer did defendant, who was operating a motorcycle with apparent ease, state that he was unable to perform a particular task because of pain, numbness, or illness.

B.

We are, however, constrained to vacate defendant's sentence because the State did not produce proof beyond a reasonable doubt that his 2012 DWI conviction was not tainted by Dennis's misconduct. We begin with defendant's argument that the State is required by the November 28, 2017 supplemental order and June 29, 2018 letter to produce documentary evidence that the breath

tests results used in the 2012 conviction were not generated by an Alcotest instrument calibrated by Dennis.

On April 7, 2017, the Supreme Court granted direct certification in Cassidy and appointed Judge Lisa as special master to consider and decide whether Dennis's actions "undermine[d] or call[ed] into question the scientific reliability of breath test" results on the Alcotest instruments Dennis calibrated.

On November 2, 2017, Judge Lisa issued an order staying "proceedings in other courts that raise issues potentially affected by the Supreme Court's ultimate determination in" Cassidy. The stay included matters, like the present appeal, in which a prior DWI conviction was proffered by the State as a predicate offense to enhance the sentence in a subsequent DWI prosecution. The order, however, permitted defendants in such cases to waive the stay.

Judge Lisa's November 28, 2017 order supplements the stay order "for the purpose of effectively identifying cases in which breath samples were provided on an Alcotest device calibrated by . . . Dennis, to which the November 2, 2017 stay order applies . . . ." As noted above, Judge Lisa ordered prosecutors to produce documentary evidence that a prior DWI conviction offered as a predicate offense at sentencing was not tainted by Dennis's misconduct.

The June 29, 2018 letter interpreted the November 28, 2017 supplemental order. It instructs prosecutors that "[t]he only definitive way to determine whether or not Sergeant Dennis calibrated the Alcotest instrument used to take a breath sample from a defendant is to obtain the relevant calibration documents" and to produce that documentary evidence in discovery and at trial to establish that a predicate DWI conviction was not tainted by Dennis's falsification of calibration records.

At the conclusion of its opinion in Cassidy, issued prior to the start of defendant's trial, the Court stated that "we lift the stay on all pending cases so that deliberations may commence on whether and how those cases should proceed." 235 N.J. at 498. In addition, the Court directed the State to "notify all affected defendants of our decision that breath test results produced by Alcotest machines not" properly calibrated by Dennis "are inadmissible, so that they may take appropriate action." Ibid.

Because the Supreme Court vacated the November 2, 2017 stay, the November 28, 2017 supplemental order necessarily has been vacated as well. Thus, we do not view Judge Lisa's directive to prosecutors to produce documentary evidence to prove Dennis was not involved in a prior DWI conviction to remain in effect. The June 29, 2018 letter, which interprets the November 28, 2017 supplemental order, also appears to no longer apply.

The record before us is bereft of evidence as to the procedures presently employed to prove that a prior DWI conviction was not tainted by Dennis. In January 2019, the Court appointed the Hon. Robert A. Fall, J.A.D. (retired and t/a on recall) "as the special master with judicial authority . . . to make judicial and administrative decisions relating to adjudicated cases in which evidential breath samples were procured using Alcotest machines calibrated" by Dennis. A July 25, 2019 order of the Court appoints three additional retired judges to sit as municipal court judges to resolve matters affected by the Cassidy decision. The record contains no evidence with respect to whether those judges continue to require the State to produce documentary evidence that a prior DWI conviction was not tainted by Dennis's misconduct, have instituted a different procedure for that purpose, or have accepted, as argued by the State, that the Attorney General's website contains a definitive list of the DWI convictions called into question by Dennis's falsification of calibration records.

Nor is there any evidence in the record that the Attorney General has issued a directive or written instructions superseding the June 29, 2018 letter. While the municipal prosecutor informed the court that the letter had "been supplanted by the new protocol that's been implemented or that's going to be implemented," he did not identify any written document setting forth such a

superseding protocol. In support of his argument, he relied on a hearsay statement of another government official that the way a defendant "knows" his prior DWI conviction was called into question by Cassidy is that he received a notice from the State to that effect. This hearsay statement, even if admissible as evidence, does not establish the existence of a protocol for proving that a predicate DWI conviction was not tainted by Dennis. At best, the statement establishes that the State maintains a list of defendants who have been notified that the prior DWI conviction may be invalid under Cassidy.

In the absence of an order from the Supreme Court or a written directive from the Cassidy special master establishing procedures for proving beyond a reasonable doubt that a prior DWI conviction was not tainted by Dennis's misconduct, we review the record established in this case to determine the sufficiency of the State's proof on that point. We conclude the State has not eliminated reasonable doubt regarding the validity of defendant's 2012 DWI conviction.

The municipal prosecutor relied on what he described as a list on the Attorney General's website of defendants notified by the State that their prior DWI convictions were subject to review under Cassidy for two propositions: (1) that defendant's 2012 DWI conviction was not tainted by Dennis because defendant's name was not on the list; and (2) Dennis's misconduct did not

affect any DWI convictions arising from Camden County. Both the municipal court and the Law Division accepted the municipal prosecutor's representations as proof of both propositions.

We find this to constitute error. The record contains no evidence with respect to how the Attorney General's list was compiled and whether it definitively includes all DWI convictions tainted by Dennis's malfeasance. A notice issued by the judiciary raises doubt about the comprehensive nature of the list. The judiciary's Cassidy website, of which we take judicial notice, N.J.R.E. 201, states that although "notices have been sent to all [defendants] eligible" to have a prior DWI conviction reviewed under Cassidy, "[y]ou may be eligible even if you did not get a notice . . . ." New Jersey Courts: Cassidy DWI Cases, https://www.njcourts.gov/courts/mcs/cassidy.html (last visited Apr. 8, 2022). This is an acknowledgement by the judiciary that the list of defendants who received a Cassidy notice from the State is not definitive.

Moreover, two Notices to the Bar issued by the Acting Administrative Director of the Courts, of which we take judicial notice, cast doubt on the proposition that Dennis's misconduct did not affect any DWI conviction arising from Camden County. In a December 6, 2017 Notice to the Bar, the Acting Director stated with respect to cases affected by Dennis's falsification of records, that "[a]lthough most of these cases were filed in five counties

(Middlesex, Monmouth, Ocean, Somerset and Union Counties), there have been cases in twelve counties total." Notice to the Bar, "Orders by Judge Lisa as Special Master in State v. Eileen Cassidy Staying Certain Alcotest-Related DWI Cases" (Dec. 6, 2017) (emphasis added). In addition, in a July 22, 2021 Notice to the Bar, the Acting Director stated that more than 13,000 DWI convictions were eligible for review under Cassidy, "with most of those cases in four counties (Middlesex, Monmouth, Somerset, Union)." Notice to the Bar and Public, "Review of DWI Convictions Involving Not Properly Calibrated Equipment (State v. Cassidy) – Website to Facilitate Submission of Requests to Review a DWI Conviction" (July 22, 2021) (emphasis added). These notices acknowledge that Dennis's misconduct affected DWI convictions in counties beyond Middlesex, Monmouth, Ocean, Somerset, and Union Counties, which are those most commonly associated with his malfeasance.

There is, therefore, reasonable doubt with respect to whether defendant's 2012 DWI conviction was based on false calibration records executed by Dennis. We do not foreclose the possibility that a more robust record in a future case may establish beyond a reasonable doubt that the State had identified every DWI conviction possibly tainted by Dennis's misconduct, provided notice to the defendant in each of those cases, and compiled a record of each such notification. If so, such a list might well constitute evidence that

a prior DWI conviction was not tainted by Dennis and can be used as a predicate to enhance a sentence for a subsequent DWI conviction. That record was not compiled here.

We note that when followed, the approach in place under Judge Lisa's supplemental order provided definitive proof that a prior DWI conviction was not affected by Dennis's misconduct. While this approach may be less convenient and efficient for the State than reliance on a list of defendants provided Cassidy notice, the definite nature of which has not been proven, the burden of Dennis's malfeasance as a law enforcement officer falls on the State. Where the State seeks to impose an enhanced sentence, it cannot escape on the grounds of convenience and expediency its obligation to prove that the prior conviction on which that enhanced sentence is predicated was not tainted by the previously established misconduct of a police officer.

Defendant's conviction is affirmed. The sentence imposed on defendant is vacated and the matter is remanded for resentencing as a first offense. We do not retain jurisdiction.