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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4608-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELLIOTT BATES, d/b/a
E.B. EXCAVATING,

Defendant-Appellant.

Submitted May 17, 2017 – Decided July 20, 2017

Before Judges Fuentes and Farrington.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Municipal Appeal No. 16-014.

Elliott Bates, appellant pro se.

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Mary R.
Juliano, Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant Elliot Bates was convicted in the Howell Municipal
Court of operating a commercial vehicle with a gross weight in
excess of the weight limitation permitted by the certificate of

registration for the vehicle, including load or contents. N.J.S.A. 39:3-20e. The municipal court imposed a \$106 fine and \$33 court costs. Defendant appealed to the Law Division pursuant to Rule 3:23-2, seeking a de novo review of his municipal court conviction. The matter came before Superior Court Judge Honora O'Brien Kilgallen on June 22, 2016. After reviewing de novo the record developed before the municipal court, Judge O'Brien Kilgallen found defendant guilty of violating N.J.S.A. 39:3-20e.

With respect to the sentence, Judge O'Brien Kilgallen noted that the \$106 fine imposed by the municipal court was not permitted under the clear language in N.J.S.A. 39:3-20e, which requires the imposition of a minimum fine of \$500 "plus an amount equal to \$100 for each 1,000 pounds or fractional portion of 1,000 pounds of weight in excess of the weight limitation permitted by the certificate of registration for that vehicle or combination of vehicles." Ibid. As a threshold issue, Judge O'Brien Kilgallen recognized that ordinarily, a defendant "should not, by virtue of having filed an appeal, be subjected to a greater sentence than he would have incurred had he not filed an appeal." State v. Eckert, 410 N.J. Super. 389, 407 (App. Div. 2009) (citing State v. De Bonis, 58 N.J. 182, 188-89 (1971)). However "where the sentence imposed in the first instance was illegal, a defendant

has no basis to argue that imposition of a harsher sentence on appeal is prohibited." Ibid.

Applying the method provided in N.J.S.A. 39:3-20e for calculating the amount of the fine, Judge O'Brien Kilgallen made the following findings:

The defendant was found to be 900 lbs. in excess of the weight permitted by the certificate of registration. This equates to a fractional charge of \$90 on top of the \$500 base penalty.

Therefore the defendant is sentenced to pay \$590 for his violation of [N.J.S.A.] 39:3-20e, and he will also have to pay the originally imposed court costs of \$33.

Defendant now appeals raising the following argument.

CLAIMANTS [SIC] CHARGE FOR AN OVERWEIGHT VEHICLE AND REGISTRATION BY USE OF TWO PORTABLE SCALES DESPITE CERTIFIED WEIGHT TICKET FROM LERTCH'S RECYCLING CENTER ON BELMAR BLVD. IN WALL TWP NEW JERSEY AND [N.J.A.C.] 13:47b-1.9 (B) WAS IMPROPER.

We reject this argument and affirm substantially for the reasons expressed by Judge O'Brien Kilgallen in her oral decision delivered from the bench on June 22, 2016. We gather the following facts from the record developed before the municipal court.

At all times relevant to this case Stephen Napoli was a New Jersey State Trooper and a member of the Commercial Vehicle Inspection Unit. On November 2, 2015, Napoli was patrolling the Route 9 area in Howell Township and making random inspections when

he first saw defendant's dump truck that was stopped at a traffic light on Strickland Road. Napoli noticed the truck's lift axle ascended when it made a left hand turn onto Route 9 South. Napoli followed the truck for approximately a mile and confirmed that the truck's left axle remained raised. Based on his training and experience, Napoli testified that "it could be dangerous" if the lift axle does descend after a turn and the truck is overburdened.

Napoli directed defendant to pull into a parking lot off of Route 9 South to conduct a commercial motor vehicle inspection of the truck. Defendant produced all of the legally required credentials, including a commercial vehicle registration showing the dump truck was registered to carry 80,000 pounds. Defendant also produced a weight bill with a time stamped printout which reflected the weight of the truck after it was loaded at a quarry. However, this document did not reflect the weight of the truck when it left the quarry. Defendant also produced a weight bill from Lertch Recycling Company, which showed defendant's truck weighed 79,780 pounds at 9:44 a.m. on November 2, 2015.

As a part of his equipment, Napoli carried four scales which had been certified by the New Jersey Superintendent of Weights and Measures. These certifications are maintained by the State Police at its Princeton Barracks and were admitted into evidence without

objection.¹ Napoli used these scales to weigh defendant's truck. He testified that the truck weighed 80,900 pounds at the time, which was 900 pounds in excess of its authorized maximum weight capacity. Defendant admitted that Napoli weighed the truck one hour after the 9:44 a.m. weight bill from Lertch Recycling Company.

Defendant argues here, as he did before the Law Division, that the State's proof cannot support a finding he violated N.J.S.A. 39:3-20e because a regulation issued by the Superintendent of Weights and Measures expressly prohibits the use of portable self-contained vehicle scales. This regulation states:

Except as hereinafter provided, the use of a portable self-contained vehicle scale is hereby prohibited for determinations of weight for all commercial purposes.

[N.J.A.C. 13:47B-1.9b]

In response, the State argues defendant misunderstands the scope of this regulatory prohibition. According to the State, the regulation does not apply here because the Legislature expressly authorized the State Police to carry out the type of enforcement action Trooper Napoli conducted here.

Officers of the Division of State Police shall have the exclusive authority to conduct random

¹ As he did in this appeal, defendant represented himself when the matter was tried before the municipal court and when the matter was tried de novo before the Law Division.

roadside examinations for the purpose of determining whether size or weight is in excess of that permitted in this Title, and officers of the Division of State Police shall have the authority, with or without probable cause to believe that the size or weight is in excess of that permitted, to require the driver, operator, owner, lessee or bailee, to stop, drive or otherwise move to a location for measurement or weighing and submit the vehicle or combination of vehicles, including load or contents, to measurement or weighing[.]

[N.J.S.A. 39:3-84.3a(2) (emphasis added).]

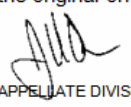
Judge O'Brien Kilgallen agreed with the State's position. We do as well. The plain language of the statute authorizes a State Police Trooper to inspect commercial vehicles on the road to require these vehicles to "move to a location for measurement or weighing." Ibid. These random fields inspections permit the State Police Trooper to determine whether the safety of a commercial vehicle has been compromised because the vehicle carries a load that exceeds its registered weight capacity. These inspections cannot be done without the use of portable scales.

We caution, however, that our holding does not impugn the validity of N.J.A.C. 13:47B-1.9b. We merely hold that the prohibition of portable self-contained vehicle scales in N.J.A.C. 13:47B-1.9b does not apply to the State Police in the context of carrying out the enforcement responsibilities in N.J.S.A. 39:3-

84.3a(2). Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION