SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5066-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH WATSON,

Defendant-Appellant.

Argued April 25, 2017 – Decided September 21, 2017

Before Judges Espinosa and Suter.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Municipal Appeal No. 5048.

John Vincent Saykanic argued the cause for appellant.

Robert J. Wisse, Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Mr. Wisse, of counsel and on the brief).

PER CURIAM

Defendant Joseph Watson was convicted of driving while under the influence of alcohol (DWI), N.J.S.A. 39:4-50; failure to stop at a stop sign, N.J.S.A. 39:4-144; and having an open container in his vehicle, N.J.S.A. 39:4-51(a). In his appeal, he argues all his convictions should be reversed because his right to a speedy trial was violated, and he further challenges his DWI conviction. We affirm.

I.

Passaic County Sheriff's Officer Edward Shanley and Dr. Richard Saperstein, Ph.D., were the only witnesses at the municipal court trial conducted in April 2008.[1] We summarize their testimony as follows.

On the evening of November 22, 2007, Officer Shanley observed a green 2000 Dodge van cross the intersection "at a high rate of speed," which he estimated to be approximately 30 to 35 miles per hour in a 25 mile per hour speed limit area.

Officer Shanley followed the van, losing sight of it for a few moments, and caught up with the vehicle as it failed to stop for a red light. He later observed the van make a wide left turn

[1] State v. Chun, 194 N.J. 54 (2008), cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008) was decided after defendant's arrest and before his trial.

without coming to a full and complete stop at a stop sign. Officer Shanley turned on his lights and siren and pulled the van over.

Officer Shanley testified regarding his observations of the driver, defendant Joseph Watson. He "smelled a strong odor of an alcoholic beverage," believed defendant's eyes were "bloodshot and watery" and his speech was "slow [and] slurred." Defendant admitted he had "[a] couple drinks." Officer Shanley observed a clear plastic cup in the cup holder with a "copper colored beverage" in it, which defendant told Officer Shanley was his friend's drink. Officer Shanley also observed an open bottle of vodka in a box behind the driver's seat.

Officer Shanley asked defendant to step out of the vehicle to conduct psycho-physical tests. He first asked defendant if he was injured; defendant responded he was not. He then explained and demonstrated the nine-step walk and turn test and asked defendant to perform the test. Officer Shanley testified defendant was instructed to leave his hands at his sides, but defendant "used his arms for balance," raising them "over six inches." Defendant also turned incorrectly, stopped to steady himself, and took the wrong number of steps. Officer Shanley also explained and demonstrated the one-legged stand test. Again, defendant "used his arms for balance and he sway[ed] while he was balancing."

Officer Shanley placed defendant under arrest and transported him to the Passaic County Sheriff's Department, approximately fifteen minutes away. Officer Shanley was able to detect an odor of alcohol coming from the rear of his vehicle where defendant was located.

At the station, defendant was placed in the DWI cellblock. Officer Shanley observed him for thirty minutes, looking for signs he was sick, burping or regurgitating and saw none. After the thirty-minute observation period, Officer Shanley "read [defendant] the standard statement for operators of motor vehicles to see if he was willing to take the Alcotest and [defendant] said yes."

Officer Shanley, who was certified to use the Alcotest, explained how to operate the machine.[2] In this case, defendant gave eight separate breath samples, which produced two valid results. Officer Shanley placed a new mouthpiece after each sample. The first result showed a .082 and .082%.[3] The second

[2] Testimony was also presented regarding the periodic examination of the Alcotest, its calibration record, and that there was a calibration certificate for each part of the test, which included a control test and linearity test. Dr. Thomas A. Vertel, Ph.D., the forensic laboratory director for the Division of the State Police, certified the simulator solutions for the Alcotest.

[3] The results include an infrared technology (IR) and electric chemical (ER) results, which is why it has two numbers.

result was .089 and .089%. The Alcotest result was a blood alcohol concentration (BAC) of 0.08%.

During cross-examination, Officer Shanley testified defendant stated he had a cold when asked if he was ill. He also testified he read defendant his Miranda[4] rights before questioning him further about what he had to drink and what he ate that day. Officer Shanley testified defendant stated he had two alcoholic drinks, but could not recall what time during the day. Defendant also said he ate turkey that day.

Dr. Saperstein was stipulated to be an expert as to the operation and administration of the testing of the Alcotest and testified on behalf of defendant. He opined that, within a reasonable degree of scientific probability, defendant's true BAC was below 0.08%.

Dr. Saperstein testified that since defendant had a cold, if his body temperature was slightly raised, this would cause a change in the breath results. Dr. Saperstein also noted the calibration certificate for the Alcotest was .098 percent, but the machine actually tested .10 percent. Therefore, he stated the machine was testing slightly higher than what the calibration certificate stated. Dr. Saperstein also cited a general comment made by the

[4] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Special Master in Chun that "there is analytical error that could be in the range of .004 to .005." Dr. Saperstein concluded that since the Supreme Court did not address this specific issue, "we can only assume that they accepted this finding by" the Special Master. Dr. Saperstein conceded, however, "[a]ll these errors are not humongous," and stated there was a "reasonable probability that the defendant's true alcohol level could have been slightly below [0.08%]."

The municipal court judge found Officer Shanley's testimony credible, noting his "demeanor as well as the objective reasonableness of his testimony." He noted Officer Shanley had eighteen years' experience as a police officer and had "worked as a bartender for [twelve] years."

The municipal court judge then discussed his findings pertaining to Dr. Saperstein. The judge found Chun disposed of the temperature issue. As to the argument that there was analytical error, the court found the Supreme Court "recognized" this machine was "an accurate device, scientifically accurate to measure the blood alcohol of defendant, or breath alcohol of the defendant."

Furthermore, the municipal court judge found there was "ample evidence of the defendant being under the influence," based on Officer Shanley's sensory impressions, defendant's "erratic

driving," and defendant's poor performance in the two field sobriety tests.

The municipal court judge found defendant guilty of failing to stop at a stop sign and the open container violation. He merged the stop sign violation with the DWI charge and sentenced defendant to a three-month license suspension, twelve hours at the I.D.R.C., $400 fine, $33 courts costs, $50 VCCB penalty, $200 D.W.I. surcharge and $75 Safe Neighborhood Services Fund. The judge imposed a fine and court costs for the open container violation. The sentence was stayed for twenty days pending any appeal.

Defendant appealed to the Law Division. Among the arguments raised, he challenged the Alcotest reading on several grounds and contended his trial counsel was ineffective because he failed to call him as a witness.

The Law Division judge remanded the matter to municipal court to permit defendant to testify and to supplement the record regarding the use of cell phones at the time of the Alcotest. The remand proceedings were conducted on March 31 and June 29, 2009.

In the remand proceedings, defendant provided the following version of events. He was traveling at a "normal speed" when he observed Officer Shanley, who then began following him. He stopped at the red light and the stop sign in question.

After defendant stepped out of the vehicle, Officer Shanley asked him whether he had been drinking. Defendant told Officer Shanley he had punch earlier in the day, but did not tell him there was Grey Goose in it or that he had a couple of drinks. He also told Officer Shanley he was very sick and had taken Nyquil that day.

Describing the sobriety tests administered to him, defendant testified Officer Shanley never administered a one-legged stand test and stated his difficulty in following Officer Shanley's instructions to follow a pen from left to right with his eyes and keep his head straight was due to his Bell's palsy.[5]

As to the nine-step walk, defendant testified Officer Shanley told him to take nine steps forward, turn around, and take nine steps back. According to defendant, there were "a lot of leaves on the ground." He mentioned this to Officer Shanley, but all he did was brush the leaves away with his foot. The leaves were not cleared and defendant had to be careful not to step on the leaves and slip. He also testified the driveway was uneven and Officer Shanley did not instruct him on how to complete the steps. However, defendant admitted on cross-examination that the leaves

[5] The State did not present evidence about a Horizontal Gaze Nystagmus (HGN) test.

on the ground did not affect the nine-step test and that he did it "military style" and "did the test perfect."

According to defendant, Officer Shanley then asked to search the van, but defendant told him he could not search without a warrant. When Officer Shanley asked what was in the box in the back seat of the car, defendant told him it was someone else's empty bottle. Defendant testified that Officer Shanley did not read him his Miranda rights.

Defendant testified that when he was at the station, he had to blow into a breathalyzer machine. He testified he told Officer Shanley about his Bell's palsy and that it was difficult for him to do that, and then attempted to comply. He blew into the machine two times, was removed into another room to complete paperwork for five to ten minutes, and then came back to the same room to continue.

Defendant testified there was a cell phone in the testing room, "right by the machine." The cell phone was on and he stated "[i]t rang a couple of times" when he was blowing into the machine. Defendant called his then girlfriend and left her a voicemail to call him back because he was at the station. Defendant's cell phone records reflect outgoing calls to his girlfriend's number at 7:53 p.m. (five minutes in duration), 8:21 p.m. (one minute), 8:36 p.m. (two minutes), 8:44 p.m. (three minutes), 8:47 p.m. (one

minute), and 9:37 p.m. (nine minutes). There were also incoming calls at 8:48 p.m. (two minutes), and 8:55 p.m. (one minute).

Defendant testified he was on his cell phone several times around the machine and at one point, he had an officer use his cell phone to give his girlfriend instructions on how to get to the station.

Defendant explained he was having a difficult time blowing into the machine because his "lips and jaw [did not] lock [him] into the machine like that, and it's hard for [him] to blow a whistle" due to his Bell's palsy. He also testified Officer Shanley did not change the mouthpiece on the machine each time defendant blew into it or wear rubber gloves when administering the test. On cross-examination, he modified his answer, stating Officer Shanley changed the mouthpiece "a few times, not every time." Defendant testified Officer Shanley asked if he was sick after the breathalyzer examination was over and defendant stated that he was "very sick," with a "cold and a bad fever."

During cross-examination, defendant testified he used his cell phone right after he finished blowing into the machine for the last time, but then he stated he was "not sure" when he used it, but it was "real close."

The municipal court judge set forth his findings, including his credibility findings, in a letter dated November 12, 2009, to

the Law Division judge. After summarizing defendant's testimony, the municipal court judge stated he found defendant's testimony "to be largely incredible." He noted he had previously found Officer Shanley's testimony to be credible and that, "[p]ractically all of the defendant's testimony is the complete opposite of what the Sheriff's officer testified to."

The judge stated,

> If the Court were to believe the defendant's testimony, Officer Shanley, an 18 year veteran of the Passaic County Sheriff's Department would have had to have grossly deviated from his duties and told the Court a wild story regarding the defendant's driving performance and on the field sobriety tests as well as the administration of the Alcotest . . . .

He specifically found "the defendant's claims as to the manner in which Officer Shanley processed his arrest to be incredible." He noted defendant's account that he gave two breath samples, was taken to an adjoining room and questioned and returned to the Alcotest room to give his third to eighth breath samples was refuted by the Alcohol Influence Report (AIR).

The municipal court judge rejected defendant's claim he was never read his Miranda rights as "completely incredible." The judge also rejected his claim he never completed a one-legged test, accepting, instead, Officer Shanley's testimony, which was documented in his police report.

As to defendant's testimony that his cell phone was being used during the Alcotest, the phone records indicate that the calls stopped between 7:53 p.m. and 8:21 p.m., the times that the Alcotest was being performed. The municipal court judge concluded the officers had defendant turn off his cell phone during that time period.

The municipal appeal from this decision was argued in the Law Division on June 28, 2010. The Law Division judge reserved decision and stated he would write an opinion.

Four and one-half years later, on February 12, 2015, after all municipal appeals were assigned to a retired judge who was on recall, a status conference was conducted. Substituted defense counsel attempted to reconstruct the procedural history for the judge, who stated he would review the file and render a decision. The judge discussed with counsel what should be included in the file. A transcript of the oral argument before the prior judge had not been ordered and so, had to be ordered for the judge to review. After defense counsel stated two briefs had been filed for the defense, the judge asked if further briefing was required. Defense counsel answered, "No," and added he believed he had argued the matter adequately before the prior judge. The only qualification to his reply that additional briefing was unnecessary was a reference to the possibility that a new case

might have come up in the intervening time since he had argued the case. Nonetheless, defendant filed a supplemental brief, dated May 19, 2015, in which he argued for the first time that the delay in his case violated his right to a speedy trial.

The Law Division judge rendered his decision on June 9, 2015. The Law Division judge considered the municipal court judge's credibility determinations and further found Officer Shanley was a credible witness, "objectively reasonable and consistent." As to defendant, the judge found that his testimony "appeared to be prepared in a sense that it contradicted nearly every significant fact testified to by Officer Shanley."

The Law Division judge found the Alcotest results were admissible as the State proved by clear and convincing evidence that the device was in working order. Citing Chun, the Law Division judge also found the three concerns Dr. Saperstein noted in his testimony were "without merit." In addition, the Law Division judge found Officer Shanley's testimony as to defendant driving in an "erratic manner," his sensory impressions, and defendant's performance on field sobriety tests established beyond a reasonable doubt that defendant was operating a motor vehicle under the influence of alcohol. The Law Division judge found defendant guilty of DWI, failing to stop at the stop sign and the open container violation. The judge imposed the same penalties

as had been imposed in municipal court and continued the stay pending appeal.

The judge also addressed the speedy trial argument raised in defendant's supplemental brief. He balanced the factors set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), adopted by our Supreme Court in State v. Gallegan, 117 N.J. 345, 355 (1989), and concluded defendant's constitutional rights were not violated.

Defendant presents the following arguments for our consideration in his appeal:

> POINT I
>
> THE 2,756 DAY (91 MONTHS AND NEARLY EIGHT-YEAR) DELAY FROM THE DATE OF ARREST TO THE LAW DIVISION DECISION VIOLATES DEFENDANT'S SIXTH AMENDMENT AND STATE COURT RIGHT TO A SPEEDY TRIAL.
>
> POINT II
>
> THE DWI CONVICTION MUST BE REVERSED AND A JUDGMENT OF ACQUITTAL ENTERED SINCE THE ALCOTEST READING OF 0.08% IS UNRELIABLE AND MUST BE RULED IN-ADMISSIBLE EVIDENCE SINCE AN ESSENTIAL REQUIREMENT AS TO THE RELIABILITY OF THE ALCOTEST WAS NOT ADHERED TO; NAMELY, THE DEFENDANT HAD HIS CELL PHONE ON HIM AND MADE AND RECEIVED SEVERAL CALLS WHILE GIVING THE BREATH SAMPLES.
>
> POINT III
>
> THE DWI CONVICTION MUST BE REVERSED AND A JUDGMENT OF ACQUITTAL ENTERED SINCE THE ALCOTEST READINGS OF 0.08% IS UNRELIABLE SINCE

AN ESSENTIAL REQUIREMENT AS TO THE RELIABILITY OF THE ALCOTEST WAS NOT ADHERED TO; NAMELY, THE DEFENDANT WAS NOT PROPERLY INSTRUCTED AS TO HOW TO BLOW INTO THE ALCOTEST MACHINE (AND THE DEFENDANT SUFFERS FROM BELL'S PALSY WHICH IMPEDES HIS ABILITY TO BLOW).

POINT IV

THE DEFENSE EXPERT DR. RICHARD SAFERSTEIN OPINED THAT, WITHIN A REASONABLE DEGREE OF SCIENTIFIC PROBABILITY, THE DEFENDANT'S TRUE BLOOD ALCOHOL CONCENTRATION (BAC) AT THE TIME OF THE TEST WAS 0.07% MANDATING A REVERSAL OF THE DWI CONVICTION.

POINT V

THE ALCOTEST RESULTS MUST BE SUPPRESSED AND THE DWI CONVICTION REVERSED SINCE THE STATE DID NOT ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT DID NOT INGEST, REGURGITATE OR PLACE ANYTHING IN HIS MOUTH FOR A PERIOD OF AT LEAST TWENTY MINUTES PRIOR TO THE ADMINISTRATION OF THE ALCOTEST.

POINT VI

THE DWI CONVICTION MUST BE REVERSED AND A JUDGMENT OF ACQUITTAL ENTERED SINCE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT OPERATED A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL IN VIOLATION OF THE DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS AND STATE CONSTITUTIONAL.

II.

The question whether defendant's constitutional right to a speedy trial was violated is a legal issue and therefore subject to de novo review. See, State v. Handy, 206 N.J. 39, 45 (2011).

In Barker, supra, 407 U.S. at 530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117, the United States Supreme Court established a balancing test that continues to govern the evaluation of claims of speedy trial violations. Under this test, the trial court must assess four non-exclusive factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of [the right to speedy trial], and prejudice to the defendant." Ibid. This four-factor test must be used to evaluate all claims of a denial of a "constitutional right to a speedy trial in all criminal and quasi-criminal matters," State v. Cahill, 213 N.J. 253, 258 (2013), including municipal prosecutions. See State v. Berezansky, 386 N.J. Super. 84 (App. Div. 2006), certif. granted, 191 N.J. 317 (2007), appeal dismissed, 196 N.J. 82 (2008).

We turn first to the length of delay. As our Supreme Court has instructed, a delay of more than one year is sufficient to warrant consideration of the remaining Barker factors, Cahill, supra, 213 N.J. at 266. The delay here is clearly sufficient to require consideration of the remaining Barker factors.

Defendant argues the delay from the date of his arrest to the date of the Law Division decision that determined his guilt violated his rights. He compares this nearly eight-year delay to cases in which shorter delays between arrest and trial in the municipal court resulted in the dismissal of charges. This

argument ignores the fact that during the course of those eight years, defendant had: a trial in municipal court, an appeal to the Law Division, proceedings in the municipal court pursuant to the remand, a second appeal, and oral argument of that appeal in the Law Division. He has not argued that the delay from arrest to trial in municipal court violated his constitutional rights. The extraordinary five-year delay occurred between the time the second appeal was argued in the Law Division and the final decision by a different Law Division judge.[6]

The second factor to be addressed is the reason for the delay. Again, defendant directs his argument to the five-year delay. He contends the State bears responsibility for prosecuting cases in a timely fashion and because the delay was due to the State's negligence in failing to do so, the delay must be weighed against the State. The State counters that there is no evidence that there was any intentional delay by either the prosecution or the State —- and defendant does not claim to the contrary.

The trial judge found the cause for the delay was "administrative." He noted the matter was originally assigned to

[6] The Court of Appeals for the Third Circuit has recognized that "the [Federal] Due Process Clause guarantees a reasonably speedy appeal[.]" Simmons v. Beyer, 44 F.3d 1160, 1169 (3d. Cir.) (citation and internal quotations omitted), cert. denied, 516 U.S. 905, 116 S. Ct. 271, 133 L. Ed. 2d 192 (1995).

another judge and assigned to him when he returned on recall and that he was out for several months due to surgery.

The third factor concerns when defendant asserted his right to a speedy resolution of his case. Although "[a] defendant does not have an obligation to assert his right to a speedy trial," Cahill, supra, 213 N.J. at 266, "'[w]hether and how a defendant asserts his right is closely related' to the length of the delay, the reason for the delay, and any prejudice suffered by the defendant." Ibid. (quoting Barker, supra, 407 U.S. at 531, 92 S. Ct. at 2192, 33 L.Ed. 2d at 117). In light of this relationship, "the assertion of a right to a speedy trial in the face of continuing delays is a factor entitled to strong weight when determining whether the state has violated the right." Ibid.

Defendant did not assert his right to a speedy trial, or more accurately, a right to a speedy resolution of his appeal, until May 2015, seven and one-half years after his arrest. It is entirely understandable that he might not be eager to seek a resolution of his appeal since the sentence was stayed pending appeal and the loss of license that would result from an affirmance would have a negative effect on his employment as a New Jersey Transit bus driver. But it is also reasonable to infer, as the State argues, that in a case where the delay was attributable at

worst to negligence, the delay might have been shortened if defendant had made a demand earlier.

Finally, we turn to the fourth factor, prejudice to defendant. In addressing prejudice to defendant, we assess three interests: prevention of oppressive pretrial incarceration, minimization of defendant's anxiety concerns and whether the defense has been impaired by the delay. See Barker, supra, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118; Cahill, supra, 213 N.J. at 266.

Defendant does not contend his defense was impaired as a result of the delay. Indeed, all fact-finding in the initial trial and the remand proceeding was long completed. Instead, he cites enduring uncertainty as the charge hung over his head, the expenses caused by the litigation, an inability to plan his life and social events and claims he suffered a deterioration in his health. As part of his contention that his ability to plan his life was inhibited, defendant states he had to remain available for court appearances. However, he has not identified any court appearances that required his attendance during the period from oral argument on his appeal to the court's decision.

Plainly, two of the three interests to be addressed in assessing prejudice are not applicable here. There was no incarceration and no impairment of the defense. We agree that, generally, some measure of personal unease would be caused by a

lingering appeal and do not doubt that defendant experienced this during the delay. But, this is substantially mitigated by the fact that defendant's sentence was stayed pending appeal, permitting defendant to continue his employment. The hardship of waiting for a disposition, alone, "is insufficient to constitute meaningful prejudice." State v. Misurella, 421 N.J. Super. 538, 546 (App. Div. 2011) (quoting State v. Le Furge, 222 N.J. Super. 92, 99-100 (App. Div. 1988)).

In sum, although the delay from oral argument of the municipal appeal to decision by the Law Division was inordinate, there was no intentional delay by the State or the courts, defendant's assertion of his right came more than seven years after his arrest, and there has been no appreciable prejudice to defendant. Balancing these factors, we conclude the delay here did not deprive defendant of any constitutional right.

III.

In Points II, III, IV and V, defendant challenges the Alcotest result as unreliable and argues that, as a result, his DWI conviction must be reversed. Defendant does not argue the required foundational documents were not submitted, see Chun, supra, 194 N.J. at 142-48, that Officer Shanley was not certified to operate the device or that he lacked the proper training to do so. See id. at 134.

When the Law Division conducts a trial de novo on the record developed in the municipal court, our appellate review is limited. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005). "The Law Division judge was bound to give 'due, although not necessarily controlling, regard to the opportunity of a [municipal court judge] to judge the credibility of the witnesses,'" ibid. (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 157 (1964)), as the Law Division judge is not in a position to observe "'the character and demeanor of witnesses and common human experience that are not transmitted by the record.'" See ibid. (quoting State v. Locurto, 157 N.J. 463, 474 (1999)).

"Our review is limited to determining whether there is sufficient credible evidence present in the record to support the findings of the Law Division judge, not the municipal court." Ibid. (citing Johnson, supra, 42 N.J. at 161-62). Moreover, "[u]nder the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Locurto, supra, 157 N.J. at 474. In this case, the Law Division judge clearly understood that his role was to make independent findings, as they were ultimately reflected in his oral opinion. We therefore defer to those findings. However, no such deference is owed to the Law Division

judge or the municipal court with respect to legal determinations or conclusions reached on the basis of the facts. See Handy, supra, 206 N.J. at 45.

A.

Defendant's first challenge to the reliability of the Alcotest result is based upon a factual premise that was rejected by the municipal court and Law Division. He states the result is unreliable because his cell phone was on him and used while he gave breath samples.[7]

The State presented testimony from Officer Shanley that refuted defendant's claim. Officer Shanley testified that the standard procedure regarding communication devices in the Alcotest room is "[n]o cell phones or radios in that area, no hand held radios in that area," and he took steps to assure that there would be no devices in the area.

The municipal court judge found Officer Shanley's testimony credible. The Law Division also found his testimony credible as it was "objectively reasonable and consistent."

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[7] In Chun, supra, 194 N.J. at 80, the Supreme Court stated the operator of the Alcotest must "attach[] a new, disposable mouthpiece and remove[] all cell phones and portable electronic devices from the testing area." However, the Court also noted "there is ample support for the finding that the Alcotest is well-shielded from the impact of any potential RFI that might otherwise affect the reported results or limit our confidence in the accuracy of the test results." Id. at 89.

The Law Division judge rejected defendant's argument that he made and received phone calls while providing the breath samples as grounds for rendering the Alcotest results inadmissible. He relied upon findings in Chun that "there is ample support for the finding that the Alcotest is well-shielded from the impact of any potential RFI that might otherwise affect the reported results or limit our confidence in the accuracy of the test results." Chun, supra, 194 N.J. at 89. He also relied upon Officer Shanley's testimony regarding standard procedure for removing such devices from the test area and a comparison of the AIR with the cell phone records to support the conclusion no calls were placed while the results were obtained.

According to the AIR, the first ambient air blank test was performed at 8:02 p.m.; the first control test was at 8:03 p.m.; the next ambient air blank was performed at 8:04 p.m.; and the first breath test results were recorded at 8:06 p.m. The eighth and final breath test results were recorded at 8:20 p.m. According to defendant's cell phone records, there was a call made at 7:53 p.m., before any testing. Another call was made at 8:21 p.m. The Law Division judge concluded that "there were no telephone calls during the testing period." Although ambient air blank and control tests were performed at 8:21 p.m. and 8:22 p.m., the Law Division judge found that a telephone call placed during that time would

not invalidate the results obtained from the tests conducted prior to the call.

We therefore concur with the Law Division's conclusion that this argument lacks merit, based on Chun and the record.

B.

Defendant next argues the Alcotest result is unreliable because he was not properly instructed on how to blow into the Alcotest machine, adding that his Bell's Palsy impeded his ability to blow.[8] This argument lacks merit, in light of the findings by both the municipal court judge and the Law Division judge that Officer Shanley's testimony was credible and defendant's testimony regarding deviations in the procedure followed was incredible.

Officer Shanley testified he took eight samples from defendant and before each sample, "instruct[ed] him how to blow into the machine." The fact that two valid results were produced from the eight samples that were taken indicates the breath samples defendant provided were adequate.

The findings by the municipal court and Law Division judges are supported by the record and entitled to our deference.

[8] Defendant did not present any expert testimony that Bell's palsy affected the ability to blow into an Alcotest machine.

C.

Defendant also argues the Alcotest results must be suppressed because the State failed to establish by clear and convincing evidence that he did not ingest, regurgitate or place anything in his mouth for a period of at least twenty minutes prior to the test. We disagree.

The State must establish by clear and convincing evidence that during the twenty-minute period immediately before administering the Alcotest, "the test subject did not ingest, regurgitate or place anything in his mouth that could" compromise the test results. State v. Ugrovics, 410 N.J. Super. 482, 489-90 (App. Div. 2009) (citing Chun, supra, 194 N.J. at 140), certif. denied, 202 N.J. 346 (2010). The State can meet that burden through the testimony of "any competent witness who can so attest." Id. at 490.

Officer Shanley testified that defendant was placed in the D.W.I. cellblock, where he observed defendant for a half hour before taking him to conduct the Alcotest. This testimony, which was found to be credible, satisfied the State's burden. Defendant's argument that Ugrovics required the observer to be a competent witness other than the Alcotest operator lacks merit since the clear import of Ugrovics was to clarify that the competent witness may be someone other than the Alcotest operator.

D.

Defendant argues the expert testimony he presented demonstrated his true BAC at the time of the Alcotest was 0.07%, below the level for intoxication, rather than the Alcotest's BAC result. The Law Division judge considered Dr. Saperstein's testimony and noted that two of the concerns he identified, regarding the effect of body temperature on the BAC reading and that there is a .004 or a .005 margin of error in the machine, lacked merit in light of the Supreme Court's decision in Chun.

We agree with the Law Division's conclusions that these arguments are not viable based on the Court's decision in Chun. The Court acknowledged the debate regarding the effect of temperature on Alcotest results and concluded "the effect of breath temperature on BAC is theoretical at best, and that the effect, if any, is ameliorated" by safeguards that "effectively underestimate BAC." Chun, supra, 194 N.J. at 109.[9] Dr. Saperstein's opinion that the Alcotest result should be discounted because there is a .004 or a .005 margin of error in the machine is not tenable based upon the Court's conclusion that the Alcotest

[9] We note further there is no proof in the record, besides defendant's testimony, that he had a "fever." Both courts found defendant's testimony not credible.

device is sufficiently reliable to prove a per se violation of N.J.S.A. 39:4-50. Id. at 65, 90, 148.

The Law Division judge also noted Dr. Saperstein's concern regarding the solution for the .10 simulator having a concentration of .208 overlooked the results of control test, which refuted that theory.

There is ample support in the record for the Law Division judge's conclusion that there was clear and convincing evidence to support the admission of the Alcotest reading of .08% BAC into evidence.

IV.

Finally, defendant argues the State failed to prove he operated a motor vehicle while intoxicated beyond a reasonable doubt. Pursuant to N.J.S.A. 39:4-50(a), a person violates the statute of "driving while intoxicated," if he or she "operates a motor vehicle under the influence of intoxicating liquor . . . or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in defendant's blood[.]" As we have already determined, because defendant's challenges to the Alcotest results fail, that result was properly admitted and sufficient to establish his guilt.

However, Officer Shanley's testimony, found credible by both the municipal court judge and the Law Division judge, provided

independent proof that was sufficient to support defendant's DWI conviction.

Affirmed.