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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2875-09T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

KENNETH D. McCONNELL JR.,

Defendant-Respondent.

Submitted October 6, 2010 - Decided October 21, 2010

Before Judges Sapp-Peterson and Simonelli.

On appeal from Superior Court of New Jersey, Law Division, Warren County, Municipal Appeal No. A-08-09-Y15.

Thomas S. Ferguson, Warren County Prosecutor, attorney for appellant (Dit Mosco, Assistant Prosecutor, of counsel and on the brief).

Kenneth D. McConnell Jr., respondent pro se, has not filed a brief.

PER CURIAM

Defendant Kenneth McConnell Jr. was arrested and charged with driving while intoxicated (DWI), N.J.S.A. 39:4-50(a). This appeal concerns the admissibility of the results of an Alcotest administered to defendant in connection with this charge. Plaintiff State of New Jersey appeals from the December 4, 2009,

Law Division order suppressing the results of the Alcotest, and from the January 28, 2010, order denying its motion for reconsideration. We reverse the grant of defendant's motion to suppress, affirm his conviction, and remand for further proceedings.

On September 10, 2007, the Independence Township Police Department calibrated its Alcotest machine. On March 17, 2008, our Supreme Court decided State v. Chun, 194 N.J. 54, 153, cert. denied, ____ U.S. ____, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008), which requires the Alcotest machine to be calibrated every six months.

On May 15, 2008, defendant was arrested in Independence Township for suspected DWI and the police administered the Alcotest at the police station using a machine last calibrated on September 10, 2007. Defendant registered a blood alcohol content reading of .18 percent, and was charged with DWI.

Defendant filed a motion in the municipal court to suppress the results of the Alcotest for failure to calibrate the machine within six months of his test. Defendant did not dispute, nor does he dispute on appeal, that the machine was calibrated in accordance with the procedures in place on the date of calibration, the machine was in good working order at the time of his test, the operator was certified to administer and

properly administered the test, or the test result was accurate or generally admissible. The municipal court judge denied the motion, concluding that the language in Chun requiring calibration every six months was "precatory," and that the "[a]lgorithm suffices to compensate for any potential for fuel cell drift." Defendant then pled guilty to DWI, reserving his right to challenge the results of the Alcotest based solely on the lack of timely calibration. The municipal court judge suspended defendant's license for seven months, imposed the appropriate fine, penalty, fee, and surcharge, and required defendant to spend twelve hours in the Intoxicated Driver Resource Centers program. The municipal judge stayed the sentence pending appeal.

On appeal to the Law Division, the judge granted defendant's motion and suppressed the Alcotest evidence. The judge concluded that the Chun "Court intended for all Alcotest machines to be calibrated every six months" and that the Independence Police Department had two months from the Chun decision to do so. Thus, "any reading from the machine, accurate or not, must be suppressed as a matter of law." This appeal followed.

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 fact and conclusions of law based upon the evidentiary record of the municipal court. See 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, not the municipal court. Id. at 162; State v. Segars, 172 N.J. 481, 488 (2002). However, we afford no special deference to the Law Division's "interpretation of the law and the legal consequences that flow from established facts. . . ." Manalapan Realty, L.P v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Here, because the Law Division's judgment rested entirely on its interpretation of the Court's opinion in Chun, our scope of review is de novo, without affording such judgment any special deference.

Prior to Chun, Alcotest machines were calibrated annually. Chun, supra, 194 N.J. at 123. Although the Chun Court required semi-annual recalibration prospectively, it did not hold that Alcotest machines calibrated annually were scientifically unreliable, or that Alcotest results obtained from such machines were inadmissible. See id. at 124-25. To the contrary, in evaluating the Alcotest for the Court, "the Special Master found that a mathematical algorithm that corrects for fuel cell drift

did not undermine the reliability of [Alcotest] results" obtained prior to Chun. Id. at 88.

The decision to grant defendant's motion to suppress is reversed, defendant's DWI conviction is affirmed, and the matter is remanded to the Law Division for entry of the sentence imposed by the municipal court.