

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

STATE OF NEW JERSEY,

Plaintiff,

V.

GIOVANNI COPPOLA,

Defendant,

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY - LAW DIVISION

APPEAL NO. 49-08

ORDER & OPINION

APPROVED FOR PUBLICATION

JULY 13, 2009

COMMITTEE ON OPINIONS

Decided: April 30, 2009

Jason Magid, for plaintiff, Assistant Camden County Prosecutor (Warren W. Faulk,
Camden County Prosecutor).

William E. Sitzler, for defendant.

McNEILL, III, J.S.C.

On September 6, 2006, Giovanni Coppola (hereafter “defendant”) who was represented by William Sitzler, appeared before the Honorable Robert T. Zane, J.M.C., in the Borough of Merchantville, at which time, defendant entered a guilty plea to violating N.J.S.A. 39:4-50, with the caveat of a State v. Chun stay. 194 N.J. 54 (2008). It was a first offense for defendant which included an Alcotest reading of .08 and therefore, defendant received a \$256 fine, \$200 drunk driving surcharge, \$75 SNSF surcharge, \$50 VCCB fund, \$33 in court costs, twelve (12) hours in the IDRC, and three (3) months loss of license.

Thereafter, on June 18, 2008, defendant appeared before Judge Zane, accompanied once again by his attorney, William Sitzler, as a result of the fact that State v. Chun had been decided

since his last appearance. On said date, defense counsel raised an issue with regard to the matter being one of a threshold nature based upon defendant's BAC readings. Essentially, the defendant argued that the court must analyze DWI cases with more scrutiny where a defendant's test results, as in this case, are at the per se violation threshold. Judge Zane held that in Chun, the Supreme Court of New Jersey described, in great detail, the safeguards for defendants and held that if the readings are within the tolerance range they can properly support a per se conviction. This court heard the appeal on January 22, 2009, and the defendant presented the same argument that he made below.

The New Jersey Supreme Court in Chun determined that the Alcotest was scientifically reliable. The Court provided a detailed discussion of the reliability of the test which encompassed approximately eleven pages of the opinion. 194 N.J. 109-20. Initially, the Supreme Court stated that "[b]oth the recommendation of the Special Master as to the acceptable tolerance range and the effect of this determination upon pending cases requires our analysis." Id. at 110. Moreover, the Supreme Court recognized the following issues with regard to the acceptable tolerance question:

The acceptable tolerance question raises a variety of concerns, including its implication for the validity of any particular test result, our confidence in the accuracy and reliability of a specific Alcotest unit, the need for performance of a third test on any particular test subject, and the appropriate method by which to assess tolerance in light of changes to the quantification of the per se violation in recent years.

[Ibid.]

Tolerance may be defined as "the range of any set of measurements that is accepted as being representative of a true reading" and therefore, a narrow range for tolerance will assure precision and accuracy with regard to a BAC reading. Ibid. "Therefore, for purposes of

permitting any device to be utilized for proof of a per se violation of the statute, the acceptable tolerance is of fundamental importance.” Ibid.

With regard to the operation of the Alcotest, the following was put forth by the Supreme Court:

At present, assuming the subject has provided an otherwise acceptable sample, the Alcotest reports the EC and IR results for the first sample. The device is programmed to accept the EC and IR test results from a second sample only if those results are within its programmed tolerance of the EC and IR results from the first breath sample. If the second-sample results are not within the tolerance, the Alcotest will record the results, but require a third sample.

[Id. at 112-13.]

Upon conclusion of the testing, the AIR will then report the final BAC test result, which will be the lowest of the four acceptable readings, that is, readings within acceptable tolerance, which the device is programmed to truncate to two decimal places. Id. at 83.

Truncating, as opposed to rounding, involves simply reporting the first and second decimal places and dropping the third. For example, by truncating, a reading of 0.079 percent BAC would be reported as 0.07 and a reading of 0.089 percent BAC would be reported as 0.08. The effect of truncating, as opposed to rounding, is to under-report the concentration, to the benefit of the arrestee.

[Ibid.]

With regard to the issue of tolerance range, the current version of the firmware utilizes a doubled tolerance range. Id. at 116-17. The Supreme Court has held that the use of a doubled tolerance range may deprive some percentage of test subjects of a third, and perhaps dispositive, test. Ibid. Referencing those individuals who were only afforded two tests due to same, the Supreme Court held: “The suggestion that we permit those test results that are outside of the range for tolerance to be utilized for purposes of a per se conviction unfortunately is, simply put,

unacceptable.” Id. at 118. Accordingly, the Supreme Court determined that any AIR report results from only two breath samples must be further analyzed to determine whether its results are within the accepted tolerance via a mathematical calculation. Ibid. In those cases where the review of the results reveals that the results fall outside of the acceptable tolerance range, the “AIR cannot be deemed to be sufficiently scientifically reliable to be admissible and it shall not be admitted into evidence as proof of a per se violation.” Id. at 120.

In this case, defendant’s primary argument is that regardless of the fact that the Chun court found the Alcotest reliable, he should be afforded the ability to vacate his guilty plea based upon the fact that his BAC reading was at the threshold .080. Defendant asserts that since his BAC reading was .080, there is doubt as to his level of intoxication regardless of the per se nature of the offense.

The Supreme Court has determined that the statutory development of the per se DWI violation demonstrates that the Legislature intended to establish a strong policy to discourage long trials complicated by pretextual defenses. State v. Hammond, 118 N.J. 306, 317-18 (1990). The Legislature has made it quite clear that only an objective determination of intoxication coupled with the operation of a motor vehicle constitutes the offense of drunk driving. Id. at 316. If those two elements are demonstrated beyond a reasonable doubt, finding an individual guilty in violation of N.J.S.A. 39:4-50 is directly in line with the Legislative intent of the statute. Ibid.

The defendant in this case implores the court to view this threshold per se violation with more scrutiny. He argues that because the Alcotest resulted in a .080 reading, the court should allow the withdrawal of the guilty plea and permit him to present additional facts to demonstrate that he was not in violation of N.J.S.A. 39:4-50. The basis for this argument can be found in the

language of Judge King's Special Master's Report and the testimony of Dr. Dubowski in State v. Downie, 117 N.J. 450 (1990) which states that the Court must take a holistic approach to analyzing the evidence in threshold per se DWI cases. The Special Master's Report stated that "we fully agree with Dr. Dubowski where the reading is at the critical level, i.e., .08 or .10, in the usual DWI prosecution, because of the margin of .004 or .005 described by Ryser and the inevitable influence of analytical and biological variation of a particular test." Special Master's Report, State v. Chun, 228 (2007).

Judge King recommended that when interpreting a close reading where persuasive exculpatory clinical evidence exists, trial judges should exercise caution at the critical levels of .04, .08, or .10. Special Master's Report, State v. Chun, 227 (2007).

This defendant's argument that the court must view the test results with more scrutiny as a result of Judge King's recommendation fails, however, because the Supreme Court specifically addressed Judge King's recommendations regarding the reliability of the Alcotest and not Judge King's recommendations regarding DWI cases at the "critical levels of .04, .08, or .10." The Court in Chun addressed the recommendations of the Special Master report in two places. First, at the opening of the opinion, the Court defined the narrow scope it was using to address the Special Master's Report. Id. at 54. The Court clearly states that it was adopting, as modified, the Special Master's reports and recommendation. Id. The Court did not state that it was adopting all of the recommendations from the Special Master report without reservation or that the recommendations were accepted in toto. The Court only adopted the recommendations that were incorporated into the Chun opinion.

Second, the Court identified each enumerated recommendation and considered and addressed each throughout the body of the opinion. Id. at 84-86. Not one of the enumerated

recommendations addressed Judge King's concerns regarding heightened scrutiny in threshold cases. The Court went through painstaking analysis over the eighty-page opinion to address the critical questions at issue and did not mention Judge King's concerns regarding threshold cases. This court finds that this was not a glaring omission but rather a specific adherence to the Supreme Court's interpretation of the legislative intent regarding per se violations.

What the Court in Chun clearly established was that when a properly administered Alcotest, functioning within the accepted tolerance range, results in a per se violation, the results are deemed to be scientifically reliable. Id. at 148. The safeguards inherent to the Alcotest's BAC calculation, such as truncation and accepted tolerance ranges, provide mathematical assurances that the test is accurate. The safeguards regarding the disclosure of AIR reports and ability to cross examine the operator of the Alcotest provide procedural assurances that the test is accurate. These factors, among others, were critical pieces of the Supreme Court's analysis that resulted in the finding that the Alcotest was scientifically reliable.

The argument presented by the defense has every potential for being pretextual and is of the ilk that the legislature intended to obviate. A per se violation at the threshold level following Chun is quite simply, a per se violation of N.J.S.A. 39:4-50. The holding of the lower court is "Affirmed."