

FRANK J. RASO,
Municipal Judge

DEBBIE J. CAMORATA,
Court Administrator



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November 8, 2010

John Menzel, Esquire
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Suite 12
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Shirley Grasso, Esquire
Prosecutor Town of Hammonton
104 Bellevue Avenue
Hammonton, NJ 08037

Re: **STATE OF NEW JERSEY**
v. WILLIAM A. MELENDEZ

Dear Ms. Grasso & Mr. Menzel:

Enclosed with this letter please find the Court's Decision with reference to the above captioned action. By now you should have received your notice of appearance for Tuesday, November 9, 2010, at 4:00 o'clock in the afternoon. On that date and time, the Court intends to impose sentence in the event an appeal is not taken.

Your continuing cooperation is sincerely appreciated.

Very truly yours,

FRANK J. RASO, J.M.C.
Hammonton Municipal Court

FJR:ldn
cc: Ms. Debbie Camorata, Court Administrator
enc.

**NOT FOR PUBLICATION WITHOUT THE CONSENT OF THE COMMITTEE ON
OPINIONS**

STATE OF NEW JERSEY,	:	MUNICIPAL COURT
	:	TOWN OF HAMMONTON
Plaintiff,	:	ATLANTIC COUNTY
	:	
v.	:	SUMMONS NOS. SP4-382829
	:	SP4-382830
SAMUEL A. MELENDEZ,	:	
	:	
Defendant	:	OPINION

Argued December 17, 2009, February 24, 2010, April 29, 2010, June 29, 2010 and September 16, 2010

Decided November 9, 2010

Before Judge Frank J. Raso, J.M.C.

John Menzel, Esquire, argued the cause for defendant

Shirley Grasso, Esquire, Municipal Prosecutor, argued the cause for the plaintiff

The Court finds, as a matter of fact, that on March 12, 2009, Samuel A. Melendez was operating his motor vehicle in an easterly direction on the Atlantic City Expressway in the approximate vicinity of mile post 25.8. This Court has jurisdiction to consider the sworn testimony of the witnesses, make findings of fact and conclusions of law, in that the Atlantic City Expressway traverses the boundaries of the Town of Hammonton from mile post 25.3, to the east, through mile post 29.3, to the west. After being duly sworn, Trooper Luis Rodriguez, a six (6) year veteran employed with the New Jersey State Police, testified that he stopped Mr. Melendez's vehicle on March 12, 2009, at approximately 11:52 p.m. Trooper Rodriguez explained that the reason for the stop was because Mr. Melendez failed to maintain a single lane of traffic and that he witnessed Mr.

Melendez weave into the left lane about one-third the width of Mr. Melendez's vehicle. The trooper also testified that Mr. Melendez weaved within his own lane of traffic. Upon stopping the vehicle, Trooper Rodriguez asked Mr. Melendez for his driving credentials and the trooper noted that it took Mr. Melendez some time to produce them. Trooper Rodriguez informed Mr. Melendez that he had stopped him for swerving and while addressing the defendant, he smelled the odor of an alcoholic beverage emanating from the vehicle. Mr. Melendez handed the trooper his license but not his registration. Trooper Rodriguez noticed that the defendant's eyes were watery and bloodshot and when Mr. Melendez finally gave him his registration, he was asked to exit the vehicle and proceed to the front of his vehicle for field sobriety testing. While both the trooper and defendant stood in front of Mr. Melendez's vehicle, a passing motorist stopped and told the trooper to get Mr. Melendez off the road. When asked whether he had consumed any type of alcoholic beverages, Mr. Melendez testified that he did drink a couple of beers. The trooper noticed that Mr. Melendez was swaying and that his speech was slurred, slow and incoherent. After administering the horizontal gaze nystagmus test, the trooper came to the conclusion that Mr. Melendez had in fact been drinking alcoholic beverages. Trooper Rodriguez began the field sobriety testing of Mr. Melendez. During the one leg stand test, he noticed that Mr. Melendez did not keep his arms at his side and that he put his foot down prior to being told to do so. On his second attempt, Mr. Melendez raised his foot and almost immediately put it back down for support. The trooper asked Mr. Melendez to perform the heel to toe test and he was unable to place his feet heel to toe while he was walking. On step five, he stumbled, and throughout the testing the trooper noticed that he staggered and swayed. Based upon the defendant's inability to either understand or satisfactorily perform the field sobriety tests, and based upon the trooper's direct observation of defendant's demeanor, behavior, appearance and

inability to safely operate his motor vehicle, Mr. Melendez was placed under arrest and handcuffed for driving while under the influence of alcohol or drugs.

Mr. Melendez was read his Miranda Rights at the time of his arrest and also back at the police barracks prior to questioning from Trooper Rodriguez. Trooper Rodriguez, a Certified Breathalyzer Operator since July 1, 2005 (re-certified on November 13, 2007) and a Certified Alcotest 7110 Operator since December 15, 2005 (re-certified December 1, 2008) testified that he took all cell phones and electronic equipment to a room that was located approximately twenty feet away from the Alcotest testing room. He noted that at approximately 12:15 a.m., he sat Mr. Melendez in front of him, approximately six feet away, and began his twenty minute observation. Trooper Rodriguez continued to observe Mr. Melendez for a little over twenty minutes and he did not notice him to burp, regurgitate, or place any foreign object in his mouth. Trooper Rodriguez prepared the Alcotest 7110 MKIII-C instrument and attempted to take three breath samples utilizing three different mouth pieces. On the first and third breath test, successful samples were taken but on the second breath test, minimum volume was not achieved. The reported breath test result as reflected on the Alcohol Influence Report form indicated a reading of 0.19% BAC. Trooper Rodriguez issued two (2) summons to Mr. Melendez, one for violating N.J.S.A. 39:4-88b (Summons No. 0113-SP4-382829), and the other for violating N.J.S.A. 39:4-50 (Summons No. 0113-SP4-382830).

On behalf of Mr. Melendez, Mr. Menzel argued that the Court should not consider the results of the breath testing because a digital temperature measuring system manufactured by Control Company was utilized and not the Ertco-Hart device discussed in State v. Chun, 194 N.J. 54 (2008). He also challenged the admissibility of the reading because potentially relevant exculpatory information was destroyed when Trooper Joseph S. Delanoce, New Jersey State Police Alcotest

Coordinator, following a calibration, control, linearity testing procedure set forth in a memo authored by Dr. Howard J. Baum, Director of Office of Forensic Sciences, during his inspection, destroys all data corresponding to the calibration, control and linearity files. Mr. Menzel further argued that less than two minute lock out periods occurred at various parts of the control test and solution test functions as well as between control test and breath test functions as recommended by the National Highway Traffic Safety Administration. Mr. Menzel also wanted the breath testing results excluded because it was his opinion that the State did not prove that the twenty minute observation period was observed by Trooper Rodriguez. Lastly, Mr. Menzel argued that Mr. Melendez's right to a speedy trial was violated because of the delay that occurred between the issuance of the summons and the trial in this matter.

During the N.J.R.E. Rule 104 hearing as to the admissibility of the blood alcohol concentration reading, the Court considered the sworn testimony of Trooper Joseph S. Delanoce, Samuel Louis Sachs, Esquire, Dr. Howard J. Baum, and Trooper Luis Rodriguez. Trooper Delanoce is certified to operate the Alcotest 7110 MKIII-C, having received his certification on March 27, 2005. As of January 4, 2008, he was also certified as a Breath Test Coordinator/Instructor on the Alcotest. He testified that he does clear the memory of the calibration tests, control tests and linearity tests after a hard copy of this information is printed. The information that is preserved and printed is in the form of the Alcotest 7110 Calibration Record, marked as Exhibit S-6, Alcotest 7110 Calibration Certificate Part I-Control Test, marked as Exhibit S-7, and Alcotest 7110 Calibration Certificate Part II-Linearity Tests, marked as Exhibit S-8, all of which were admitted into evidence. Trooper Delanoce explained that he clears the memory as part of his training and because the Alcotest machine will not function beyond the linearity testing if a trooper attempts to analyze a breathe

sample after his inspection. Trooper Delanoce testified that while two minute gaps are necessary between the taking of valid breath samples, two minute gaps are not necessary when he is testing and/or inspecting the Alcotest 7110. After explaining the two minute gap issues raised by Mr. Menzel, Trooper Delanoce concluded that the Alcotest 7110 MKIII-C, Serial No. ARNK-0017, utilized in testing Mr. Melendez's breath samples was in proper working order based upon his review of the Alcohol Influence Report marked as Exhibit S-4 which was admitted into evidence. Mr. Sachs, lead attorney on all hardware and software issues in State v. Chun argued before the New Jersey Supreme Court, testified that he reviewed the information provided by the State and because of the deletion of the information testified to by Trooper Delanoce, he cannot give a complete opinion on the operability of the machine that tested Mr. Melendez's breath samples. He explained that there appears to be a high percentage of blowing errors but these errors cannot be explained because he does not have the linearity and control testing information. He did testify that excessive blowing errors can be created by any number of factors, including humor error, that may have nothing to do with the operability of the machine. Dr. Howard J. Baum, Director of Office of Forensic Sciences, testified that after the information is printed, the memory is cleared because of a programing error, or misstep, with the software program utilized by the Alcotest. This programing error, which he referred to as a "bug", is currently being worked on and will be corrected in the next version of the firmware. He indicated that he has observed and reported the bug from approximately 2005. He explained in great detail which files are deleted and testified that the data that is not printed does not effect the quality of the results, or the accuracy of the results, produced by the Alcotest. It was his opinion that the unprinted data does not have to be preserved because it is irrelevant to the operability of the Alcotest machine and that all of the relevant information is printed on the calibration

certificates that were marked and entered into evidence as S-6, S-7 and S-8. Dr. Baum also testified as to the use of the Control Company equipment, versus the equipment manufactured by Ertco-Hart, and he concluded that the two temperature testing devices are the same for the purpose used with the Alcotest 7110. He explained that the digital thermometer measures the temperature of the simulator solution while the temperature probe maintains the constant temperature of the simulator solution. It was his opinion that the change from Ertco-Hart to Control Company was based primarily upon economic reasons. The Ertco-Hart digital measuring system costs two thousand dollars to purchase and \$700 to annually re-calibrate. The Control Company digital measuring system costs \$300 to purchase and it does not have to be calibrated, rather, because it is relatively inexpensive, it is simply discarded. He also testified that the Control Company digital thermometers are smaller, lighter, easier to carry, and not as sensitive to shock as is the Ertco-Hart brand.

The Court concludes, as a matter of law, that Trooper Rodriguez had probable cause to stop Mr. Melendez's vehicle based upon the violation of N.J.S.A. 39:4-88b. Trooper Rodriguez also had probable cause to arrest Mr. Melendez for a violation of N.J.S.A. 39:4-50 based upon the trooper's observations of the defendant, the defendant's admission as to alcohol consumption and his poor performance of the field sobriety testing. Probable cause exists where the facts and circumstances, within the officer's knowledge and of which he had reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed. The totality of the circumstances must be considered in determining whether there is probable cause. State v. O'Neal, 190 NJ 601, 612 (2006). Trooper Rodriguez has a considerable amount of experience in the detection and prosecution of persons operating vehicles while under the influence of alcohol and the facts of this case support his opinion that Mr. Melendez was operating

his vehicle while under the influence of alcohol. The Court finds that the testimony of Trooper Rodriguez is both credible and believable. Accordingly, the Court finds that Mr. Melendez demonstrated a substantial deterioration of his mental faculties and his physical capabilities to the extent that it was improper for him to operate his motor vehicle. See generally State v. Johnson, 42 NJ 146 (1964); State v. Tamburro, 68 NJ 414 (1975).

The Court is obligated to make findings of fact and conclusions of law with respect to "under the influence" and "per se" violations of N.J.S.A. 39:4-50. State v. Slinger, 281 NJ Super. 538, 543 (App. Div. 1995), citing, State v. Sisti, 209 NJ Super. 148, 151 (App. Div. 1986).

Based upon the language, not only in the State v. Chun decision, but also in the February, 2007 and October, 2007 Report and Supplemental Report and Recommendations of Special Master Retired Appellate Division Presiding Judge Michael Patrick King, and especially considering the sworn testimony of Dr. Baum, the Court finds that the temperature measuring devices or probes, either Ertco-Hart or Control Company, are inter-changeable as long as they are traceable to the National Institute of Standards and Technology. Exhibit S-17. The Court further finds, based upon the sworn testimony of Dr. Baum, that the deletion of the data corresponding to the calibration, control and linearity files does not effect the quality or accuracy of the results of the Alcotest. The useful information that exists is printed on the documents referenced as S-6, S-7 and S-8. The State has met its burden of proof of clear and convincing evidence by the testimony adduced during the N.J.R.E. Rule 104 hearing. Romano v. Kimmelman, 96 NJ 66, 90-91 (1984). All of the other foundational documents for the introduction of the reading have been placed into evidence including Worksheet A, Exhibit S-38. The Court finds that the conditions of admissibility of evidence have been met and finds Mr. Melendez guilty of the per se violation of driving while under the influence

of alcohol due to the 0.19% Blood Alcohol Concentration reading reflected on the Alcohol Influence Report. Exhibits S-4 and S-5.

Relying upon the reasoning set forth in State v. Gallegan, 117 NJ 345 (1989), State v. Detrick, 192 NJ Super. 1983, and State v. Tsetsekas, 411 NJ Super. 1 (2009), the Court has previously ruled that Mr. Melendez's right to a speedy trial has not been violated. The Court has also previously ruled that the twenty minute observation period was established by Trooper Rodriguez's testimony regarding the use of his wrist watch.

Sentencing shall be scheduled for November 9, 2010.



FRANK J. RASO, J.M.C.
Hammonton Municipal Court