SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1811-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

DILBIR JASSAL,

Defendant-Respondent.

Argued April 25, 2017 – Decided May 3, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 15-12-1020.

Christopher W. Hsieh, Chief Assistant Prosecutor, argued the cause for appellant (Camelia M. Valdes, Passaic County Prosecutor, attorney; Mr. Hsieh, of counsel and on the brief).

Thomas R. Ashley argued the cause for respondent.

PER CURIAM

We granted the State's motion for leave to appeal from a December 15, 2016 order dismissing a charge of refusing to provide a breath sample. The court dismissed the charge because on the

ticket, the officer cited N.J.S.A. 39:4-50.2, the implied consent provision of the refusal statute, not N.J.S.A. 39:4-50.4a, the penalty section of the statute. The court refused to permit the State to amend the charge. We reverse and remand for further proceedings.

The police pulled over defendant's vehicle, which had been traveling more than 100 miles per hour. At the scene, defendant admitted to the officer that he consumed two or three beers. The officer performed field sobriety tests, arrested defendant for driving while intoxicated (DWI), N.J.S.A. 39:4-50, and transported him to the police station.

At headquarters, the officer read defendant the standard statement that he would be charged with refusal if defendant refused to provide a breath sample. Defendant refused to give the breath sample and the officer issued the ticket. In addition to this ticket and the DWI charge, the State charged defendant with committing other motor vehicle offenses. A grand jury indicted and charged defendant with second-degree eluding, N.J.S.A. 2C:29-2(b).

The State conceded that the ticket should have cited the penalty section of the refusal statute, N.J.S.A. 39:4-50.4a, rather than the implied consent section, N.J.S.A. 39:4-50.2. It argued, however, that the judge should have amended the ticket

pursuant to Rule 7:14-2 because the two statutes are substantively interrelated. The judge found defendant knew the State charged him with refusal to give a breath sample, N.J.S.A. 39:4-50.4a, which supported the State's position that defendant would not be prejudiced by amending the ticket. Nevertheless, the judge refused to amend the ticket, and dismissed the charge.

On appeal, the State raises the following arguments:

> POINT I
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> BECAUSE N.J.S.A. 39:4-50.2 AND N.J.S.A. 39:4-50.4[a] ARE INTERRELATED SUBSECTIONS OF THE SAME SUBSTANTIVE REFUSAL OFFENSE, AND ABSENT A SHOWING OF PREJUDICE, THE TRIAL COURT ERRED IN REFUSING TO AMEND THE TICKET TO CITE TO N.J.S.A. 39:4-50.4[a], AND ALSO ERRED IN DISMISSING THE TICKET. [(Raised below).]
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> A. The Trial Court Erred in Dismissing the Ticket Under the Theory That It Charged a Different Substantive Offense.
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> B. The Trial Court Erred in Refusing to Permit Amendment of the Traffic Ticket.

The issue on appeal involves a purely legal question. Appellate review of a trial court's application of the law is plenary. State v. Coles, 218 N.J. 322, 342 (2014). Applying this de novo review, we conclude the judge erred by dismissing the ticket rather than amending the charge pursuant to Rule 7:14-2, which provides:

> The court may amend any process or pleading for any omission or defect therein or for any

> variance between the complaint and the evidence adduced at the trial, but no such amendment shall be permitted which charges a different substantive offense, other than a lesser included offense. If the defendant is surprised as a result of such amendment, the court shall adjourn the hearing to a future date, upon such terms as the court deems appropriate.

N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a comprise the same substantive offense. N.J.S.A. 39:4-50.2, entitled "[c]onsent to taking of samples of breath; record of test; independent test; prohibition of use of force; informing accused" provides in pertinent part that

> (a) Any person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of [N.J.S.A.] 39:4-50 or section 1 of P.L.1992, c.189 ([N.J.S.A.] 39:4-50.14).
>
> . . . .
>
> (e) No chemical test, as provided in this section, or specimen necessary thereto, may be made or taken forcibly and against physical resistance thereto by the defendant. The police officer shall, however, inform the person arrested of the consequences of refusing to submit to such test in accordance

> with section 2 of this amendatory and supplementary act. A standard statement, prepared by the chief administrator, shall be read by the police officer to the person under arrest.

N.J.S.A. 39:4-50.4a, entitled "[r]evocation for refusal to submit to breath test; penalties" provides in part that

> . . . the municipal court shall revoke the right to operate a motor vehicle of any operator who, . . . shall refuse to submit to a test provided for in section 2 of P.L.1966, c.142 ([N.J.S.A.] 39:4-50.2) when requested to do so . . . .
>
> The municipal court shall determine by a preponderance of the evidence . . . whether [an individual] refused to submit to the test upon request of the officer . . . . In addition to any other requirements provided by law, a person whose operator's license is revoked for refusing to submit to a [breath] test shall . . . satisfy the same requirements of the center for refusal to submit to a test as provided for in section 2 of P.L.1966, c.142 ([N.J.S.A.] 39:4-50.2). . . .

N.J.S.A. 39:4-50.2 therefore establishes that motorists provide implied consent to provide a breath sample, and N.J.S.A. 39:4-50.4a sets forth the penalty for refusing to provide a breath sample. Our Supreme Court has acknowledged these sections cross-reference and rely on each other substantively.

> To identify all of the elements of a refusal offense, we must look at the plain language of both statutes because although they appear in different sections, they are plainly interrelated. Focusing on what police officers must say to motorists helps

> demonstrate that point. In essence, the refusal statute requires officers to request motor vehicle operators to submit to a breath test; the implied consent statute tells officers how to make that request. In the language of the statutes, to be convicted for refusal, judges must find that the driver "refused to submit to the test upon request of the officer." N.J.S.A. 39:4-50.4a(a) (emphasis added). That test, as explicitly noted in the refusal statute, is the one "provided for in section 2 of P.L. 1966, c. 142 ([N.J.S.A.] 39:4-50.2)"--the implied consent law. The implied consent statute, in turn, directs officers to read a standard statement to the person under arrest for the specific purpose of informing "the person arrested of the consequences of refusing to submit to such test in accordance with section 2 [(N.J.S.A. 39:4-50.4a)]."
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> [State v. Marquez, 202 N.J. 485, 501 (2010) (second alteration in original) (footnote omitted).]

As further support that both sections be substantively read together, the Court stated "Sections 50.2(e) and 50.4a . . . impose an obligation on officers to inform drivers of the consequences of refusal." Id. at 506.

Defendant maintains that the judge correctly dismissed the charge pursuant to State v. Nunnally, 420 N.J. Super. 58 (App. Div. 2011). In Nunnally, the police arrested the defendant for violating N.J.S.A. 39:3-10.13 (prohibiting operation of a commercial motor vehicle by a driver "with an alcohol concentration of 0.04% or more"). Id. at 62. After the defendant refused to

submit to an Alcotest, the State charged him with violating the general refusal statute, N.J.S.A. 39:4-50a, rather than charging him with refusal by a person driving a commercial vehicle, N.J.S.A. 39:3-10.24 (the CDL refusal statute). Ibid. We affirmed the Law Division's dismissal of the charge that had alleged a violation of the general refusal statute. Id. at 62-63. Nunnally is factually distinguishable and inapplicable because this case does not involve an attempt to amend the general refusal charge to reflect a violation of the CDL refusal statute by someone who operated a commercial vehicle.

We therefore reverse, remand, and direct the court to amend the ticket accordingly and proceed with all outstanding charges. We do not retain jurisdiction.