

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4936-14T2

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Appellant,

v.

T.S.,

Defendant-Respondent,

and

M.B. and E.P.,

Defendants,

IN THE MATTER OF N.S. and T.B.,

Minors.

Argued March 6, 2017 – Decided March 15, 2017

Before Judges Sabatino and Haas.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FN-07-329-15.

Sara K. Bennett, Deputy Attorney General,
argued the cause for appellant (Christopher
S. Porrino, Attorney General, attorney; Andrea

M. Silkowitz, Assistant Attorney General, of counsel; Ms. Bennett, on the briefs).

T. Gary Mitchell, Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Mr. Mitchell, of counsel and on the brief).

Melissa R. Vance, Assistant Deputy Public Defender, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Vance, on the brief).

PER CURIAM

The Division of Child Protection and Permanency ("the Division") appeals the Family Part's decision which determined, after a fact-finding hearing, that defendant T.S. had not abused or neglected her minor daughters, one of whom was a passenger in defendant's vehicle while she drove it in an intoxicated condition. In ruling that defendant's conduct did not warrant a finding of abuse or neglect, the trial court substantially relied on Title Nine case law that has since been repudiated by the Supreme Court. For the reasons that follow, we reverse.

The Division's factual proofs at the hearing were substantially unrefuted. Defendant is the mother of two daughters, T.B. ("Tammy") and N.S. ("Nancy").¹ At the time of the incident, defendant also had residential custody of her two nieces, J.S.

¹ To protect the privacy of the minor children, we use pseudonyms and initials.

("Jamie") and S.B. ("Sadie"). Tammy and Jamie, the two children who were the passengers in defendant's vehicle, were respectively ages fourteen and eleven.

On January 23, 2015, defendant stopped by her cousin's residence, who lived a short distance from her home. According to defendant, she went there to drop off money for her cousin, who was planning defendant's wedding. While at her cousin's residence, defendant admittedly drank what she estimated to be two glasses of wine and three shots of peach vodka. At that point, defendant, who was tired after having worked a double shift that day, got into her car and headed home. Her daughter Tammy and her niece Jamie were in the back seat.

Clothy Ortiz, an East Orange Police Officer on patrol that night, testified that she noticed a car driving past her on Elmwood Street in the dark without its lights on. It was about 8:43 p.m. Officer Ortiz heard a "big ding sound" and saw the driver's side mirror of the car strike a pedestrian crossing sign in the middle of the street. The officer activated her sirens and caused the driver to pull over.

Officer Ortiz approached the car, a Nissan Maxima, and saw defendant in the driver's seat and the two teenage girls in the back seat. According to Ortiz, defendant slurred her speech.

Defendant admitted that she had hit the pedestrian sign, but claimed she was adjusting her rear view mirror at the time.

The officer directed defendant to turn off the engine and remove the keys from the ignition. Defendant complied. The officer asked defendant if she had been drinking, and she responded "Yes." According to the officer, Tammy spontaneously stated to her that "she was kind of scared, because her mom was getting close to [other] cars."² Field sobriety tests were administered to defendant by other officers who came to the scene.

Because the East Orange Police Department lacked an officer certified to administer breath testing, defendant was transported to the Montclair Police Department. As confirmed by another testifying witness, Montclair Officer Jamar Jones, the Alcotest produced a reading of 0.19 blood alcohol content ("BAC"), more than two times the legal limit specified in N.J.S.A. 39:4-50. Officer Jones noticed that defendant was "uneasy on her feet" and emanated the smell of alcohol.

The police issued three summonses to defendant for driving while intoxicated ("DWI"), leaving the scene of an accident, and

² Given the context, we readily consider Tammy's spontaneous statement to the officer an admissible excited utterance. N.J.R.E. 803(6)(2). Indeed, no hearsay objection to the statement was made by defendant's trial counsel.

failing to possess a driver's license or insurance card. Defendant was also charged with two counts of endangering the welfare of a child.³

The police released Tammy and Jamie to the custody of defendant's boyfriend. It is undisputed that the children were not physically harmed in the incident.

The Division was notified and conducted an investigation. The investigation revealed that defendant had no reported prior history of substance abuse or child abuse or neglect. In fact, defendant was serving as a licensed resource parent for her nieces as the result of abuse or neglect by her sister. The Division ascertained that neither of the children's fathers were living in their residence at the time of the incident, and that, in fact, Tammy's father had passed away in 2013.

Due to defendant's incarceration for this incident, the Division conducted an emergency Dodd removal⁴ and placed the daughters temporarily with other caretakers. Defendant was

³ According to defense counsel at oral argument on the appeal, the criminal prosecution was ultimately resolved by the court's admission of defendant into the Pre-Trial Intervention program ("PTI").

⁴ A Dodd removal is an emergent removal of a minor without a court order pursuant to N.J.S.A. 9:6-8.21 to -8.82 (the Dodd Act). N.J. Div. of Youth & Fam. Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011).

thereafter released from jail and was granted visitation with her daughters. The Division provided defendant with services, including substance abuse counseling and testing. By the end of February 2015, the Family Part ordered the Division to reunify defendant with her daughters if she continued to comply with services. The nieces, however, were not returned to defendant's care.⁵

The Division charged defendant with abuse or neglect in violation of N.J.S.A. 9:6-8.21(c)(4)(b) as to her daughters. The trial court conducted a one-day fact-finding hearing in April 2015, at which Officers Ortiz and Jones testified concerning the DWI incident and their observations of defendant. The Deputy Attorney General also called the Division investigator who had interviewed defendant after the incident. The investigator related defendant's admission of having several drinks before driving the children. He administratively established a finding of abuse or neglect before the Division's complaint was litigated in the Family Part. On cross-examination, the investigator acknowledged that defendant had cooperated with the services provided to her, and had not tested positive during that time.

⁵ At oral argument on the appeal, it was represented to us that the nieces were adopted by non-relatives.

Defendant did not testify or present evidence. The Law Guardian for the minors called another Division employee, who briefly confirmed that defendant had completed the services provided to her.

On May 21, 2015, the trial judge issued an oral opinion, accompanied by a written decision, concluding that the Division had not met its burden of proving abuse or neglect by a preponderance of the evidence. The judge did recognize that "[a]lthough there was no evidence that any actual harm was caused to the children, there is no question that the action of the defendant clearly placed the young girls in imminent danger and substantial risk of harm. Without question such an action is wanton and willfully negligent."

Nevertheless, the judge declined to find defendant liable for abuse or neglect within the standards of Title Nine because defendant's conduct after the DWI incident had been favorable. The judge relied in this regard on this court's published opinion in N.J. Division of Child Protection & Permanency v. M.C., 435 N.J. Super. 405 (App. Div. 2014), which authorized trial courts to consider a parent's conduct both before and after an incident to determine the parent's risk of harming a child at the time of the fact-finding. Guided by M.C., the trial judge found it significant that defendant had cooperated with the Division

immediately after the incident, completed all of the programs offered to her, and had not failed a drug or alcohol test while under the Division's supervision.

The judge characterized defendant's conduct in driving her car while drunk with two minor passengers, despite it being "dangerous," as "an isolated incident." The judge also noted that defendant had no previous substance abuse issues and no criminal record.

The judge credited defendant for taking responsibility for her actions after the arrest. The judge also perceived that the Division must not have believed defendant's biological children remained at risk, because it had returned them to her custody.

On the whole, the judge concluded that she felt "constrained" to follow the rationale of M.C., including events that occurred after the DWI incident. She consequently dismissed the Division's complaint and terminated the litigation.

The Division appealed the trial court's finding. In the meantime, the Supreme Court issued its instructive opinion in Department of Children and Families v. E.D.-O., 223 N.J. 166 (2015). The Court's opinion in E.D.-O. imposed an important temporal caveat to the proper analysis in an abuse-or-neglect case.

The facts in E.D.-O. involved a mother who left her sleeping nineteen-month-old child in a locked car with the motor running for ten minutes while she went into a shopping mall. Id. at 169. The child was not harmed. Ibid. In the Division's investigation, it learned the mother had no previous violations, and that the child was "well-nurtured" and provided for. Id. at 172. Based on the incident alone, the Division administratively substantiated a finding of abuse or neglect without a hearing. This court affirmed, finding "the mother's action's plainly constituted gross neglect" and needed no hearing. Id. at 169-70. The defendant sought reversal in the Supreme Court, arguing that her benign post-incident conduct up through the time of the fact-finding hearing showed that she posed no ongoing risk of harm to her child.

The Court in E.D.-O. remanded the matter. In doing so, the Court made clear that the evaluation of a parent's conduct for abuse or neglect should not be determined by the risk the parent poses at the time of the fact-finding. Rather, the analysis should focus on the events up through the time of the conduct. Id. at 170. A trial court's focus on the parent's status as of the time of the fact-finding hearing, wrote the Court, "has the obvious potential to overlook [earlier] conduct, even aberrational conduct, that had the clear capacity to produce a catastrophic result." Id. at 189. "Such an approach contravenes the

legislative determination that child protective services and a court may intervene before a child experiences actual harm." Ibid.

The Court instructed in E.D.-O. that a trial court may consider for limited purposes the risk a parent poses at the time of the fact-finding, but only in the context of determining future services and the disposition of the children, not for making the abuse-or-neglect determination itself. Ibid. The Court explained that the "myriad dispositions available to the trial court after it enters a finding of abuse or neglect are fashioned based on current circumstances." Ibid. (emphasis added). Indeed, "N.J.S.A. 9:6-8.50(e) expressly permits a trial court to suspend a dispositional hearing indefinitely to permit the Division to report the current status of the parent and child and whether any further services or supervision are required." Id. at 190.

Following the issuance of its opinion in E.D.-O., the Court vacated the trial court's ruling in favor of the defendant parent in M.C., which had focused on the parent's favorable post-incident conduct, and remanded M.C. to this court. 223 N.J. 160 (2015) (directing the matter to be reconsidered in light of E.D.-O.).⁶

⁶ Subsequently, in August 2016, this court revised its original decision in M.C. See N.J. Div. of Child Protection & Permanency v. M.C., No. A-2398-12 (App. Div. Aug. 4, 2016), aff'g in part, rev'g in part, 435 N.J. Super. 405 (App. Div. 2015).

The upshot of these developments in the governing case law is that the Court's opinion in E.D.-O. has now superseded this court's earlier opinion in M.C. endorsing a contrary approach. As the law stands today, the focus in an abuse-or-neglect fact-finding must be on the harm or risk of harm to children as of the time of a defendant parent's behavior, and not the positive steps that parent may have taken after the Division responded to the incident and provided services.

Applying the approach mandated by E.D.-O. to the present case, the record clearly demonstrates that defendant abused and neglected her daughter Tammy on January 23, 2015 when she drove her while under the influence of alcohol. Defendant admittedly had five alcoholic beverages at her cousin's house before she took the wheel of her car with two minors in the back seat. With the children inside, she crashed the car into a sign and nearly struck other vehicles. She frightened her daughter Tammy to such a degree that caused the child to express her fear to an investigating officer. Moreover, defendant's BAC tested at more than twice the legal limit, and the officers who observed her noted that her speech was slurred and balance unsteady. She clearly placed her child at a severe risk of harm, even given the short distance involved.

The situation here is worse than the situation in New Jersey Division of Child Protection & Permanency v. J.A., 436 N.J. Super. 61 (App. Div. 2014), in which a defendant father was found to be responsible for abuse or neglect for allowing his intoxicated wife to drive their children. Id. at 65-66. Here, defendant directly placed her child⁷ at risk by taking the wheel herself while clearly intoxicated.⁸ Moreover, although defendant did not have any prior reported instances of abusive or neglectful conduct, the mere fact that this DWI event was "isolated" does not compel a finding that it was insufficiently severe to meet the statutory test. See e.g., G.S. v. Dep't of Human Servs., 157 N.J. 161, 180 (1999) (finding that "even an isolated unintentional injury may form the basis for a finding of neglect where the intrinsic danger of the situation is obvious").

Further, the trial court correctly found that defendant's conduct was "wanton and willfully negligent." The court had more

⁷ The Division's complaint notably did not assert abuse or neglect as to defendant's niece Jamie. We also discern no sufficient basis on this record to require a finding of abuse or neglect as to Tammy's sister, Nancy, who was not in the car at the time.


⁸ Defendant argues that the Division's position is tantamount to a per se rule that a parent's DWI with children in the car is categorically abuse or neglect in all instances. At oral argument, the Deputy Attorney General disavowed such a per se position, and we need not comment here on whether such a per se approach would be consistent with Title Nine or advisable.

than enough evidence to make that determination, given that defendant consumed five alcoholic drinks while tired, but still drove two minors with her lights off and struck a road sign. See N.J. Div. of Child Protection & Permanency v. Y.N., 220 N.J. 165, 181 (2014) (declaring that Title Nine requires, at minimum, that the Division show the parent acted with gross negligence or recklessness).

We commend defendant for her cooperation with the Division's services and her post-incident efforts to maintain sobriety and avoid endangering the children again. But, as the Court instructed in E.D.-O., those post-incident measures do not eviscerate the patent danger that previously was created by defendant's reckless decision to drive the minors while intoxicated.

The trial court's finding of no abuse or neglect as to Tammy is reversed.⁹ The matter is remanded to the Family Part to enter an appropriate order consistent with this opinion, and for any other further proceedings that may be warranted. Jurisdiction is not retained.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

⁹ Appellate counsel agreed at oral argument that a reversal would not have the effect of elevating defendant's administrative status from "established" abuse or neglect to "substantiated" for purposes of the Central Registry. See N.J.A.C. 3A:10-7.3(c); N.J. Div. of Child Protection & Permanency v. V.E., ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 14).