SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0204-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RONALD HORTON,

Defendant-Appellant.

Argued January 30, 2018 – Decided February 23, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Municipal Appeal No. 13-16-J.

Ronald Horton, appellant, argued the cause pro se.

Alexander Mech, Assistant Prosecutor, argued the cause for respondent (Michael H. Robertson, Somerset County Prosecutor, attorney; Alexander Mech, of counsel and on the brief).

PER CURIAM

Defendant Ronald Horton appeals from his conviction by the Law Division for driving while intoxicated (DWI), N.J.S.A. 39:4-

50, and refusal to take a breath test, N.J.S.A. 39:4-50.4a. His appellate brief presents the following points for our consideration:

> I. MOTION TO SUPPRESS THE ARREST DUE TO UNREASONABLE SEIZURE AND EVIDENCE OBTAINED WITHOUT "MIRANDA WARNING"
>
> II. MOTION TO OVERTURN THE MUNICIPAL COURT'S "DWI" DECISION BECAUSE THE STATE DID NOT ESTABLISH THAT DEFENDANT HAD A BAC OF 0.08 AND COURT DID NOT [FIND] "PROOF BEYOND A REASONABLE DOUBT"
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> III. MOTION TO OVERTURN THE MUNICIPAL COURT'S "DWI REFUSAL" DECISION

After reviewing the record presented to us, we find no merit in any of the arguments raised in those three points. Except as addressed below, they do not warrant discussion here. See R. 2:11-3(e)(2). We affirm the conviction. However, we remand for the limited purpose of correcting a typographical error in the August 10, 2016 order memorializing the conviction, which mistakenly cites the refusal statute as N.J.S.A. 39:4-50.2 instead of N.J.S.A. 39:4-50.4a. See State v. Cummings, 184 N.J. 84, 90 n.1 (2005).

A brief summary of the procedural background and the evidence will suffice. The municipal court proceedings began with an extensive hearing on defendant's suppression motion. The State presented testimony from Officer Patrick Clyne. Defendant

presented his own testimony plus that of Herbert Leckie, an expert on field sobriety testing methods, and Dr. Lance Gooberman, an expert on the physiological effects of alcohol and the effects of injury on the ability to perform field sobriety tests.

According to Officer Clyne, he was dispatched to the scene of a one-car accident, where he found defendant leaning on the hood of his car. Defendant told Officer Clyne that he was "fine," and had just taken the turn in the road too fast. According to Clyne, defendant displayed some of the typical signs of intoxication: he smelled of alcohol, and had watery eyes and slurred speech. He also admitted that he had been drinking. Clyne administered three field sobriety tests — the horizontal gaze nystagmus (HGN) test, the walk and turn test, and the one-leg stand test — all of which defendant failed. At that point, he arrested defendant. These events were recorded by the motor vehicle recorder (MVR) in the police cruiser.[1]

Leckie testified that Officer Clyne did not adequately question defendant about his possible medical conditions before administering the field sobriety tests. He also opined that Clyne was not qualified to administer the HGN test, and did not reach reliable conclusions about defendant's performance on any of the

[1] A DVD of the MVR recording was later admitted in evidence during the trial, without objection.

tests. He also disagreed with some of the officer's observations of defendant's condition, based on viewing the MVR video.

Dr. Gooberman opined that defendant's lower back problems would have affected his ability to perform the walk and turn test and the one-leg stand test. He also opined that a concussion would affect defendant's ability to knowingly decline to take the breath test. Gooberman also testified that there was insufficient evidence on which to conclude that defendant was intoxicated. He admitted, however, that he had not watched the MVR video.

Defendant testified that prior to the accident, he had two alcoholic drinks with dinner at a local restaurant. He testified that he hit his head during the accident and injured his ankle while getting out of his car. He also testified that prior back surgeries left him with physical limitations that affected his mobility. He disagreed with Clyne's testimony about his physical appearance and demeanor at the scene.

In denying the suppression motion, the municipal judge discounted the HGN test, because Clyne was not certified to perform it. However, the judge found that the officer properly administered the other two tests. The municipal judge did not find defendant's experts persuasive, and found Officer Clyne's testimony more credible than defendant's testimony.

After the municipal judge denied the motion, the trial began. The prosecutor told the judge that, to avoid repetition, the defense had stipulated that the court could incorporate into the trial record Officer Clyne's testimony at the suppression hearing. Defense counsel did not disagree.

In brief additional trial testimony, the officer recalled that he smelled alcohol when defendant was in his police cruiser, and that when they arrived at the police station, defendant's face was flushed and his eyes were droopy and watery. Officer Clyne and Officer Frizziola both testified that defendant refused to take the Alcotest, after being read the standard warning statement about the consequences of refusing to take the test.

After consulting with his attorney, defendant decided not to testify at the trial. The defense did not call any other witnesses. During his closing argument, defense counsel stated in passing that he "moved" to incorporate the testimony of his experts into his trial evidence. The municipal judge did not address that "motion."

In deciding the case, the municipal judge found that defendant unequivocally refused to take the Alcotest. After viewing the MVR video, the judge also found that the State proved defendant's intoxication while driving, based on Officer Clyne's observations,

defendant's admission that he was drinking, and defendant's failing the walk and turn and one-leg stand tests.

After considering the municipal court record de novo, the Law Division judge issued a written opinion dated August 10, 2016, rejecting defendant's suppression issues and convicting him of refusal and DWI. The Law Division judge concluded that Officer Clyne had "a reasonable suspicion that defendant might be guilty of DWI and . . . was justified in requesting that . . . defendant perform standard field sobriety tests." The Law Division judge credited testimony that defendant smelled of alcohol, admitted that he had been drinking, had glassy eyes and slurred speech, and had "slow and fumbling" movements. The judge also credited testimony that defendant failed two properly administered field sobriety tests. Thus, he concluded that there was probable cause to arrest defendant.

Based on the testimony of the police officers, and the MVR video, the Law Division judge found defendant guilty of refusal and guilty of DWI. The judge reasoned that, because defense counsel did not call any witnesses prior to making his closing argument, the testimony of the defense experts was not incorporated by reference into the trial. However, the judge also concluded that even if he considered the expert testimony, it would not change his decision.

On this appeal, defendant argues, among other things, that Officer Clyne improperly interrogated him without first administering Miranda[2] warnings, the State did not establish beyond a reasonable doubt that he had a blood alcohol content (BAC) of at least 0.08, and the summons issued to him for refusal was defective.

On this appeal, it is not our role to make new factual findings. Rather, we determine whether the Law Division judge's decision is supported by sufficient credible evidence. See State v. Locurto, 157 N.J. 463, 470-71 (1999). We owe particular deference where, as here, both the municipal judge and the Law Division judge have made essentially the same credibility determinations. Id. at 474. We conclude that the Law Division judge's factual findings are supported by sufficient credible evidence. Based on those findings, there is no reason to disturb defendant's conviction for breath test refusal and DWI.

Contrary to defendant's assertion, "a DWI suspect is not entitled to Miranda warnings prior to administration of field sobriety tests." State v. Ebert, 377 N.J. Super. 1, 9 (App. Div. 2005) (citing State v. Green, 209 N.J. Super. 347, 350 (App. Div. 1986); State v. Weber, 220 N.J. Super. 420, 424 (App. Div. 1987)).

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Nor are the police required to administer Miranda warnings before conducting general questioning of a driver during a roadside traffic stop. Green, 209 N.J. Super. at 350.

The State was not required to prove defendant's BAC in this case, where defendant refused the Alcotest. Rather, the State properly proved that defendant was driving while intoxicated, based on the officer's observations, defendant's admission that he had been drinking, and defendant's failing the field sobriety tests. See State v. Cryan, 363 N.J. Super. 442, 455-56 (App. Div. 2003); see also State v. Bealor, 187 N.J. 574, 585 (2006).

Defendant did not question the validity of the summons charging him with refusal, either before the municipal court or the Law Division. We decline to address the issue for the first time on appeal. See State v. Robinson, 200 N.J. 1, 19-20 (2009). However, we note that a summons is not to be dismissed "because of any technical insufficiency or irregularity." R. 7:2-5; see State v. Fisher, 180 N.J. 462, 469-70 (2004).

As previously noted, we affirm the conviction. We remand this matter to the Law Division for the limited purpose of correcting a typographical error in the August 10, 2016 order.

Affirmed in part, remanded in part. We do not retain jurisdiction.