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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0866-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JUDITH RUSSO,

Defendant-Appellant.

Argued January 30, 2018 – Decided May 22, 2018

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Sussex County, Municipal Appeal No. 29-10-14.

George T. Daggett argued the cause for appellant (Law Offices of George T. Daggett, attorneys; George T. Daggett, on the brief).

Shaina Brenner, Assistant Prosecutor, argued the cause for respondent (Francis A. Koch, Sussex County Prosecutor, attorney; Shaina Brenner, of counsel and on the brief).

PER CURIAM

Following a trial de novo before the Law Division, defendant Judith Russo appeals her convictions for driving while intoxicated

(DWI), N.J.S.A. 39:4-50, and refusal to submit to breath tests, N.J.S.A. 39:4-50.2 (collectively, the charges). On appeal, she argues:

> POINT I
>
> THE TESTIMONY OF DEFENDANT, HER EXPERTS AND THE HOSPITAL RECORDS CLEARLY SUBSTANTIATE THE DOCTRINE OF NECESSITY.
>
> POINT II
>
> THE CREDIBILITY FINDING BY THE COURT BELOW IS FLAWED.
>
> POINT III
>
> THE DECISION OF THE COURT BELOW AS TO DOUBLE JEOPARDY WAS INCORRECT.
>
> POINT IV
>
> THE COURT BELOW ERRED BY IGNORING THE PRESENCE OF DOUBLE JEOPARDY.
>
> POINT V
>
> THIS CASE IS A CLASSIC EXAMPLE OF FAILURE TO PROVIDE A SPEEDY TRIAL.
>
> POINT VI
>
> THE DECISION OF THE COURT BELOW ON OCTOBER 6, 2016 WAS A MISINTERPRETATION OF THE EVIDENCE IN THIS CASE.
>
> POINT VII
>
> THE "NORMAL" STANDARD OF REVIEW IN CASES SUCH AS THIS, SHOULD NOT APPLY TO THE INSTANT MATTER.

POINT VIII

DEFENDANT'S CONVICTION FOR REFUSING TO SUBMIT TO THE ALCOTEST, PURSUANT TO N.J.S.A. 39:4-50.4, SHOULD BE REVERSED AND DISMISSED.

We find defendant's claims have no merit and for the reasons that follow, affirm the trial judge's sound decision.

I.

We summarize the following facts and procedural backdrop to the matter before us. On September 22, 2012, defendant and a male friend dined together at a restaurant where she had two martinis. At some point, the friend gave defendant a prescription bottle of Nucynta to hold in her pocketbook for him. After dinner, she drove her friend to his house because he did not have a car or license. Shortly thereafter, Hardyston Township police officers arrived in response to a noise complaint. After the friend identified himself, the police took him into custody because of an outstanding arrest warrant. Before he was taken away, he told defendant she could stay overnight because she had been drinking. Responding to defendant's inquiry, the police advised her that she could not post bail that evening to release her friend because there was no bail condition on the warrant. According to defendant, after the police left, she felt a panic attack and thinking she was taking four Xanax, she instead took her friend's

Nucynta. Upon realizing she took the Nucynta, she claims that she decided to drive to the police station – despite not knowing where she was – for help.

Approximately twenty-five minutes later, Detective Michael Masters saw defendant double-park her car in front of the police station, and for no apparent reason she automatically opened her trunk prior to exiting the car. Staggering towards him, Masters testified that she stated that she was there to pick up her friend. Due to her erratic behavior, Masters administered field sobriety tests to defendant, which was recorded on a motor vehicle recording (MVR) system. When she failed the tests, she was arrested and directed to take a breathalyzer exam. She refused, indicating that she would be willing to give a blood sample because she was on prescribed medication for a brain tumor. While in custody, defendant fell asleep, and sensing she needed medical attention, Masters called an ambulance to take her to the hospital. There, defendant was diagnosed with suffering from a drug overdose; she tested positive for amphetamines and methadone.[1] She was issued summonses for DWI, careless driving, and refusal to submit to breath tests.

[1] Nucynta is a form of methadone.

About a month later, a pre-trial conference was held at the Hardyston Township Municipal Court. Because defendant requested additional discovery regarding her friend's arrest, trial was not scheduled until June 2013. Prior to and after the initial trial date, defendant sought a series of adjournments on May 24, June 14, July 11, and July 26, which were all granted. Further, due to defense counsel's unavailability, the trial could not be held in August and September.

On November 14, defendant filed a motion in Hardyston Municipal Court to change venue because she had a pending DWI charge (the Ogdensburg charge).[2] If found guilty, it would be her second DWI conviction. The motion was granted in February 2014; the charges were transferred to Byram Municipal Court. Yet, due to a conflict of interest, the matter was transferred again, this time to Green Township Municipal Court. Trial was scheduled for March 5, but was adjourned because of defendant's pending speedy trial motion. Six weeks later, the motion was denied; the judge explained from the bench that the delays were reasonable and in accord with State v. Detrick, 192 N.J. Super. 424 (App. Div. 1983).

[2] The charge issued on May 6, 2011, was originally set for trial in Ogdensburg Municipal Court, but was later transferred to Franklin Township Municipal Court and then to Hardyston Municipal Court.

The next trial date, July 14, was also adjourned when a defense witness was unavailable. Eventually tried on August 6, the municipal court judge reserved decision. On October 1, the judge issued his oral decision finding defendant guilty of DWI and refusal to submit to breath tests.[3] Sentencing, however, was postponed because of the pending Ogdensburg charge.

Defendant then filed a motion for reconsideration; asserting the defense of necessity because she claimed that she drove to the police station for help upon realizing she took her friend's medication. On November 5, after hearing argument, the judge denied the motion. During a subsequent colloquy between counsel and the judge, it was revealed that the Ogdensburg charge had been resolved two weeks earlier when defendant pled guilty to the offense of reckless driving and the DWI charge was dismissed.[4] Because defendant was not present, sentencing was adjourned for two weeks when defendant was sentenced as a second DWI offender.

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[3] Defendant was found not guilty of careless driving.

[4] Defendant's brief states the Ogdensburg charge was "finally concluded on December 3, 2013," but there is no corresponding copy of the order or other document in her appendix confirming that date. And based on the municipal court judge's statement on October 1, 2014 — without objection by either party — that he would delay sentencing until the Ogdensburg charge was resolved, and the subsequent noted colloquy on November 5, 2014, the December 3, 2013 date is apparently incorrect.

The judge granted only a stay of the jail term, not the license suspension nor payment of fines and penalties.

Defendant filed a trial de novo appeal to the Law Division. After a series of adjournments due to a delay in receiving the transcripts of the municipal court proceedings, as well as defense counsel's unavailability on two occasions, the appeal was heard and denied on July 17, 2015. The trial court found there was credible evidence beyond a reasonable doubt that defendant was guilty of the charges. The court rejected defendant's speedy trial claim on the basis that the delays in the municipal court trial were due to defendant and the State, and did not violate principles of speedy trial.

Defendant filed a notice of appeal with our court on August 7, 2015. However, with the State's consent, on February 9, 2016, we granted defendant's motion to vacate her conviction and to remand to the Law Division for a new trial de novo because defendant's hospital medical records and pill bottle evidence from the municipal court trial were never transmitted to the Law Division. Additionally, emergent relief was granted to stay her sentence.

A new trial de novo was conducted but the outcome did not change. On October 28, 2016, the same court issued an order finding that there was no violation of defendant's speedy trial

rights and rejected defendant's contention that a second trial de novo constituted double jeopardy.[5] The request to stay was granted. This appeal followed.

II.

In our review of the decision on a municipal appeal, "[w]e review the action of the Law Division, not the municipal court." State v. Robertson, 438 N.J. Super. 47, 64 (App. Div. 2014). We consider "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Stas, 212 N.J. 37, 49 (2012) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). "Unlike the Law Division, which conducts a trial de novo on the record, Rule 3:23-8(a), we do not independently assess the evidence." State v. Gibson, 429 N.J. Super. 456, 463 (App. Div. 2013) (citing Locurto, 157 N.J. at 471), rev'd on other grounds, 219 N.J. 227 (2014). We defer to the trial judge's findings of fact, but "no such deference is owed to the Law Division or the municipal court with respect to legal determinations or conclusions reached on the basis of the facts." Stas, 212 N.J. at 49 (citing State v. Handy, 206 N.J. 39, 45 (2011)) (stating "appellate review of legal determinations is plenary").

[5] The Law Division granted defendant's request for stay.

With this in mind, we first address defendant's claim in Point V that her conviction should be vacated because the approximately twenty-six month delay between her arrest — September 2011 — and the sentencing by the municipal court judge — November 2014 — violated her right to a speedy trial. She argues the municipal court should not have delayed her trial to await the outcome of the Ogdensburg charge; and the State and the Law Division caused an inordinate delay when the initial trial de novo was decided without the evidence of her medical records, which resulted in a remand.

"The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and imposed on the states by the Due Process Clause of the Fourteenth Amendment." State v. Tsetsekas, 411 N.J. Super. 1, 8 (App. Div. 2009) (citing Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967)). "The constitutional right . . . attaches upon defendant's arrest." Ibid. (alteration in the original) (quoting State v. Fulford, 349 N.J. Super. 183, 190 (App. Div. 2002)). Since it is the State's duty to promptly bring a case to trial, "[a]s a matter of fundamental fairness," the State must avoid "excessive delay in completing a prosecution," or risk violating "defendant's constitutional right to speedy trial." Ibid.

The determination of whether a defendant's rights have been violated is based upon the four-factor balancing analysis set forth in Barker v. Wingo, 407 U.S. 514, 530 (1972). See State v. Cahill, 213 N.J. 253, 258 (2013) ("We conclude that the four-factor balancing analysis of Barker v. Wingo, 407 U.S. 514 (1972), remains the governing standard to evaluate claims of a denial of the federal and state constitutional right to a speedy trial in all criminal and quasi-criminal matters."). The four non-exclusive factors that a court should evaluate: (1) length of the delay, (2) reason for the delay, (3) assertion of the right by a defendant, and (4) prejudice to the defendant. Id. at 264 (citing Barker, 407 U.S. at 530). No one factor is determinative of whether a right to a speedy trial has been violated. Id. at 267 (citing Barker, 407 U.S. at 533).

"These four [Barker] factors are . . . applied when [a] defendant asserts a speedy trial claim arising from delay in a municipal court drunk driving prosecution." Fulford, 349 N.J. Super. at 189; see, e.g., Tsetsekas, 411 N.J. Super. at 8-10 (citations omitted). We will not overturn a trial judge's decision where a defendant was deprived of due process on speedy-trial grounds unless the judge's ruling was clearly erroneous. State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977).

Considering the first factor, the length of delay, we look to Chief Justice Wilentz's 1984 "directive, later echoed in Municipal Court Bulletin letters from the Administrative Office of the Courts, that municipal courts should attempt to dispose of DWI cases within sixty days." Tsetsekas, 411 N.J. Super. at 11 (quoting State v. Farrell, 320 N.J. Super. 425, 446-47 (App. Div. 1999)). Although we have not suggested that "any delay beyond the sixty-day goal is excessive," as "[t]here is no set length of time that fixes the point at which delay is excessive." Ibid. Here, the delay in the commencement of the trial and final adjudication was inordinate and weighs significantly in favor of defendant. See id. at 11-12 (holding a delay of 344 days excessive); Farrell, 320 N.J. Super. at 428 (holding a delay between summons and trial completion of 663 days to be extensive).

Turning to the second factor, reasons for the delay, we examine the length of a delay in light of the culpability of the parties." Tsetsekas, 411 N.J. Super. at 12 (citing Barker, 407 U.S. at 529). "[D]ifferent weights should be assigned to different reasons" proffered to justify a delay. Barker, 407 U.S. at 531. Purposeful delay tactics weigh heavily against the State. Ibid. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government," than "[a] more neutral reason such as negligence or overcrowded courts",

albeit no matter the reason for delay, the ultimate responsibility to prosecute a case rests with the state. Ibid. "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." Ibid. And, "[d]elay caused or requested by the defendant is not considered to weigh in favor of finding a speedy trial violation." Farrell, 320 N.J. Super. at 446.

In addressing the cause of the delay, the trial court noted that there was a desire to resolve the Ogdensburg charges first, and a "fair reading of the procedural history is that both the defense and the State participated in the slow movement on the case, and [there were] other scheduling problems that came up . . . [, which] could not have been avoided." The court further added, there was "no sense that there was a desire on the part of . . . defendant to rush to a judgment on these [charges]." To some extent we agree, but conclude that defendant was the prime reason for the delay. Within the twelve months after defendant was charged, her counsel was granted four adjournment requests[6] before advising the municipal court that he was unavailable for the months of August and September. Thereafter, further delay was due to

[6] Which in large part was due to defendant's additional discovery request regarding her friend's charges — made two months after initial discovery was provided and one month after the initial pre-trial conference.

defendant's successful motion to change venue, which as noted led to another venue change due to a conflict of interest, and she was granted another adjournment request due to the unavailability of a witness. Moreover, as we have previously recognized, "the transfer of the matter between municipal courts" — even if a "significant part" of the delay — reasonably explains and justifies a trial delay. Detrick, 192 N.J. Super. at 426. Defendant cites the impact of waiting to dispose of the Ogdensburg charge — which had in its own procedural odyssey that need not be detailed here — but fails to acknowledge anywhere in the record where she objected to that wait-and-see approach. We therefore find this factor weighs significantly against the defendant.

Next, we address the third factor, defendant's assertion of her rights. "A defendant does not have an obligation to assert his right to a speedy trial because he is under no obligation to bring himself to trial." Cahill, 213 N.J. at 266 (citing Barker, 407 U.S. at 527). Although a defendant's delay in demanding a speedy trial does not constitute a waiver of his right, his "assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." Barker, 407 U.S. at 528. A court may also consider "the frequency and force of the [defendant's]

objections" when assessing whether the defendant properly invoked the right. Barker, 407 U.S. at 529.

Defendant filed a speedy trial motion with the municipal court on March 5, 2014, almost thirty months after the charges were issued.[7] Nevertheless, it appears to us that defendant quietly embraced the municipal court's approach to wait until the Ogdensburg charge was concluded because for strategic purposes, she wanted dismissal of the Ogdensburg charge before the charges here were tried; which in fact is what happened. Thus, we find this factor weighs slightly against defendant.

Lastly, we consider the fourth factor, prejudice to defendants, which is assessed in a light most favorable to defendants, whose interests the right is designed to protect. Cahill, 213 N.J. at 266 (citing Barker, 407 U.S. at 531). "Those interests include prevention of oppressive incarceration, minimization of anxiety attributable to unresolved charges, and limitation of the possibility of impairment of the defense." Id. (citing Barker, 407 U.S. at 532). "[P]roof of . . . actual [trial] prejudice is not a necessary condition precedent to the vindication of the speedy trial guarantee." Merlino, 153 N.J. Super. at 15-16. The impairment of an accused's defense is considered "the

[7] The municipal court denied the motion for the same reasons that we do so.

most serious since it [goes] to the question of fundamental fairness." State v. Szima, 70 N.J. 196, 201 (1976).

We accept defendant's assertion that the delay caused her anxiety. Yet, considering that defendant was faced with the Ogdensburg charge that also had a long delay — approximately three-and-a-half years — before it was ultimately resolved, it is unclear that the charges here were the sole root of her anxiety. Nonetheless, defendant does not contend that she was prejudiced in her ability to defend the charges. Accordingly, we are unpersuaded that this factor weighs in favor of defendants.

In sum, balancing all four Barker factors leads us to agree with the Law Division that there was no violation of defendant's right to a speedy trial.

III

In Point VIII, defendant contends the court erred in finding her guilty of refusal to submit to breath tests because she was willing to submit to a blood test and Masters contacted emergency medical services, which took her to the hospital due to her deteriorating health condition. There is no legal nor factual support for defendant's contention.

In State v. Marquez, 202 N.J. 485, 503 (2010), our Supreme Court, in referencing the statutory factors needed to sustain a

refusal conviction, citing N.J.S.A. 39:4-50.2(e) and N.J.S.A. 39:4-50.4a(a), held:

> (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test.

The State proved these elements beyond a reasonable doubt. See State v. Cummings, 184 N.J. 84, 88 (2005).

Defendant did not sustain her burden of proving that purported physical limitations prevented her from completing the breath tests. See State v. Monaco, 444 N.J. Super. 539, 551 (App. Div. 2016). Viewing the video, and considering Masters' testimony, the court determined that after defendant is explained the breath tests procedures, the obligation to submit to the breath tests, and the consequences of a refusal, she says no three times to doing the breath tests. Moments later, off camera, but audio recorded, she offered to submit to a blood test because of unexplained medical issues. Noting that a person must have sufficient breath to produce a valid breath test, the court found, "[t]here is nothing . . . in the video suggesting respiratory distress," regarding defendant's refusal to submit to a

breathalyzer test. The court further reasoned that the police called an ambulance for defendant "not [due to] any statement she had made to [them], [but it was her] nodding off that led to that decision."

Since we defer to the court's findings of fact, which are supported by credible evidence, we see no need to disturb these findings.

IV

Related to defendant's challenge to the refusal to submit conviction, she contends in Points I and II that the court misapplied the facts and law in determining that the defense of necessity did not apply to her decision to drive to the police station in anticipation of the ill effects from taking her friend's medicine. Defendant argues the court gave improper weight to Masters' testimony as opposed to the hospital records, which indicate she told emergency medical personnel that she drove to the police station seeking help because she had taken her friend's medicine, the source of her illness. She further asserts that the court misapplied State v. Romano, 355 N.J. Super. 21, 36 (App. Div. 2002), by placing the burden on her to prove the defense of necessity beyond a reasonable doubt.

We disagree. Under common law, the elements of the defense of necessity are:

> (1) There must be a situation of emergency arising without fault on the part of the actor concerned;
>
> (2) This emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
>
> (3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
>
> (4) The injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong.
>
> [Romano, 355 N.J. Super. at 29 (quoting State v. Tate, 194 N.J. Super. 622, 628 (App. Div. 1984), rev'd on other grounds, 102 N.J. 64 (1986)).]

In short, our courts have allowed the defense of necessity to be asserted when the otherwise criminal conduct at issue prevents an even greater evil. See ibid. Under N.J.S.A. 2C:2-9, "the burden [is] on the defendant to come forward with some evidence of the defense and the burden of proof on the State to disprove the affirmative defense beyond a reasonable doubt." Id. at 35-36.

Here, defendant presented evidence of mistakenly taking her friend's Nucynta and driving to the police for medical assistance, and the court properly applied the burden to the State to establish beyond a reasonable doubt that the defense of necessity did not excuse her conduct to the charges. The court credited Master's testimony that defendant never indicated to him that, when he

initially approached her nor during the approximately twenty-five minutes it took him to administer the field sobriety tests, she drove to the police station for medical help due to an overdose of medicine. The court believed his assertion that defendant stated she was there to help her friend who had been arrested on the warrant. The video did not show her in a state of panic when she arrived at the police station as she claimed. And while the hospital records contain statements by defendant — and buttressed by her testimony — that she went to the police station seeking aid from the medication she took, the court is not bound to give her assertions more weight than Masters' testimony. Thus, the court rejected defendant's claim that she drove to the police station to seek aid. Given our standard of review, we see no basis to part company with the court's factual findings, which are supported in the record.

We also conclude that defendant's reliance on Romano is misplaced. There, the defendant left a restaurant intoxicated when three angry men brutally beat and threatened to kill him. Romano, 355 N.J. Super. at 24. He made it to his car and drove 350 yards without turning on the headlights and was stopped by police. Ibid. The defendant, covered in blood, immediately informed the officer he had been "jumped" and asked for help. Ibid. We found the defendant's actions were justified, because

no realistic alternative to avoid his pursuers existed. Id. at 35.

Unlike the defendant's actions in Romano, defendant's decision to drive to the police station was not justified because it was to see if she could help her friend. Even if we assume that she drove to the police station seeking aid for her anticipated ill reaction to the medication, her actions still did not satisfy the defense of necessity. First, she created the situation by taking the medication. Second, if she truly feared the medicine's ill effects, she should have drove to the hospital for assistance.[8] Third, no emergency existed when she drove to the police station because as Master stated, and as verified by defendant's expert witness, it was sometime after defendant took the medication and after she got to the station that the medication's ill effect occurred.

V

In Points III and IV, defendant contends that her rights against double jeopardy were violated when we vacated her conviction and remanded the matter to the trial court following her first appeal to this court – after it was discovered that the

[8] Defendant testified that her cellphone battery was dead, and she did not know her friends' neighbors well enough to ask them for assistance. The record does not indicate whether there was a landline phone in her friend's home.

court was not forwarded defendant's hospital records and pill bottle that were admitted in the municipal court trial – and another trial de novo was held that resulted in another guilty verdict. She maintains that while the State, the Criminal Case Management Office, and the court's law clerk, were aware that the court did not have the hospital records and pill bottle, she was not informed.[9] Defendant also asserts that they also submitted a reproduced video for the first trial de novo without informing her. Defendant maintains that under United States v. Dinitz, 424 U.S. 600, 611 (1976) and State v. Dunns, 266 N.J. Super. 349, 366 (App. Div. 1993), these bad faith actions caused her to be retried, which afforded the State a better chance to obtain a conviction; thus, a double jeopardy violation.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, and Article I, Paragraph 11 of the New Jersey Constitution prohibit an individual from being twice placed in jeopardy for the same offense. State v. Miles, 443 N.J. Super. 212, 220-21 (App. Div. 2015), aff'd 229 N.J. 83 (2017). The New Jersey constitutional protections against double jeopardy have been interpreted to be co-extensive with the protections afforded by the federal clause. Id. at 221 (citing State v. Schubert, 212

[9] However, it is unclear how this claim relates to the double jeopardy argument.

N.J. 295, 304 (2012)). Under both clauses, a defendant is safeguarded against three types of abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. Ibid. (citing State v. Dively, 92 N.J. 573, 578 (1983)). "New Jersey has traditionally placed the burden upon a defendant seeking protection of the double jeopardy bar." State v. Salter, 425 N.J. Super. 504, 520 (App. Div. 2012) (citing State v. Ebron, 61 N.J. 207, 217-18 (1972)).

None of the abuses cited in Schubert apply to the present situation. The second trial de novo was due to the court's failure to have the entire municipal court record in the first trial de novo in which defendant was found guilty. In defendant's first appeal to us, with the State's consent, we granted defendant's motion to vacate defendant's conviction and remand for the second trial de novo. Moreover, based upon our review of the record, there is no proof that the State — nor, for that matter, the court staff — were aware that the court did not have the complete record for the first trial de novo. In fact, during that proceeding, defendant's argument in both her brief and at oral argument cited the hospital records and pill bottle, and the court's oral decision referred to "medical records." Accordingly, double jeopardy did not attach to the second trial de novo.

VI

The remaining arguments raised by defendant, to the extent we have not addressed them, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION