SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1486-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT CAPERS,

Defendant-Appellant.

Argued telephonically March 12, 2018 – Decided April 19, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Municipal Appeal No. 009-09-16.

Robert Pentangelo argued the cause for appellant.

Michael R. Philips, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Dennis Calo, Acting Bergen County Prosecutor, attorney; Michael R. Philips, of counsel and on the brief).

PER CURIAM

Defendant Robert Capers appeals from the Law Division's order entered after a de novo trial on the record. The Law Division

found defendant guilty of driving while intoxicated (DWI) in violation of N.J.S.A. 39:4-50. After reviewing defendant's contentions in light of the record and applicable principles of law, we affirm.

On June 27, 2015, defendant was issued a complaint-summons for DWI in violation of N.J.S.A. 39:4-50. That morning, at approximately 3:26 a.m., Detective David Kurz and Officer Thomas Ripoli of the Fort Lee Police Department observed a vehicle improperly parked with its lights on and engine running. The officers found defendant asleep in the driver's seat with his arm and head hanging out of the driver's side window. They also observed a woman asleep in the passenger's seat. Although the officers attempted to wake defendant numerous times, he kept falling back asleep.

When defendant finally awoke, he informed the officers that he had attended a graduation party. During their interaction, Kurz observed that defendant's eyes were watery and his speech was slurred, and he asked defendant to step out of the vehicle. Defendant did so but was unsteady on his feet, leaned on the car and swayed back and forth. Kurz also described defendant as speaking very slowly. His eyes appeared blurry and bloodshot.

Officer Nicole Businitch was called to conduct field sobriety tests on defendant, including a "walk and turn" and a "one-leg

stand" test. As defendant performed the "walk and turn" test, Businitch observed six clues indicating signs of intoxication: defendant broke his feet apart during the instruction phase, started the test too early, missed heel-to-toe steps on multiple occasions, took the incorrect number of steps, stepped off of the lines, failed to count out loud during the test, and held his arms six inches away from his body. Defendant also failed the "one-leg stand" test because he put his foot down repeatedly, did not count aloud, and stopped the test on his own after twelve seconds.

Having determined that defendant failed both sobriety tests, the officers arrested defendant and transported him to the police station. Sergeant James Lee observed defendant for twenty minutes before administering the Alcotest. The test indicated that defendant's blood alcohol content (BAC) was .16.

Following a trial in municipal court, the judge found defendant guilty of DWI in violation of N.J.S.A. 39:4-50. The judge found, beyond a reasonable doubt, that "defendant was in fact the operator of the car, who had operated the car to that position," that there was sufficient evidence from "the field sobriety tests and the number of clues . . . to require the defendant to submit to an Alcotest," and that the "Alcotest was properly administered" with a BAC reading of .16, which was above the legal limit.

Defendant appealed to the Law Division where the court conducted a trial de novo on the record on October 28, 2016. The Law Division judge found defendant guilty of a per se violation of the DWI statute. He stated that "with the engine running, asleep, hand and head out [of] the window, [defendant] was operating the vehicle." The judge further stated that defendant was observed for twenty minutes prior to the Alcotest, and that the Alcotest reading of .16 "was properly registered."[1] The court imposed the same fines and penalties as the municipal sentence: a seven-month driver's license suspension, twelve hours of Intoxicated Driver Resource Center classes, installation of an ignition interlock for six months, and the requisite fines, fees, and costs.

In this appeal, defendant argues:

> POINT ONE: THE STATE HAS FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. CAPERS WAS UNDER THE INFLUENCE AT THE TIME OF THE OPERATION OF THE VEHICLE.

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[1] During the municipal court trial, Ripoli initially testified that he, Kurz, and Lee were present in the testing room, in full uniform with radios and cell phones, during the performance of the Alcotest. However, Ripoli clarified his testimony, stating that only Lee was in the room with defendant during the Alcotest. The Law Division judge addressed this testimony in his decision, stating: "the testimony that only Sergeant Lee was in the room, that was corrective testimony, and was not conflicting testimony. . . . I find it credible that there was only one officer in the [Alcotest] room."

POINT TWO: THE STATE HAS FAILED TO ESTABLISH THE NECESSARY PROOFS REGARDING THE ALCOTEST RESULTS AND THEY SHOULD BE DISREGARDED.

Our scope of review is limited to whether the conclusions of the Law Division judge "could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). We do "not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." State v. Robertson, 228 N.J. 138, 148 (2017) (quoting State v. Locurto, 157 N.J. 463, 474 (1999)).

Appellate courts give substantial deference to a trial judge's findings of fact. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Invr's Ins. Co., 65 N.J. 474, 484 (1974)). These findings should only be disturbed when there is no doubt that they are inconsistent with the relevant, credible evidence presented below, such that a manifest denial of justice would result from their preservation. Id. at 412. We owe no deference to the trial judge's legal conclusions. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Defendant contends that the judge erroneously determined that he was operating a car at the time of the DWI arrest. A person is deemed to have been driving while intoxicated if that person "operates a motor vehicle while under the influence of intoxicating

liquor, narcotic, hallucinogenic or habit-producing drug." N.J.S.A. 39:4-50(a). "Actual operation is not required." State v. Ebert, 377 N.J. Super. 1, 10 (App. Div. 2005). "'Operation' may be prove[n] by actual observation of the defendant driving while intoxicated," by defendant's admission, or through circumstantial evidence reflecting circumstances that the defendant was driving while intoxicated. Id. at 10-11 (citations omitted).

The Law Division judge opined that circumstantial evidence existed to prove that defendant operated the vehicle beyond a reasonable doubt:

> This [c]ourt is satisified, based upon the testimony, that the defendant's car was observed by officers at approximately 3:26 a.m. That the defendant's car . . . was parked on the side of a public street, with the keys in the ignition, the engine running, with his hand and head outside the window. Because he was found asleep in the driver's seat. That there is clear inference that he drove the vehicle to that location.
>
> The [c]ourt has no doubt that the vehicle was operated by the defendant. . . .
>
> All that needs to be proved is operation. Whether he was operating his vehicle, actually operating it ten minutes prior, or an hour prior, or . . . hours prior, the [c]ourt is satisfied that -- by the circumstantial evidence beyond a reasonable doubt, and with the engine running, asleep, hand and head out the window, that he was operating the vehicle.

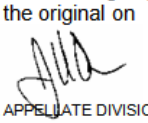
We discern no basis to disturb the judge's decision. He thoroughly reviewed the facts and we are satisfied there is sufficient credible evidence in the record to substantiate his finding that defendant was operating the vehicle.

We also find defendant's argument that the Alcotest was improperly administered to be unpersuasive. Defendant relies on the testimony of Ripoli where he stated he was in the test room during the Alcotest. However, Ripoli clarified thereafter that only Lee was in the test room during the performance of the Alcotest. Lee corroborated that he was the only person present in the testing room and no electronic devices were present. The judge found Lee's testimony to be credible, and that the Alcotest reading was properly administered and registered. He therefore determined defendant to be guilty of per se DWI.

"A violation of [the DWI statute] may be proven 'through either of two alternative evidential methods: proof of a defendant's physical condition or proof of a defendant's blood alcohol level.'" State v. Howard, 383 N.J. Super. 538, 548 (App. Div. 2006) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, 180 N.J. 45 (2004)). We are satisfied that there is sufficient credible evidence in the record to substantiate these findings. Therefore, defendant was properly convicted of DWI in violation of N.J.S.A. 39:4-50.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION