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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1501-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MINA GIRGIS,

Defendant-Appellant.

Submitted January 23, 2018 – Decided March 2, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Municipal Appeal
No. 16-12.

Clark & Clark, LLC, attorneys for appellant
(Ryan J. Clark, on the brief).

Joseph D. Coronato, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella,
Chief Appellate Attorney, of counsel; John C.
Tassini, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from an order of the Law Division dated November 3, 2016, which denied his motion to vacate his conviction for refusing to submit to a breath test. We affirm.

This appeal arises from the following facts. On October 30, 2015, at approximately 1:04 a.m., a Toms River police officer observed an illegally parked car. The officer approached the vehicle and saw defendant asleep behind the wheel of the car, with the keys in the ignition. The car's engine was running and the headlights were on.

The officer woke defendant and had him exit the car. Defendant denied he had been driving, and said a friend had driven him there and left. Defendant admitted he had consumed two beers that evening, and the officer observed a bottle of vodka in plain view on the back seat of the car. Defendant then admitted he had consumed some of the vodka.

The officer transported defendant to police headquarters, where the officer read defendant the Attorney General's standard statement informing him of the consequences of refusing to submit to the breath test as required by N.J.S.A. 39:4-50.29(e). Defendant refused to submit to the test. As a result, the officer issued Summons No. TR-088016, which charged defendant with refusal to provide breath samples "contrary to N.J.S.A. 39:4-50.2." The officer also issued Summons No. TR-088015, which charged defendant

with driving while intoxicated, contrary to N.J.S.A. 39:4-50; and Summons No. TR-088017, which charged defendant with possessing an open container of alcohol in an automobile, contrary to N.J.S.A. 39:4-51b.

On May 6, 2016, defendant appeared in the Toms River municipal court. His attorney sought dismissal of the refusal charge, arguing that the summons erroneously cited N.J.S.A. 39:4-50.2. Counsel argued that the summons should have cited N.J.S.A. 39:4-50.4a, which he asserted was the statute applicable to the charge of refusing to provide a breath sample. Counsel further argued that the State could not amend the summons because more than ninety days had passed since the alleged refusal offense occurred. See N.J.S.A. 39:5-3(b).

The municipal court judge denied the motion. Defendant then pled guilty to the refusal charge and the State agreed to dismiss the other charges. Defendant reserved the right to appeal the denial of his motion to dismiss the summons.

The judge imposed a fine of \$506, a \$100 surcharge, and \$33 in court costs. In addition, the judge ordered the revocation of defendant's driving privileges for two years, and required that he spend forty-eight hours at an Intoxicated Drivers Resource Center. The judge also ordered defendant to use an interlocking

device on his primary vehicle during the two-year revocation period and one year thereafter. The judge refused to stay the sentence.

Defendant filed an appeal seeking de novo review by the Law Division of the denial of his motion to dismiss the summons charging refusal to submit to the breath test. The judge considered the appeal on November 3, 2016, and placed her decision on the record. The judge rejected defendant's argument that the summons must be dismissed because the officer failed to cite N.J.S.A. 39:4-50.4a.

The judge noted that N.J.S.A. 39:4-50.2, which provides that every person who operates a motor vehicle in this State consents to providing breath samples for the purpose of measuring the level of alcohol in his or her system, and N.J.S.A. 39:4-50.4a, which sets forth the penalties for failing to submit to the breath test, must be read together. The judge concluded that the summons was not defective.

The judge also rejected defendant's contention that he was denied due process and notice of the charge due to the officer's failure to cite N.J.S.A. 39:4-50.4a. The judge found that defendant was informed of the charge and the consequences of refusing to submit to the breath test.

The judge entered an order dated November 3, 2016, denying defendant's motion to dismiss the summons. This appeal followed.

On appeal, defendant argues: (1) his conviction cannot be sustained because the summons cited a violation of N.J.S.A. 39:4-50.2, which is not a substantive traffic offense; and (2) the summons could not be amended because N.J.S.A. 39:5-3(b) requires that a complaint for refusing to provide breath samples be made within ninety days of the offense.

When reviewing a decision on a municipal appeal to the Law Division, we defer to the trial court's findings of fact if "the findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Kuropchak, 221 N.J. 368, 382-83 (2015) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). However, we owe no deference to the trial court's decision on an issue of law "and the consequences that flow from established facts," which we review de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

We first consider defendant's contention that the summons issued for refusal was fatally defective because the officer cited the implied consent law, N.J.S.A. 39:4-50.2, rather than the statute which sets forth the penalties for refusing to submit to the breath test, N.J.S.A. 39:4-50.4a. Defendant contends N.J.S.A. 39:4-50.2 is not a substantive traffic offense and therefore his conviction cannot be sustained.

The implied consent statute, N.J.S.A. 39:4-50.2, provides in pertinent part that:

[a]ny person who operates a motor vehicle on any public road, street or highway . . . 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 . . . 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

. . . .

No chemical test . . . 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 [N.J.S.A. 39:4-50.4a] 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.

In addition, N.J.S.A. 39:4-50.4a provides that "the municipal court shall revoke the right to operate a motor vehicle of any operator who, after being arrested for [DWI] . . . refuse[d] to submit to a [chemical] test provided for in section 2 of . . . [N.J.S.A. 39:4-50.2] when requested to do so." In determining whether a person is guilty of refusal,

[t]he municipal court shall determine . . . whether the arresting officer had probable

cause to believe that the person had been driving or was in actual physical control of a motor vehicle . . . while the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-inducing drug or marijuana; whether the person was placed under arrest . . . and whether he refused to submit to the test upon request of the officer; and if these elements of the violation are not established, no conviction shall issue.

[Ibid.]

In State v. Marquez, the Court stated that "[t]o identify all of the elements of a refusal offense, [the Court] must look at the plain language of both statutes because although they appear in different sections, they are plainly interrelated." 202 N.J. 485, 501 (2010). The Court observed that because N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a "cross-reference one another internally" and "rely on each other substantively," the statutes "must therefore be read together." Id. at 502. The Court stated:

[a] careful reading of the two statutes reveals four essential elements to sustain a refusal conviction: (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.

[Id. at 503 (citing N.J.S.A. 39:4-50.2(e), 39:4-50.4a(a); State v. Wright, 107 N.J. 488, 490 (1987)).]

In Marquez, the Court held that reading the standard statement is a necessary element of a refusal conviction, and rejected the contention that the procedural safeguards of N.J.S.A. 39:4-50.2 are not a substantive element of the refusal offense. Id. at 506. The Court added that "[t]he fact that motorists are deemed to have implied their consent, pursuant to [N.J.S.A. 39:4-50.2], does not alter that conclusion." Ibid. The Court held that N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a "impose an obligation on officers to inform drivers of the consequences of refusal." Ibid.

We note that in State v. Cummings, the Court held that a conviction of refusal requires proof beyond a reasonable doubt. 184 N.J. 84, 89 (2005). In Cummings, the Court observed that N.J.S.A. 39:4-50.4a is the "exact statutory provision applicable to breathalyzer refusal cases," and that "care should be taken to list . . . N.J.S.A. 39:4-50.4a" in the summons charging refusal. Id. at 90 n.1.

The Cummings Court did not, however, hold that dismissal is required when the summons cites N.J.S.A. 39:4-50.2 rather than N.J.S.A. 39:4-50.4a. Ibid. (finding "no prejudice resulting from it"). Indeed, such a conclusion would be inconsistent with the Court's later decision in Marquez, where the Court held that the

elements of the refusal offense are drawn from both N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a. Marquez, 202 N.J. at 502.

Therefore, in this case, the Law Division judge correctly determined that the summons issued to defendant for refusing to submit to the breath test was not fatally flawed. Since the elements of the refusal offense are found in both N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a, the citation of only the former statute does not require dismissal of the summons. Indeed, dismissal of the charges under these circumstances would exalt form over substance, an approach our courts have "properly rejected." State v. Fisher, 180 N.J. 462, 472 (2004). Moreover, defendant was not prejudiced because the officer read him the standard statement, which informed him of the penalties for refusal set forth in N.J.S.A. 39:4-50.4a.

The judge also correctly found that defendant's reliance upon State v. Nunnally, 420 N.J. Super. 58 (App. Div. 2011), was misplaced. In that case, the defendant held a commercial driver's license (CDL) and he was driving a commercial vehicle at the time he was alleged to be driving while intoxicated. Id. at 63-64. The defendant repeatedly failed to blow properly into the machine that was being used to test the level of alcohol in his system. Id. at 64. He was cited for refusal to submit to the breath test in

violation of the general refusal statute, N.J.S.A. 39:4-50.4a.
Ibid.

We held that the citation to the general refusal statute, rather than the CDL refusal statute, required dismissal of the charge because a CDL refusal is not a lesser-included offense of general refusal. Id. at 66-67. The proofs required for a CDL refusal are different from those required for a general refusal. Id. at 67. The CDL statute provides that an officer must have probable cause to believe the driver of a commercial vehicle has at least a .04 percent blood alcohol content, whereas the general refusal statute only requires probable cause that the driver was operating the vehicle "under the influence" of alcohol. Ibid.

We concluded that citation to the general refusal statute failed to provide the defendant with notice of the offense with which he was charged. Id. at 67-68. We also concluded that the State could not amend the charge on the date of trial because it was more than ninety days after the alleged offense occurred. Id. at 62, 67-68.

Here, the judge correctly found that Nunnally was distinguishable. As the judge noted, the defendant in Nunnally was charged with a CDL refusal and the officer cited the general refusal statute in the summons. In this case, defendant was charged with general refusal, and while the summons cited only N.J.S.A.

39:4-50.2, the summons was not fatally flawed because the implied consent law and the refusal statute must be read together. The judge also correctly determined that defendant was adequately informed of the consequences of his refusal to submit to a breath test, and that he violated the general refusal law.

In view of our determination that the summons issued here properly charged defendant with failing to submit to a breath test, we need not address defendant's contention that the statute of limitations in N.J.S.A. 39:5-3(b) precluded the State from amending the summons to cite N.J.S.A. 39:4-50.4a.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION