SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1963-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ASHTON FUNK,

Defendant-Appellant.

Submitted January 25, 2018 – Decided May 8, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Municipal Appeal No. 001-16.

Jacobs & Barbone, PA, attorneys for appellant (Louis M. Barbone, on the brief).

Damon G. Tyner, Atlantic County Prosecutor, attorney for respondent (Melinda A. Harrigan, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following a trial de novo in the Law Division, defendant, a former firefighter and lifeguard for the city of Margate, was convicted of shoplifting, N.J.S.A. 2C:20-11(b)(1), a disorderly

persons offense. The conviction stemmed from the theft of four items valued at $7.98 from the local Wawa convenience store. He was sentenced to pay $308 in fines and costs, and ordered to forfeit his public employment pursuant to N.J.S.A. 2C:51-2. Defendant now appeals from the judgment of conviction and order of forfeiture, raising the following arguments for our consideration:

> POINT I[1]
>
> DEFENDANT'S CONVICTION ON DE NOVO APPEAL WAS NOT BASED ON SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD, AND WAS A CLEARLY MISTAKEN FINDING, REQUIRING INTERVENTION AND CORRECTION BY THE APPELLATE DIVISION THROUGH APPRAISAL OF THE RECORD AND BY MAKING ITS OWN FINDINGS AND CONCLUSIONS.
>
> A. THE DE NOVO COURT'S FINDING THAT LT. BAUMGARDNER WAS CREDIBLE IS NOT BASED ON SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD.
>
> B. THE DE NOVO COURT'S FINDING THAT DEFENDANT WAS NOT A REGULAR CUSTOMER WHO ROUTINELY PAID FOR HIS MERCHANDISE WAS AGAINST THE SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD.
>
> C. THE DE NOVO COURT'S FINDING THAT THERESA MACINAW LACKED WEIGHT AND RELIABILITY WAS UNSUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD.

[1] We condensed the points for clarity.

POINT II

THE PROSECUTOR'S FAILURE TO SEEK A WAIVER OF FORFEITURE PURSUANT TO N.J.S.A. 2C:51-2(E) WAS AN ABUSE OF DISCRETION, AS FACTUALLY CONFIRMED BY THE TRIAL COURT, AND THE TRIAL COURT'S ORDER OF FORFEITURE WAS ERROR AS A MATTER OF LAW.

After considering the arguments presented in light of the record and applicable law, we affirm.

The following facts were adduced from the municipal court[2] trial record. Lt. Joseph Baumgardner of the Longport Police Department testified that at approximately 8:55 a.m. on August 17, 2015, he arrived at the Margate Wawa, where he goes every morning for coffee. Before entering the store, he observed defendant, whom he knew through defendant's employment with the Margate City Fire Department. After entering the store, Baumgardner approached the coffee bar where he greeted defendant.

Thereafter, Baumgarner observed defendant pick up a pre-made breakfast sandwich, a bottle of Gatorade, a bag of sunflower seeds, and a cup of coffee. While standing at the checkout counter, Baumgarder observed defendant "retrace[] back through . . . the store, loop[] around . . . and then exit[] out the front door" without paying for the items. Baumgardner explained that there

[2] The case was transferred from Margate to Egg Harbor Township Municipal Court.

were two open lines to pay, but defendant entered neither line before leaving the store. Baumgardner admitted that at one point, he stopped observing defendant for "a few seconds" but, apart from those brief moments, he had been consistently watching defendant in the store.

After paying for his own merchandise, Baumgardner exited the store and confronted defendant, who was already seated in his vehicle. Baumgarder asked defendant how he got ahead of him. According to Baumgarder, defendant essentially replied that "[the] guy in line let me in front of him . . . ." Baumgarder testified he never asked defendant whether he paid for the four items, accused him of shoplifting, or ordered him back into the store, but rather let him leave. Baumgardner subsequently reported the incident to his police chief, who in turn contacted the County Prosecutor's Office, which led to an investigation resulting in the filing of the shoplifting charge.

During the investigation, Prosecutor's Office Detective Sergeant Jason Kangas interviewed defendant on August 18, 2015. During the interview, defendant claimed that prior to leaving the store with the four items, someone offered to purchase the items for him. Defendant eventually described his benefactor as a six-foot tall male in his upper fifties with dirty blond hair. After initially indicating that the interaction occurred by the coffee

bar, defendant revised his account and ultimately stated that the conversation with his benefactor occurred in the back right area of the store.

Kangas reviewed the Wawa video surveillance tapes[3] he obtained from Raymond Cheung, a Wawa shift manager, but could not locate anyone matching defendant's description of his benefactor. Cheung knew defendant as a regular customer who always paid for his merchandise, but explained that if someone wanted to pay for someone else's order, "[t]hey would have to physically bring the items up" to "be scanned and accounted for . . . ."

Kangas also examined the transaction journal provided by Daniel Blake Loper, the Wawa store manager. The journal consisted of all the sales occurring between 8:30 a.m. and 9:30 a.m on the date in question. However, Kangas could not identify a single transaction that included a cup of coffee, a breakfast sandwich, Gatorade, and sunflower seeds. Loper also knew defendant as a regular customer who always paid for his merchandise, and confirmed that in order to pay for someone else's order, "[t]hey would still have to bring it up to the register . . . ."

In the course of the investigation, Kangas also interviewed Wawa cashiers, Martia McShan and Theresa Macinaw. At trial, McShan

[3] The video surveillance footage was admitted into evidence.

testified consistent with her statement to Kangas that at no point during her shift on the date in question had anyone paid for someone else's items. Moreover, she never rang up a cup of coffee, a breakfast sandwich, Gatorade, and sunflower seeds in a single transaction. She also confirmed that normally, if someone wanted to purchase an item for another person, both patrons must come to the register with the items so that the items could be scanned into the system. Otherwise, she would not permit the sale.

Macinaw, who was also a Wawa shift manager, testified that she was working the register on the date in question. When asked whether she heard anyone say that they wanted to pay for someone else's order, she replied, "I recollect that I, I mean I can't be sure but I'm pretty sure that I did hear that, yes." She believed a patron named "Rich" made the offer, as he had purchased items for other customers in the past. However, Macinaw denied ringing up a cup of coffee, a breakfast sandwich, Gatorade, and sunflower seeds in one transaction and, when specifically asked if Rich paid for defendant's items, responded "[e]vidently that day that probably didn't happen." Macinaw claimed she did not tell Kangas about Rich's offer to pay because she did not remember it when she was interviewed.

Richard Cramer, the man identified as "Rich[,]" testified on defendant's behalf. According to Cramer, he occasionally

purchased items for defendant at the Wawa. However, when asked on cross-examination whether he saw defendant on August 17, 2015, he responded, "No."

On September 15, 2016, Judge Bernard E. DeLury, Jr. issued a written decision, finding defendant guilty of shoplifting. Judge DeLury found both Baumgardner's and Kangas' testimony "credible" and made factual findings consistent with their testimony. The judge noted that while the testimony of Macinaw and Cramer also "appeared to be credible, . . . the facts they related were not dispositive of . . . [d]efendant[']s contentions that he did not shoplift the items and that the State failed to prove the requisite intent." Judge DeLury acknowledged that while "Macinaw's testimony was credible[,]" it "lack[ed] weight and reliability, as she was soon contradicted by other evidence[,]" including "Cramer's testimony that he was not even in the store that day."

Further, the judge compared defendant's statement to Baumgardner at the scene, that someone permitted him to cut in line, to defendant's statement to Kangas during questioning, that someone offered to pay for his items. The judge concluded that "[n]either version has the ring of truth" and explained that the statements "are obviously inconsistent[,]" and "at odds with the testimonial and video evidence in the case." Moreover, the judge noted that if

> [d]efendant was a regular in the Wawa, he would then have likely known that at least two of the items, the sunflower seeds and the Gatorade, had to be scanned, even if they were going to be paid for by someone else. More importantly, the video clearly shows . . . [d]efendant walking around the people in line and exiting the store without ever having paid for the items.

After delineating the elements of shoplifting, Judge DeLury concluded that "the credible evidence" established "beyond a reasonable doubt" that "[d]efendant purposely took possession of items offered for sale by Wawa; that Wawa [was] a store or other retail mercantile establishment; and that [d]efendant acted with the purpose of depriving Wawa of the merchandise without paying Wawa the value thereof." As to the first element, the judge stated:

> [T]he State's evidence was most compelling and persuasive. The State proved beyond a reasonable doubt that . . . [d]efendant carried out of the Wawa four items that were displayed for sale in the store, namely a cup of coffee, a Sizzli breakfast sandwich, a bag of sunflower seeds and a bottle of Gatorade. The testimony of Lt. Baumgardner and the composite video recording from Wawa provided ample proof of this element.

As to defendant's intent, Judge DeLury explained:

> The State has also proven beyond a reasonable doubt that . . . [d]efendant acted purposely in carrying away the items. Based on Lt. Baumgardner's testimony and the video evidence, it is clear that . . . defendant moved about the store with the purpose of

> obtaining the items and that he made a direct and purposeful exit from the store after a few minutes. This was not a case of absent-minded browsing in a store where a person may pick up an item, hold on to it and then unintentionally or thoughtlessly wander out of the store. . . . Defendant's conduct in this case showed that he acted purposely with respect to the nature and result of his conduct. From the totality of the circumstance[s] and in light of the credible evidence, the []court infers that it was . . . [d]efendant's conscious object to carry away the retail merchandise from the Wawa without paying for it with the purpose to deprive Wawa of its property, that is, to steal the four food and drink items. It is not the [c]ourt's role to speculate what may have happened in the past when . . . [d]efendant shopped at the Wawa. Nor is [d]efendant's argument about his "open and conspicuous" behavior and the unlikelihood of him shoplifting dispositive of . . . [d]efendant's purpose and conduct on August 17, 2015. The [c]ourt understands . . . [d]efendant's argument that it made no sense for him to shoplift from his neighborhood Wawa where he was a regular customer. However, people do senseless, curious, and unfathomable and unlawful things that are not in their best interest all the time. . . . In this case, if the [c]ourt were to speculate, it is just as likely that . . . [d]efendant's purpose in shoplifting the items was rooted in the fact that the store was crowded and busy and he may not have wanted to wait in line to pay for a few items of small value. In any event, and leaving all conjecture aside, . . . [d]efendant's unlawful purpose in carrying away the items has been sufficiently proven by the State's evidence.

As to defendant's possession of the items, the judge reasoned:

> Similarly, the State has proven beyond a reasonable doubt that . . . [d]efendant possessed the four retail items knowingly. . . . He had knowing, intentional control of the items accompanied by a knowledge of their character. Specifically, the [c]ourt infers . . . [d]efendant's knowing possession from his actions in preparing his coffee and individually selecting his food and beverage items. Based on the evidence, it is clear that . . . [d]efendant knew he was in possession of the four items. It is equally clear that . . . [d]efendant's possession was neither passing, fleeting or uncertain. He was aware of his control of the items and could have relinquished his control of them at any time before he left the Wawa.

Addressing the remaining elements, Judge DeLury noted "the State's evidence established beyond a reasonable doubt that the full retail value was $7.98, thereby grading the matter as a disorderly persons offense." Further, the judge explained that "[t]he State's evidence showed beyond a reasonable doubt that the Wawa in Margate is a merchant within the meaning of the statute[,]" and "[t]he State's evidence has given the [c]ourt ample basis to infer that . . . [d]efendant acted with the intent to deprive Wawa of the property permanently[,] inasmuch as "[t]hese items were consumable and were destined for . . . [d]efendant's immediate consumption."

After finding defendant guilty of shoplifting, on January 8, 2016, the municipal judge granted the State's application to forfeit defendant's public employment. In a written opinion dated

December 5, 2016, Judge DeLury denied defendant's motion to waive the forfeiture of public employment pursuant to N.J.S.A. 2C:51-2(e). After considering the prosecutor's statement of reasons for declining to waive forfeiture, the judge found no abuse of discretion. First, acknowledging that the forfeiture was predicated upon defendant's conviction for shoplifting, which satisfied the "offense of dishonesty" requirement of N.J.S.A. 2C:51-2(a)(1), the judge noted that although it was "a relatively petty theft involving less than eight dollars in retail value[,]"

> [n]evertheless, the real gravamen of the offense for the purpose of the forfeiture statute is that the offense is one of moral turpitude, which warrants the application of the statute in this case . . . . Another factor to consider is the high standard that public safety employees are held to. . . . Defendant is a firefighter and lifeguard. As such, he should be held to a higher standard of conduct.
>
> . . . .
>
> [T]he community is entitled to employ those of high moral character who do not stoop to petty theft, a theft that was done in the public view.

Next, Judge DeLury acknowledged that waiver of forfeiture is permitted under N.J.S.A. 2C:52-2 "where the conviction is of a petty disorderly persons offense" and "discretion to grant such a waiver is reserved . . . exclusively to the county prosecutor and the Attorney General[,]" subject to review under an abuse of

discretion standard. Citing State v. Rone, 410 N.J. Super. 589, 603 (App. Div. 2009), the judge noted it was defendant's burden to prove that "good cause exists to waive forfeiture." However, after considering the prosecutor's decision not to seek a waiver in light of the sixteen factors delineated in State v. Flagg, 171 N.J. 561, 571 (2002),[4] the judge concluded that the prosecutor

[4] Those factors are as follows:

> 1. The totality of the circumstances surrounding the event;
> 2. The nature of the offense, including its gravity and substantiality, whether it was a single or multiple offense and whether it was continuing or isolated;
> 3. The quality of moral turpitude or the degree of guilt or culpability, including the employee's reasons, motives and personal gain;
> 4. The duties of the employee;
> 5. The relationship between the offense and the duties of the employee, including but not limited to, whether the criminal activity took place during work hours or involved work facilities, contacts, relationships, or equipment;
> 6. The employee's length of service;
> 7. The employer's desires;
> 8. The needs and interests of the victim and society, including consideration of the victim's desires;
> 9. The extent to which the employee's offense constitutes part of a continuing pattern of anti-social behavior;
> 10. The employee's prior record of convictions and disciplinary infractions;
> 11. The threat presented to coworkers or the public if the employee is permitted to retain his or her position;

"considered all permissible bases" and "articulated several rational bases that are embraced by established policies" in deciding against waiver.

Notably, the judge pointed out that the prosecutor considered as aggravating circumstances the fact that defendant, who has been a Margate City firefighter since 2011 and on the Margate City Beach Patrol for nineteen years, held positions that "are held in high esteem" "particularly in the close-knit beach communities of [the] County . . . ." According to the prosecutor, because defendant was "entrusted with the lives and property of his fellow citizens[,]" he "must adhere to the highest standards of conduct."

> 12. Any involvement of the employee with organized crime;
> 13. Whether the employee has been granted waiver on a prior occasion;
> 14. The impact of waiver on the employment status of codefendants as to avoid an injustice if similarly situated culpable individuals are tried in separate trials;
> 15. Whether waiver of forfeiture of office would undermine public confidence in the integrity of important governmental functions, including but not limited to law enforcement functions; and
> 16. Nature and scope of cooperation with the prosecuting authorities.
>
> [Attorney General Guidelines for Deciding Whether to Apply for a Waiver of Forfeiture of Public Office Pursuant to N.J.S.A. 2C:51-2(e) 9-10, available at http//www.state.nj.us/lps/dcj/agguide/waiverofforfeiture.pdf.]

Instead, "defendant committed the offense minutes before his shift at the fire station was to begin" and "was wearing a part of his fire fighter uniform, a Margate City Fire Fighter hat, as well as shorts which were purchased by the [Margate City] Beach Patrol . . . ." Further, "[d]efendant was less than candid with law enforcement" and provided "two different versions of what occurred . . . , neither of which reflected the unvarnished truth."

Additionally, defendant appeared to have been "motivated by unlawful personal gain" and evinced "a guilty state [of] mind" in committing an offense that "impose[s] significant costs on retailers[,]" which "costs are ultimately passed on to consumers in the form of higher prices." His conduct suggested to the prosecutor that "he believe[d] he [was] above the law." Further, in the prosecutor's view "[d]efendant's propensity to steal present[ed] a threat to the public as he is given access to people[']s home[s] as a fire fighter often at times when residents are vulnerable or are in a physically or mentally compromised state."

While the judge rejected the prosecutor's consideration of two prior theft allegations that did not result in charges or convictions, the judge noted that the prosecutor's consideration of two prior "[d]isciplinary [i]nfractions" in connection with his position with the Beach Patrol as well as a prior out-of-state

"[d]riving [u]nder the [i]nfluence" conviction was proper. Likewise, given the employer's ambivalence, the absence of "a clear indication . . . that the employer desire[d] a waiver[,]" weighed against defendant and in favor of the prosecutor's decision. The prosecutor "was mindful of the claimed hardships that will be attendant with the loss of public employment" but determined that "such hardships [were] not undue under the circumstances."

The judge concluded

> [T]he Prosecutor's reasons for not seeking a waiver demonstrate an appropriate exercise of prosecutorial and executive discretion. The court is mindful that the Prosecutor's decision not to seek a waiver in this case will result in [the] end of . . . defendant's long-held public employment. However, since the Prosecutor has considered all applicable factors and has soundly exercised her discretion, the application of the forfeiture requirement will not work as an "instrument of injustice" in this case. No doubt the result will be very serious, costly, weighty and embarrassing to . . . defendant and his family. This result, however, under the law is a just one and the individual consequences that follow from . . . defendant's dishonesty are not sufficient to render the prosecutor's decision into an instrument of injustice.

Judge DeLury entered a memorializing order on December 14, 2016, ordering the immediate forfeiture of defendant's "positions of employment with Margate City[,]" and this appeal followed.

On appeal, while acknowledging that the record establishes "the prima facie elements necessary" for "a shoplifting charge[,]" defendant argues that there was insufficient credible evidence for the trial judge to find him guilty beyond a reasonable doubt. Specifically, defendant challenges the judge's credibility assessments of Baumgardner's and Macinaw's testimony, as well as the judge's finding that he was not a regular customer who routinely paid for his items. Defendant argues further that while the conviction triggered the forfeiture provisions of N.J.S.A. 2C:51-2, the prosecutor abused her discretion in denying him a waiver because he lacked "moral culpability[.]" Defendant also asserts the prosecutor's reliance on "prior 'suspicions'" that never resulted in "a criminal charge" or "a disciplinary infraction" was the "essence of an ordinary abuse of discretion" that invalidated the "waiver analysis." We disagree and affirm substantially for the reasons detailed in Judge DeLury's well-reasoned and cogent opinions. We add only the following comments.

On an appeal of a municipal conviction to the Law Division, the Law Division judge must decide the matter de novo on the record. State v. Adubato, 420 N.J. Super. 167, 176 (App. Div. 2011). This means that the Law Division judge must independently make his or her own factual findings, rather than determining whether the findings of the municipal judge were supported by

sufficient credible evidence. See ibid.; State v. Johnson, 42 N.J. 146, 157 (1964). However, in making findings about witness credibility, the Law Division judge should give "due" but "not necessarily controlling" weight to the municipal judge's credibility determinations, because the municipal judge had the opportunity to observe the testimony firsthand. Adubato, 420 N.J. Super. at 176 (quoting Johnson, 42 N.J. at 157).

When we review the Law Division judge's decision, our standard is different. We do not decide the facts de novo. Rather we decide whether the Law Division judge's factual findings are supported by sufficient credible evidence. Adubato, 420 N.J. Super. at 176; State v. Locurto, 157 N.J. 463, 470-71 (1999). Where both the municipal judge and the Law Division judge have found a witness credible, we owe particularly strong deference to the Law Division judge's credibility finding. Locurto, 157 N.J. at 474. Moreover, when the municipal court and the Superior Court "have entered concurrent judgments on purely factual issues[,]" we do not disturb those findings "absent a very obvious and exceptional showing of error." Ibid. However, we review legal conclusions de novo. See State v. Rivera, 411 N.J. Super. 492, 497 (App. Div. 2010).

Turning to the forfeiture order, pursuant to N.J.S.A. 2C:51-2(a)(1), "[a] person holding any public office, position or

employment . . . who is convicted of an offense [involving dishonesty] shall forfeit such office, position or employment . . . ." The forfeiture requirement is triggered when "[a] public official [is] convicted of a crime of dishonesty, no matter how petty . . . ." State v. Hamm, 121 N.J. 109, 125 (1990). However, "to avoid the harshness of forfeiture and disqualification for a few minor offenses in which the circumstances dictate otherwise[,]" Flagg, 171 N.J. at 571, N.J.S.A. 2C:51-2(e) provides that "[a]ny forfeiture or disqualification . . . which is based upon a conviction of a disorderly persons [offense] . . . may be waived by the court upon application of the county prosecutor or the Attorney General and for good cause shown." While "[d]efendant ha[s] the burden of proof to establish the presence of good cause to warrant a waiver of the forfeiture . . . that would otherwise flow from [the] conviction[,]" State v. Rone, 410 N.J. Super. 589, 607 (App. Div. 2009), a county prosecutor's decision not to apply for a waiver of forfeiture is subject to judicial review under the abuse of discretion standard. Flagg, 171 N.J. at 571-72.

An abuse of discretion arises when a decision is "made without a rational explanation, inexplicably departed from the established policies, or rests on an impermissible basis." Id. at 571 (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985). "Ordinarily, an abuse of discretion

will be manifest if defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment." Ibid. (quoting State v. Baynes, 148 N.J. 434, 444 (1997)). In determining whether a prosecutor's decision to not seek waiver constitutes an abuse of discretion, in Flagg, our Supreme Court articulated sixteen specific factors for consideration, which factors were encompassed in the Attorney General's guidelines intended to assure state-wide uniformity in the handling of waiver of forfeiture applications. Id. at 579. See Attorney General Guidelines for Deciding Whether to Apply for a Waiver of Forfeiture of Public Office Pursuant to N.J.S.A. 2C:51-2(e) 9-10, available at http//www.state.nj.us/lps/dcj/agguide/waiver offorfeiture.pdf.

Here, we are satisfied that the record contains ample support for defendant's conviction for shoplifting. We also agree with Judge DeLury's determination that the decision against waiver reflected no abuse of prosecutorial discretion.

Affirmed.