SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4671-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WALTER R. MUNICO,

Defendant-Appellant.

Telephonically argued January 10, 2018 – Decided March 2, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-12-2100.

Luke C. Kurzawa argued the cause for appellant (Reisig Criminal Defense & DWI Law, LLC, attorneys; Matthew W. Reisig, of counsel; Luke C. Kurzawa, on the brief).

Mary R. Juliano, Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Kathleen S. Bycsek, of counsel and on the brief).

PER CURIAM

Defendant appeals from the Law Division's denial of his motion to dismiss a one-count indictment[1] charging him with a violation of N.J.S.A. 2C:40-26(b), by operating a motor vehicle during a period of license suspension or revocation,[2] for a second or subsequent violation of driving while intoxicated,[3] or refusal to submit to a breath test.[4] He contends:

> POINT I
>
> THE INDICTMENT PENDING AGAINST DEFENDANT SHOULD HAVE BEEN DISMISSED BY THE LAW DIVISION, ALONG WITH THE UNDERLYING CRIMINAL COMPLAINT, BECAUSE THE MUNICIPAL COURT IMPROPERLY ASSUMED A PROSECUTORIAL ROLE BY DIRECTING THE MATAWAN POLICE DEPARTMENT FILE A CRIMINAL CHARGE AGAINST THE DEFENDANT AND FAILED TO FOLLOW NEW JERSEY COURT RULES REGARDING OPEN PROCEEDINGS.

We conclude Judge Joseph W. Oxley did not abuse his discretion in denying defendant's motion and affirm.

A decision on whether to dismiss an indictment is left to the sound discretion of the trial judge and will be reversed only for an abuse of discretion. State v. Warmbrun, 277 N.J. Super. 51,

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[1] This was the second indictment returned against defendant. The first, charging the same offense, was dismissed without prejudice on grounds unrelated to the present appeal.

[2] N.J.S.A. 39:3-40.

[3] N.J.S.A. 39:4-50.

[4] N.J.S.A. 39:4-50.2, -50.4(a).

59-60 (App. Div. 1994). An indictment should be dismissed only on the "clearest and plainest ground," where it is manifestly deficient or palpably defective. State v. Hogan, 144 N.J. 216, 228-29 (1996) (quoting State v. Perry, 124 N.J. 128, 168 (1991)).

Defendant argues the municipal court judge violated the separation of powers clause[5] when he "instructed the Matawan Police [Department][6] to file a criminal indictable charge without any independent review or consideration of . . . [d]efendant's matter by the [c]ounty [p]rosecutor, or any member of the [e]xecutive branch." Defendant references a police department "Call for Service Details Report," authored by Officer Jennifer Paglia on the date of the municipal court proceedings, that reads:

> Received a call from Hazlet Court[7] advising they have a subject who has [three] driving while [suspended violations] and needs to be charged with [N.J.S.A.] 2C:40-26 (Operating a Motor Vehicle During a Period of License Suspension, Fourth Degre[e] Crime). See investigation for details.

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[5] N.J. Const. art. III, § 1, ¶ 1.

[6] Defendant was initially charged by a Matawan officer with driving while suspended, N.J.S.A. 39:3-40, and failure to maintain lamps, N.J.S.A. 39:3-66.

[7] The case was heard in a joint municipal court servicing the Borough of Hazlet, the Borough of Matawan and the Township of Aberdeen.

The separation of powers doctrine was designed to create a system of checks and balances among the three branches of government. State v. Leonardis, 73 N.J. 360, 370 (1977). It "prevents any one branch from aggregating unchecked power, which might lead to oppression and despotism." Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 573 (App. Div. 2000). "It is not intended, however, to create an absolute division of powers among the three branches of government, thereby preventing cooperative action among them. Only when the challenged statute impairs the integrity among the branches should the doctrine's effect on a branch's constitutional limits be recognized." State v. Bond, 365 N.J. Super. 430, 441 (App. Div. 2003) (citation omitted).

There is no evidence the municipal court judge himself called the police. Nor is there evidence that the judge or any other court personnel told the officer that defendant "needs to be charged" with the indictable offense. Officer Puglia was never called to testify whether those words were hers or those of whomever called her.

Even if the judge called the police, his actions did not violate the separation of powers clause. Rather, the notification was part of a cooperative effort between the branches of government to obviate double jeopardy issues. As our Supreme Court observed in State v. Dively, 92 N.J. 573, 589-90 (1983):

> Administration of the law is not entrusted solely to the judiciary. The legislative and executive arms of the State have vital roles in that governmental function. Effective enforcement depends upon cooperation between municipal courts, municipal prosecutors, and county prosecutors. An effective, orderly procedure dictates the necessity of an arrangement whereby more serious crimes are tried in the court of plenary jurisdiction as intended, rather than disposed of in the municipal court for an infraction of a substantially minor nature. A "breakdown in communications between state and municipal officials forms no justification for depriving an accused . . . of his right to plead double jeopardy." Robinson v. Neil, 366 F. Supp. 924, 929 (E.D. Tenn. 1973). Accordingly, it is necessary that there be effective cooperation between the municipal courts and the county prosecutor. We have no doubt that such cooperation will be forthcoming. We have heretofore directed that where a complaint is filed in the municipal court and the magistrate has reason to believe that the factual situation out of which the complaint arose may also involve an indictable offense, the matter should be referred to the county prosecutor. Municipal Court Bulletin Letter #96, February 20, 1964.

The "forthcoming" cooperation of which the Court wrote was formalized by Administrative Directive #10-82, "Action on Cases Involving Possible Indictable Offenses" (May 3, 1983), that requires "the municipal court judge or municipal court administrator" to notify the county prosecutor when a complaint alleging "a Title 39 violation involving a motor vehicle accident resulting in death or serious personal injury" is filed in a

municipal court. That directive, like its predecessor directive, intended the referral procedure to "afford the [c]ounty [p]rosecutor an opportunity to determine whether the accident involved an indictable offense," and explicitly recognized that the prosecutor would determine the course of action thereafter.[8] The directive, our Supreme Court said,

> specifically places the responsibility on the municipal court judge or municipal court clerk to notify the [c]ounty [p]rosecutor about such violations in order to give the prosecutor an opportunity to consider whether indictable offenses are involved. When the [p]rosecutor decides to proceed before the grand jury, the municipal court proceedings are stayed unless and until the [p]rosecutor notifies the municipal court that the grand jury has failed to return an indictment or that the matter has been dismissed.
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> [In re Seelig, 180 N.J. 234, 240 (2004).]

Contrary to defendant's argument, the actions of the municipal court judge or the clerk/administrator followed the long-standing cooperation between the judicial and executive branches required to obviate double jeopardy problems. The prosecutor's retention of control over the case – including the discretion to present, as well as the actual presentation of the

[8] Municipal Court Bulletin Letter #96 provided that, after referral, "[t]he [c]ounty [p]rosecutor will . . . be in a position to determine whether to present the matter to the [g]rand [j]ury [or to] refer the complaint back to the municipal court for disposition."

case to the grand jury — maintained the constitutionally required separation of powers. As Judge Oxley found, "the conduct of the [m]unicipal [c]ourt [j]udge did not alter or affect the evidence presented to the grand jury."

We also perceive no constitutional violation because the police, and not the prosecutor, were notified. Although procedures call for notice to the prosecutor, the call to the police — who obviously referred the case to the prosecutor — added only another layer of notice to the executive branch. In fact, notice to the police afforded greater insulation against untoward influence of defendant's prosecution; if the judge intended to exert influence to indict defendant — of which we see no evidence — direct pressure to the prosecutor's office would have been more effective.

Defendant's argument that the municipal court's off-the-record notification regarding the potential indictable offense violated Rule 1:2-1 is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). The communication did not involve any party or witness and was a purely ministerial duty in accordance with the practices established by the Supreme Court; the telephone call need not have been made in open court.

Affirmed.