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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4962-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KATHLEEN R. BELKO,

Defendant-Appellant.

Argued January 16, 2018 – Decided February 8, 2018

Before Judges Accurso and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Cape May County, Municipal
Appeal No. 42-12-15.

Michael P. Albano argued the cause for
appellant (Albano & Viola, LLC, attorneys;
Michael P. Albano, on the briefs).

Gretchen A. Pickering, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for respondent (Robert W. Johnson,
Acting Cape May County Prosecutor, attorney;
Gretchen A. Pickering, of counsel and on the
brief).

PER CURIAM

Defendant Kathleen R. Belko appeals from her conviction,
following a trial de novo in the Law Division, of driving while

intoxicated (DWI), N.J.S.A. 39:4-50(a), and refusal to submit to a chemical breath test (refusal), N.J.S.A. 39:4-50.4. Based on our review of the arguments advanced on appeal in light of the record and applicable law, we affirm.

I.

On a rainy evening in January 2015, off-duty Wildwood police sergeant Matthew Sicilia observed a vehicle traveling at approximately five miles below the speed limit drift to the left, nearly hitting parked cars three separate times. Sicilia saw the vehicle make a wide left turn at an intersection, mount the curb and strike a road sign, bending the sign post and causing the sign to dislodge from the post. Sicilia called the Wildwood Police Department, reported what he saw and waited for patrol officers to arrive. Sicilia saw the vehicle's driver, later identified as defendant, exit the vehicle, appear to assess the damage and get back into the vehicle.

Wildwood police officer David Holman responded to the scene. Sicilia told Holman what he saw, and then left. Holman approached defendant, who was still in the vehicle's driver's seat, and asked for her license and registration. Defendant asked Holman why he stopped her, and he explained she had been involved in an accident. Holman testified defendant appeared confused.

When Holman asked defendant for her vehicle documents, she emptied the contents of her purse on her lap, but Holman observed her driver's license in her hand. Holman did not immediately detect the odor of alcohol, and asked defendant if she had any medical issues. Defendant denied any medical issues, but Holman called for a rescue team because defendant appeared disoriented. While waiting for the rescue team's arrival, Holman asked defendant to exit the vehicle.

Holman observed defendant appear to lean on the vehicle for balance when she exited. He asked defendant if she had been drinking, and she admitted having one glass of wine at a local restaurant. Holman administered a Horizontal Gaze Nystagmus Test (HGN), and observed an "involuntary jerking" of defendant's eyes that indicated alcohol impairment.

While the rescue team assessed defendant, Holman detected an odor of alcohol emanating from defendant's breath. The rescue team determined defendant's vital signs were normal, and defendant denied the need for medical treatment.

Because of the weather conditions, and with defendant's consent, Holman transported defendant to the police station to perform field sobriety tests. Once at the station, Holman set up a DVD recorder to record the tests. He testified he later discovered no recording was made due to an equipment malfunction.

Holman administered two field sobriety tests: a walk-and-turn and a one-leg stand. He instructed defendant how to perform the tests, and demonstrated each. During the walk-and-turn, defendant was unable to stand heel-to-toe or walk in a line taped to the floor, and leaned on a wall for balance. Defendant failed to complete the one-leg stand test, dropping her foot several times before giving up.

Holman arrested defendant for DWI and explained her Miranda¹ rights. In response to Holman's questions, defendant denied being sick but said she had an injury to her right hip. According to Holman, defendant, who was sixty-one years old, did not appear to suffer from any shortness of breath, wheezing, coughing, or any other difficulty breathing.

Defendant agreed to give a breath sample. Holman instructed defendant concerning the breath test, and directed that she must seal her lips around the mouthpiece when providing the sample. Defendant said she understood the instructions, and attempted the test four times.

For the first sample, defendant blew into the machine for less than half of a second and stopped. The Alcotest registered

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

no airflow. Holman observed that defendant did not appear to be out of breath or to have any trouble breathing, and did not wheeze.

Holman changed the mouthpiece and again instructed defendant on the test procedure. Defendant began blowing into the mouthpiece but, contrary to Holman's instructions, lifted her lips from the mouthpiece, permitting air to escape from her mouth without going into the mouthpiece. Holman advised defendant she was not providing a good sample and defendant, for the first time, claimed she had asthma. Holman testified defendant was not short of breath, did not wheeze, and showed no signs of any breathing issues.

Undeterred, Holman replaced the mouthpiece and again instructed defendant about the test. Defendant did not seal her lips around the mouthpiece during the third test and did not provide any airflow into the device.

Prior to the fourth attempt, Holman again instructed defendant concerning the test and reiterated that she was required to keep her lips sealed around the mouthpiece. Holman told defendant that if she failed to provide a breath sample, she would be charged with refusal.

Defendant began providing a breath sample in accordance with the instructions, but when Holman told defendant she was providing a good sample, she took her lips off of the mouthpiece and stopped

blowing. Again, Holman did not observe that defendant was short of breath or exhibited any breathing issues. Holman terminated the test, and charged defendant with DWI, refusal and reckless driving, N.J.S.A. 39:4-96.

Defendant testified that prior to the accident and her arrest, she met a friend at a bar and had a shot of tequila with club soda. She then went to a local restaurant for dinner and had a glass of wine before dinner. She recalled the bartender poured a second glass of wine because she wanted to drink wine with her dinner. Defendant testified she did not recall drinking the second glass of wine, eating her dinner or what occurred during the approximately two-and-one-half hours she was at the restaurant before leaving in her car. She recalled, however, having two sips of a liqueur after dinner, paying the bill and having difficulty calculating the tip, and slurring her speech.

Defendant did not recall leaving the restaurant, but remembered being approached by Holman after the accident. Asked to address her performance on the chemical breath test, defendant testified she had never seen the test before and "wasn't sure what exactly [she] should be doing."

Defendant's husband, Carl Johnson, testified defendant called him after dinner, and spoke "like a little baby." He was unable to understand what she said.

Defendant called DWI expert John Flanagan. He opined that under the guidelines established in State v. Chun, 194 N.J. 54 (2008), "women over the age of [sixty] need only to provide 1.2 liters of breath versus 1.5 liters of breath." He testified the Alcotest machine used by Holman had outdated firmware, which did not automatically adjust from 1.5 liters of air to 1.2 liters of air after an officer inputs the suspect's age. Flanagan also testified defendant was 130 pounds overweight, which would "severely impact her ability to perform the field sobriety test."

In a detailed oral opinion, the Law Division judge found defendant's testimony was not credible. The court determined Sicilia and Holman were credible witnesses and accepted their version of the facts. The court found defendant guilty of DWI based on the officers' observations of defendant's erratic operation of her vehicle resulting in an accident, her difficulty in retrieving the vehicle credentials, her leaning on the vehicle for support after exiting the vehicle, the odor of alcohol from her breath, defendant's failure to correctly perform the field sobriety tests and her admission to consuming alcoholic beverages prior to operating her vehicle.

The court also found defendant guilty of refusal. The court determined defendant "purposely attempted and did circumvent the test by providing no samples, by manipulating her mouth to prevent

air from going into the machine." The court rejected as not credible defendant's testimony she did not understand how to provide the sample, and that she suffered from breathing difficulty and from asthma. The court noted there was no medical evidence defendant suffered from asthma, and accepted as credible Holman's testimony that defendant never exhibited any signs of shortness of breath or wheezing during the administration of the chemical breath test. The judge accepted Holman's testimony that defendant failed to provide an adequate sample by letting air flow outside of the mouthpiece and, in the fourth test, by simply choosing to stop blowing. Relying on Holman's testimony about the equipment malfunction, the court rejected defendant's request for an adverse interest against the State because it did not provide a recording of defendant's performance of the tests at the police station.

The court sentenced defendant as a first-time DWI offender to a three-month loss of driving privileges, and to a concurrent seven-month loss of driving privileges for refusal.² The court imposed the requisite fines and other mandatory penalties. This appeal followed.

On appeal, defendant makes the following arguments:

I. Defendant cannot be convicted of refusal based on State v. Chun and driving under the

² The reckless driving charge was merged by the municipal court with defendant's DWI conviction.

influence as Defendant has established reasonable doubt.

II. An adverse inference must be drawn against the State for its failure to preserve and produce a video of the Defendant[] at the police station.

II.

We review the Law Division's decision following a trial de novo on appeal from a municipal court by employing the "substantial evidence rule." State v. Heine, 424 N.J. Super. 48, 58 (App. Div. 2012). "Our review is limited to determining whether there is sufficient credible evidence present in the record to support the findings of the Law Division judge, not the municipal court." State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005). We review the Law Division's interpretation of the law de novo without according any special deference to the court's interpretation of "the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Defendant first argues the court erred by finding her guilty of DWI. She claims the proofs were inadequate to support her conviction because she did not drink enough alcohol to become intoxicated, the accident may have caused her to become disoriented and confused, and her age and physical limitations caused her poor performance on the field sobriety tests.

Defendant's argument is founded on her testimony, which the municipal court and Law Division rejected as not credible. We defer to the judge's credibility determinations and where, as here, the municipal court and Law Division found defendant's testimony was not credible, we "ordinarily should not undertake to alter concurrent findings of fact and credibility determinations made by [the] two lower courts absent a very obvious and exceptional showing of error." State v. Locurto, 157 N.J. 463, 474 (1999) (citations omitted). Defendant has not demonstrated any error in the Law Division's credibility determinations. Thus, we defer to the court's finding that defendant's testimony was not credible, and reject her contention her testimony created a reasonable doubt that she drove while intoxicated.

Moreover, the credible evidence supports the court's finding defendant operated her vehicle while intoxicated. See Clarksburg Inn, 375 N.J. Super. at 639. The State may satisfy its burden of proving a DWI charge "through either of two alternative evidential methods: proof of defendant's physical condition or proof of a defendant's blood alcohol level." State v. Howard, 383 N.J. Super. 538, 548 (2006) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, 180 N.J. 45 (2004)). Lacking proof of defendant's blood alcohol level, the State relied on the officers'

testimony concerning defendant's physical condition to satisfy its burden at trial.

A defendant's demeanor, physical appearance, slurred speech, and bloodshot eyes, together with an odor of alcohol or an admission of the consumption of alcohol and poor performance on field sobriety tests, are sufficient to sustain a DWI conviction. State v. Bealor, 187 N.J. 574, 588-89 (2006); accord State v. Federico, 414 N.J. Super. 321, 327 (App. Div. 2010); State v. Liberatore, 293 N.J. Super. 580, 589 (Law Div.), aff'd o.b., 293 N.J. Super. 535 (App. Div. 1996). Here, the credible evidence showed defendant erratically operated her car and caused an accident, was confused, smelled of alcohol, admitted drinking three different alcoholic beverages and failed two field sobriety tests. There was sufficient credible evidence supporting the court's determination defendant was guilty of DWI beyond a reasonable doubt.

Defendant next claims the court erred by finding her guilty of refusal. She contends that because she was overweight, had trouble breathing, and was confused and disoriented after being involved in a single-car accident, there was a "reasonable doubt as to whether she was capable of blowing into the Alco[test] machine" Defendant had the burden of proving her purported physical limitations prevented her from completing the chemical

breath test. See State v. Monaco, 444 N.J. Super. 539, 551 (App. Div.), certif. denied, 228 N.J. 409 (2016). As the court correctly determined, however, defendant did not sustain her burden because her testimony was not credible, and she did not present any medical evidence showing she had any physical limitations preventing her from completing the test.

Defendant further asserts that because she was over sixty-years of age, her failure to provide a sufficient breath sample did not support her refusal conviction under the order entered by the Court in State v. Chun, 215 N.J. 489, 492 (2013). In Chun, 194 N.J. at 97-100, the Court found that women over the age of sixty have a reduced ability to generate the 1.5 liters of air volume the Alcotest device required to obtain an accurate blood alcohol reading. The Court directed that an Alcohol Influence Report (AIR) showing an inadequate breath sample for a woman over sixty is not "admissible as evidence in a prosecution for refusal . . . unless the woman also provided another breath sample of at least 1.5 liters." Id. at 151.

Defendant relies on the Court's subsequent order in Chun, 215 N.J. at 492, which further provided that "for women over the age of 60 in prosecutions for refusal . . . if the only evidence of refusal is the inadmissible AIR, such women may not be charged

with, prosecuted for, or convicted of that offense." Defendant contends the order barred her conviction for refusal here.

In this case, the AIR was not "the only evidence" defendant committed the offense. To the contrary, the court found defendant purposely circumvented the test by refusing to maintain a seal around the mouthpiece with her lips and choosing to stop blowing into the mouthpiece. The orders in Chun do not bar refusal prosecutions against women who are over sixty, or excuse a sixty-one-year-old defendant's repeated failure to comply with an officer's instructions.

Defendant last argues the court erred by failing to draw an adverse inference against the State based on its failure to record her performance of the tests at the police station. We find insufficient merit in the argument to warrant discussion in a written opinion. R. 2:11-3(e)(2). The police were not obligated to record defendant's performance of the tests, see State v. Gordon, 261 N.J. Super. 462, 464-65 (App. Div. 1993), and although Holman unsuccessfully attempted to do so, the failure to make the recording was solely the result of an equipment failure.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION