RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3074-18T2

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

M.W.,

Defendant-Appellant/
Cross-Respondent,

and

J.G.,

Defendant.

IN THE MATTER OF D.W., a Minor,

Respondent/Cross-Appellant.

Telephonically argued March 24, 2020 –
Decided April 29, 2020

Before Judges Fisher, Gilson and Rose.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-0246-17.

Patricia A. Nichols, Assistant Deputy Public Defender, argued the cause for appellant/cross-respondent (Joseph E. Krakora, Public Defender, attorney; Robyn A. Veasey, of counsel; Patricia A. Nichols, on the briefs).

Nancy P. Fratz, Assistant Deputy Public Defender, argued the cause for respondent/cross-appellant (Joseph E. Krakora, Public Defender, Law Guaridan, attorney; Nancy P. Fratz, of counsel and on the briefs).

Morgan Rose Merkowsky, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Donna Sue Arons, Assistant Attorney General, of counsel; Morgan Rose Merkowsky, on the brief).

PER CURIAM

After a fact-finding hearing, the family judge concluded by a preponderance of the evidence that the child in question – D.W. (nine years old at the time of the incident in question) – was an abused or neglected child within the meaning of N.J.S.A. 9:6-8.21(c), because he was found in the back seat of a vehicle operated by his father, defendant M.W., while defendant was passed out and under the influence.

Defendant appeals, arguing the family judge erred: (1) "in failing to rule, with a statement of reasons, and conclusions of law, on defense and law guardian arguments for dismissal"; (2) "in failing to make findings anew based on all evidence, arguments and interpretations presented to [him], rather than 'uphold' an agency decision"; (3) "in refusing to consider mitigating factors as they were part of the totality of the circumstances that identify and inform causation of the conduct being scrutinized"; and (4) "in making inconsistent rulings on admission of hearsay and embedded hearsay within the State's evidence, accepting for the truth contents of evidence specifically excluded, failing to test the reliability of statements of the child in light of the circumstances surrounding the alleged making and recordation of those statements or enforce the requirements for proper admission of Alcotest results." Defendant also argues there was: (5) "no statutory or precedential authority for the trial court's belief that a Title [Nine] finding was compulsory, especially where, as here, the State's evidence provided uncontroverted rebuttal of its theory of the case thus the trial judge's application of J.A.,[1] as a categorical finding of abuse or neglect, must be reversed"; and (6) "the record did not provide the trial court sufficient evidence on which to base

[1] N.J. Div. of Child Prot. & Permanency v. J.A., 436 N.J. Super. 61 (App. Div. 2014).

the findings made." The Law Guardian has also filed a cross-appeal on the child's behalf, arguing that (1) the trial judge erred "in not exercising its discretion to dismiss the Title [Nine] abuse and neglect case and determining this was a family in need of services pursuant to N.J.S.A. 30:4C-12," and (2) if the judgment were to be affirmed, that this court should "examine the reliability of the interpretation of N.J.S.A. 9:6-8.52, suspended judgment, by N.J. Div. of Youth & Family Servs. v. R.M.,[2] to determine the analysis was erroneous and s[h]ould be reversed, and this court should determine that the most appropriate disposition for this litigation was to afford [defendant] the ability to participate in a suspended judgment and after completion of services possibly seek to vacate the neglect finding pursuant to N.J.S.A. 9:6-8.59."

We decline to consider the argument that the judge should have considered and entered a suspended judgment because that relief was not sought in the trial court. State v. Robinson, 200 N.J. 1, 20 (2009); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). We find insufficient merit in the other arguments of defendant and the Law Guardian to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), and affirm substantially for the reasons set forth by Judge

[2] 411 N.J. Super. 467 (App. Div. 2010).

Bruce J. Kaplan in his thoughtful and well-reasoned written decision. We add only the following few comments.

Defendant argues, among other things, that the child's statement was not corroborated, the judge relied on embedded hearsay, and there were insufficient grounds to support admission into evidence of defendant's 0.17 blood alcohol level determined by the police-administered Alcotest conducted on the night in question. Even if there were reasons to question the admission of that evidence – in fact, even if that evidence were excluded – we are satisfied that the testimony, which was based on personal knowledge of the police officer, who, as the judge found, credibly testified at the hearing, was sufficient to support the judge's ultimate conclusions.

The officer credibly testified that, on May 17, 2017, at 11:01 p.m., having responded to a 9-1-1 call, he found defendant "passed out" in the driver's seat, while the child was asleep and unharmed in the back, of a car "stopped in the middle of the roadway." The car was "in park" with defendant's "foot . . . on the gas pedal," with "the engine . . . revving," and smoke emanating from the car's hood. The vehicle was "left of center" and facing "oncoming traffic." Defendant did not awake when the officer knocked on the window; after opening the car door and succeeding in waking defendant, the officer smelled alcohol.

The officer then attempted to conduct field sobriety tests. Defendant was unable to complete the HGN (horizontal gaze nystagamus) test because defendant "kept talking [and] turning his head." Defendant was unable to complete the walk-and-turn test despite three attempts because he "almost fell over," and the officer had concerns for defendant's safety. The officer additionally testified that he believed defendant was intoxicated because "he got down on the booking room floor despite being asked not to, was loud, had slurred speech, and smelled of alcohol from the time the officers arrived at the scene and throughout his time at the police station." The judge found the officer to be "very credible."

These findings more than adequately support the judge's determination that the child fit the statutory definition of an abused or neglected child. We have held that a parent, who either operates[3] a vehicle while under the influence or permits a child to ride with a driver under the influence, acts inconsistently with N.J.S.A. 9:6-8.21(c)(4). See J.A., 436 N.J. Super. at 68 (cited with approval in Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 189 (2015)).

[3] State v. Thompson, __ N.J. Super. __, __ (App. Div. 2020) (slip op. at 6).

Defendant also forcefully argues that a medical condition and not alcohol was responsible for the way he appeared that evening. He, however, offered no evidence to support such a contention. And, even though the record contains information about defendant's high blood pressure and the fact that the jail would not admit him that night because of that circumstance, the judge was not required to agree that it was anything but alcohol that caused the circumstances in which defendant and the child were found. Clearly, the judge was persuaded by the police officer's credible testimony, which fully supported the Division's argument that defendant was inebriated behind the wheel of his car.

Affirmed.