SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1951-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SEAN BRENNAN,

Defendant-Appellant.

Argued May 8, 2023 – Decided July 24, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Municipal Appeal No. 19-044.

Peter M. O'Mara argued the cause for appellant (The O'Mara Law Firm, attorneys; Peter M. O'Mara, on the brief).

Alecia Woodard, Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago, Monmouth County Prosecutor, attorney; Alecia Woodard, of counsel and on the brief).

PER CURIAM

Defendant Sean Brennan appeals from the March 16, 2021 order of the Law Division convicting him after a trial de novo of driving while intoxicated (DWI), N.J.S.A. 39:4-50, and reckless driving, N.J.S.A. 39:4-96. We affirm.

I.

The trial court found the following facts. On June 17, 2019, at around 8:45 p.m., Officer Christopher Ibarra responded to a report of a suspicious vehicle on North Rohallion Drive in Rumson. At the scene, Ibarra observed a vehicle with the engine idling sitting in the middle of the roadway. He approached the vehicle and saw Brennan in the driver's seat. Ibarra immediately detected a strong odor of alcohol emitting from the car and noticed Brennan's eyes were bloodshot and watery and his speech was slurred. Ibarra asked Brennan why he was there. Brennan responded that he was going to pick up a friend, but when asked where the friend lived, did not respond.

Sergeant Christopher Isherwood arrived on the scene shortly after and observed Ibarra speaking with Brennan. Isherwood observed that Brennan looked confused, his face was flushed, his eyes were bloodshot, and it seemed as "if he didn't know how he got to where he was."

Isherwood instructed Ibarra to take Brennan out of the vehicle for a field sobriety test after he smelled a strong odor of an alcoholic beverage from the vehicle.[1] Brennan was first instructed to recite the alphabet. He performed it correctly. Ibarra then had Brennan complete the leg-lift stand test. Brennan informed him he had an injury on his left leg, but he could still perform the test properly. Brennan made seven attempts to lift and hold his leg as instructed. However, the attempts were for "barely a second, five seconds with a sway, two seconds, two seconds, three seconds, five seconds and two seconds."

Ibarra then asked Brennan to complete a heel-to-toe walk. The officer gave instructions and demonstrated how to properly complete the test. After Brennan finished, Ibarra and Isherwood concluded Brennan "appeared to be under the influence based on a lack of balance, the swaying, and failure to listen to [] instructions." The officers' interactions with Brennan at the scene were captured on video recordings, which were admitted as evidence at trial.

Based on the results of the roadside examination, the officers placed Brennan under arrest at 9:08 p.m. The officers escorted Brennan to the police station to be processed. They prepared to give Brennan a breath sample test on

[1] Ibarra had not taken classes or received certifications on psychophysical tests to assess whether a subject was impaired by alcohol. Isherwood, however, was trained and certified in standardized field sobriety tests.

the Alcotest machine to which Brennan consented. However, Brennan told Ibarra he was having problems with his asthma. Isherwood asked Brennan if he needed medical assistance. Brennan requested his inhaler and gave the officers permission to search his vehicle to find it. The officers could not locate the inhaler and asked Brennan if he needed to go to the hospital. Brennan declined. A short time later, Brennan complained he was having chest tightness, and the officers called for an ambulance. Brennan was transported to Riverview Medical Center at 9:55 p.m. without the Alcotest being administered.[2]

At about 10:10 p.m., while Brennan was receiving medical treatment at the hospital, the officers requested his consent to do a blood draw. Brennan declined. At 10:45 p.m., Isherwood contacted Assistant Prosecutor Noah Heck to obtain a telephonic search warrant for the blood draw. Over the next hour, Heck attempted to reach a municipal court judge, but was unsuccessful. During that time, he attempted to contact four on-call municipal court judges to no avail. The reason for the judges' unavailability was not established in the record.

At 11:46 p.m., Heck called Isherwood and advised him to do a warrantless blood draw because he could not get in contact with any of the on-call judges.

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[2] The parties agree the Alcotest breathalyzer machine is not portable and could not have been brought to the hospital.

Heck was concerned about alcohol burn off because nearly three hours had elapsed since the traffic stop. The officers told Brennan they would be drawing blood based on exigency, and he was compliant. The sample revealed a blood alcohol content (BAC) of 0.19, well above the legal limit. Brennan was charged with DWI, N.J.S.A. 39:4-50, and reckless driving, N.J.S.A. 39:4-96.

Brennan moved before the municipal court to suppress the blood sample readings based on lack of probable cause and lack of a warrant. After hearing testimony, the municipal court found there was probable cause to arrest Brennan based on the smell of alcohol, the car being parked in the middle of the road, the inability to complete the balance tests or follow directions, and Brennan's failure to answer when asked where his friend lived. The court found he could not complete the leg-lift test and did not count when instructed by the officers. After a trial, the court found Brennan guilty of DWI based on the observational evidence and as a per se violation based on the blood test results.

The municipal court suspended Brennan's driver's license for seven months, required mandatory use of an ignition interlock device (IID) on his vehicle for six months, and imposed fines and a two-day suspended jail sentence, conditioned on Brennan completing twelve hours of Intoxicated Driving Resource Center (IDRC) programming. The court merged the reckless driving

conviction into the DWI conviction. The court stayed Brennan's sentence pending appeal to the Law Division.

At the Law Division, Brennan argued that the warrantless blood draw should be suppressed because there was no exigency, and if there was, it was police created due to their inability to contact a judge to obtain a warrant. He also argued the observational evidence alone was not sufficient to prove him guilty of DWI beyond a reasonable doubt.

On March 16, 2021, the Law Division, after a trial de novo, convicted Brennan of DWI and reckless driving. The court found neither the officers nor Heck acted unreasonably or deliberately to create an exigency in their failed attempts to obtain a warrant. The court also found there was no evidence the officers deliberately delayed administering the Alcotest at police headquarters due to Brennan's health concerns. The court concluded the approximately half-hour delay between Brennan refusing the blood draw and Isherwood calling Heck was reasonable because the officers credibly testified that they believed they could "transport the defendant back to police headquarters and have [d]efendant submit to the Alcotest" after he completed his medical treatment. The court stated although it was "highly unusual" that none of the municipal court judges could be reached, the failure to reach them was not a deliberate

contributing factor to the exigency. The court found that based on the exigent circumstances, the warrantless blood draw was justified, and the blood sample results were properly admitted as evidence. The court also found the observational evidence was sufficient to find Brennan guilty of DWI beyond a reasonable doubt.

The trial court found defendant guilty of DWI and reckless driving, which it merged into the DWI conviction. The court suspended Brennan's license for seven months, required IID use for thirteen months, as well as forty-eight hours of IDRC programming, and imposed a two-day suspended county jail sentence, contingent on the successful completion of IDRC. The court also imposed fines and denied Brennan's request for a stay of sentence.[3] A March 16, 2021 order memorializes the Law Division's decision.

This appeal followed. Brennan raises the following arguments.

> POINT I
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> THE BLOOD SAMPLES WITHDRAWN IN THIS MATTER ARE INADMISSIBLE BECAUSE THEY WERE OBTAINED IN VIOLATION OF MR. BRENNAN'S RIGHTS.

[3] Brennan subsequently sought a stay of his sentence in this court, which we denied.

POINT II

THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE MR. BRENNAN GUILTY BEYOND A REASONABLE DOUBT BASED ON THE OBSERVATIONS.

II.

After a trial de novo in the Law Division, this court's review "focuses on whether there is 'sufficient credible evidence . . . in the record' to support the trial court's findings." State v. Robertson, 228 N.J. 138, 148 (2017) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). "[A]ppellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Ibid. (alteration in original) (quoting State v. Locurto, 157 N.J. 463, 474 (1999)). However, the trial court's legal rulings are considered de novo. Ibid.; but see Locurto, 157 N.J. at 470 (appellate review of a de novo conviction in the Law Division following a municipal court appeal is "exceedingly narrow.").

The United States Constitution and the New Jersey State Constitution guarantee the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; N.J. Const. art. I, ¶ 7. A "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" is a Fourth Amendment search requiring a warrant. State v. Adkins, 221 N.J. 300, 309 (2015) (alteration in

original) (quoting Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 616 (1989)); see Schmerber v. California, 384 U.S. 757, 769-770 (1966) ("[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [into the body] on the mere chance that desired evidence might be obtained" without a warrant). Therefore, warrantless searches are "constitutionally invalid unless one of the few 'well-delineated exceptions to the warrant requirement' applies." State v. Zalcberg, 232 N.J. 335, 345 (2018) (quoting State v. Gonzales, 227 N.J. 77, 90 (2016)).

One example of an exception to the warrant requirement is exigent circumstances. State v. Johnson, 193 N.J. 528, 552 (2008). Exigent circumstances exist when they "preclude expenditure of the time necessary to obtain a warrant because of a probability that the suspect or the object of the search will disappear, or both." State v. DeLuca, 168 N.J. 626, 632 (2001) (quoting State v. Smith, 129 N.J. Super. 430, 435 (App. Div. 1974)).

> [A]pplying the exigency doctrine "demands a fact-sensitive, objective analysis" based on the totality of the circumstances. Ibid. However, "some factors to be considered in determining" exigency include "the urgency of the situation, the time it will take to secure a warrant, the seriousness of the crime under investigation, and the threat that evidence will be destroyed or lost or that the physical well-being of people will be endangered unless immediate action is taken."

> [Zalcberg, 232 N.J. at 345 (first quoting DeLuca, 168 N.J. at 632; and then quoting Johnson, 193 N.J. at 552-53).]

"The focus of the exigent circumstances inquiry is whether the police conduct was objectively reasonable under the totality of the circumstances." State v. Brown, 456 N.J. Super. 352, 365 (App. Div. 2018). However, exigent circumstances cannot be police-created. State v. Walker, 213 N.J. 281, 295 (2013). There is a distinction between "police-created exigent circumstances designed to subvert the warrant requirement and police-created exigencies that naturally arise in the course of an appropriate police investigation." Ibid. (quoting State v. Hutchins, 116 N.J. 457, 469 (1989)).

In Missouri v. McNeely, the Supreme Court considered whether "the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 569 U.S. 141, 145 (2013) (emphasis omitted). On highway patrol, police stopped a truck that was exceeding the speed limit and repeatedly crossing the centerline and observed the driver had bloodshot eyes, slurred speech, and the smell of alcohol on his breath. Ibid. The driver performed "poorly" on the field sobriety tests, and then declined to take a portable breath-test to measure his BAC, so the officers drove

him to the station. Ibid. When the driver again refused to give a breath sample, the officers decided to go to the hospital instead for blood testing and told him if he did not voluntarily submit to the test his license would immediately be revoked. Id. at 145-46. The driver again refused and his blood was taken without his consent. Id. at 146. His BAC was measured at 0.154, and he was charged with DWI. Ibid. The driver moved to suppress the blood test results and on appeal, the United States Supreme Court held that

> while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.
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> [Id. at 156.]

The Supreme Court recognized that because officers often need to obtain medical support for drunk-driving suspects before conducting blood tests, "some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant." Id. at 153. It stated that there was no plausible justification for an exception to the warrant requirement when an officer "can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer." Ibid. The Court recognized that "cases will arise when anticipated delays in

obtaining a warrant will justify a blood test without judicial authorization," but the potential loss of evidence was only one factor that would lead to potential exigent circumstances. Id. at 165.

In 2015, the Court addressed the retroactive applicability of McNeely and gave guidance on the totality of the circumstances analysis to determine whether exigency supported warrantless blood draws. Adkins, 221 N.J. at 300-02. The driver was arrested on suspicion of drunk driving after a crash where he failed field sobriety tests. Id. at 302. The police conducted a warrantless blood draw without having secured a warrant or the driver's prior consent. Ibid. The Court held

> dissipation of alcohol from a person's bloodstream is not the beginning and end of the analysis for exigency in all warrantless blood draws involving suspected drunk drivers. Rather, courts must evaluate the totality of the circumstances in assessing exigency, one factor of which is the human body's natural dissipation of alcohol.
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> [Id. at 312.]

The Court recognized that prior to McNeely, New Jersey's case law "played a leading role in dissuading police from believing that they needed to seek, or explaining why they did not seek, a warrant before obtaining an involuntary blood draw from a suspected drunk driver." Id. at 317. The Court held that

courts should "ascribe substantial weight to the perceived dissipation [of blood-alcohol evidence]" and must "focus on the objective exigency of the circumstances that the officer faced in the situation." Ibid.

In Zalcberg, the Court applies the totality-of-the-circumstances analysis detailed in Adkins. In that case, a serious accident occurred on "a major thoroughfare" in Monmouth County near the "heavily trafficked Monmouth County fair" and emergency medical and fire personnel were called to the scene along with the police. Id. at 338-39. The fire department used the "Jaws of Life" to extricate the driver and his two passengers from the vehicle, and all three were transported via helicopter to the hospital. Id. at 339. Officers suspected alcohol contributed to the accident because emergency medical personnel smelled alcohol on the driver's breath, and a miniature bottle of alcohol was found in the vehicle's console. Ibid.

The officers concluded there was probable cause the driver had been driving under the influence, but because he was incapacitated and unable to complete field sobriety tests, the officers determined a blood sample was needed. Ibid. At the time, the officers in the township's police department routinely took blood samples in serious motor vehicle accidents, and although telephonic warrants were available, "none of the officers present believed that a

search warrant was required to obtain a blood sample and none of them had been trained in obtaining one," so no discussion regarding obtaining a search warrant ensued.[4] Id. at 339-340. An hour after the officers arrived to conduct the blood draw, they were granted access to defendant and completed the extraction. Id. at 340. The driver moved to suppress the results of the blood draw, and the Court held the warrantless blood draw did not violate defendant's constitutional rights. Id. at 340, 352.

In its totality-of-the-circumstances analysis, the Court found the accident was serious and required the "Jaws of Life" and a helicopter to extricate and transport the victims to the hospital, and the officers on the scene had to investigate whether alcohol was involved in the crash, direct traffic, and examine the scene, among other duties. Id. at 351. The Court concluded that any delays to obtain the sample, including waiting at the hospital while the driver was being treated, was not a lack of emergent circumstances and did not undermine the claims of exigency, but only explained the "complexity of the situation and the reasonable allocation of limited police resources." Ibid.

[4] The accident at issue in Zalcberg occurred prior to the decisions in McNeely and Adkins.

The court held the lack of a telephonic warrant procedure and the officers' "genuine pre-McNeely belief that a warrant was not compulsory" were not fatal to the exigent circumstances exception. Id. at 351. The court found there was no established framework for obtaining a telephonic warrant in the State at that time and "the officers' lack of awareness of any formal procedure through which they could obtain a telephonic warrant, coupled with their pre-McNeely belief that they did not need such a warrant, suggest[ed] that there was no reasonable availability of a warrant." Id. at 351-52.

The Court also held that accidents do not create a per se objective exigency but based upon "a fatal accident with multiple serious injuries, the absence of an established telephonic warrant system, . . . the myriad duties with which the police officers present were tasked," and with substantial weight given to the potential dissipation of alcohol, the objective exigency existed and, thus, the warrantless blood draw was valid. Id. at 352.

Applying these precedents, we agree with the trial courts that exigent circumstances excused the warrant requirement to draw Brennan's blood sample. Although Brennan was not involved in an accident that required significant police investigation and resources, he required medical attention due to his complaints of chest pain. The police attempted to retrieve Brennan's inhaler

from his car, which potentially could have avoided the need for him to be transported to the hospital, but were unsuccessful. After a second complaint of medical symptoms by Brennan, the officers summoned an ambulance to transport him to the hospital. This effectively terminated the officers' attempt to obtain breath samples on the Alcotest device at the police station.

Although approximately thirty minutes passed between Brennan's refusal to consent to the blood draw and Isherwood's call to Heck, there is sufficient support in the record for the trial court's conclusion that the delay was due to the officers' reasonable belief that a breath sample on the Alcotest device could be obtained by transporting Brennan back to the station after he received medical attention.

After 10:45 p.m., Heck attempted to contact four municipal court judges that were on-call at the time. It is not clear from the record why those judges were not available. There is, however, no suggestion that the inability to contact the judges was the fault of the officers. Unlike in Zalcberg, a protocol for obtaining a warrant existed and the officers were trained to use it. The officers' efforts to follow that protocol, however, were frustrated by circumstances outside of their control. We hesitate to attribute to the officers what appears to have been a failure on the part of the courts to have a judge on call for a warrant

application. There is no evidence in the record of deliberate efforts by the officers or Heck to undermine the warrant process.

Given the time needed for Brennan's medical care, the reasonable attempts by the police to obtain a search warrant, the nearly three hours since Brennan was arrested, and the substantial weight given to the dissipation of blood alcohol levels, there is sufficient support in the record to conclude that an objective exigency allowing for a warrantless blood draw existed.

Brennan also argues the State failed to meet its burden to prove beyond a reasonable doubt he violated the DWI statute based solely on the officers' observations. "A violation of N.J.S.A. 39:4-50[] may be proven 'through either of two alternative evidential methods: proof of a defendant's physical condition or proof of a defendant's blood alcohol level.'" State v. Howard, 383 N.J. Super. 538, 548 (App. Div. 2006) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003)). N.J.S.A. 39:4-50(a) prohibits operating a motor vehicle under the influence of intoxicating liquor. To be under the influence requires "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person," or "a condition which so affects the judgment or control of a motor vehicle operator 'as to make it improper for him to drive on the

highway.'" State v. Cryan, 363 N.J. Super. 442, 455 (App. Div. 2003) (quoting State v. Johnson, 42 N.J. at 165).

The municipal court and trial court found Brennan did not correctly perform the leg-lift or heel-to-toe field sobriety tests administered by the officers. Brennan "attempted seven times to lift and hold his leg and held, by the Court's count, for barely a second, five seconds with a sway, two seconds, two seconds, three seconds, five seconds, and two seconds." In addition, Brennan did not follow the officer's clear and understandable instructions for the heel-to-toe walk by not counting the steps as instructed and getting the count wrong once he was reminded to count. Brennan mis-stepped on his way forward twice and was instructed to walk nine steps forward and then turn around and do nine heel-to-toe steps back, but continued to walk, not heel-to-toe, fourteen steps until Ibarra terminated the test. These failures, along with his "very slow and lethargic" appearance, swaying, slurred speech, and smell of alcohol support both courts' findings that Brennan was clearly under the influence of alcohol.

We have carefully reviewed the record, including the video recordings of the stop and field sobriety tests, and find no basis on which to disturb Brennan's convictions. Even if the BAC results of the blood sample are not considered, the record contains sufficient support for a finding that Brennan was impaired

by alcohol consumption while operating a motor vehicle. The reckless driving conviction, although not addressed at length in the parties' briefs, appears to have been based on Brennan's operation of the vehicle while impaired. It too is supported by the evidence in the record.

Affirmed.