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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2507-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL ROWEK,

Defendant-Appellant.

Argued April 17, 2023 – Decided May 3, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Municipal Appeal No. 21-016.

Timothy J. Foley argued the cause for appellant (Foley & Foley, attorneys; Sherry L. Foley and Timothy J. Foley, on the briefs).

Robert J. Lombardo, Assistant Prosecutor, argued the cause for respondent (Robert J. Carroll, Morris County Prosecutor, attorney; Robert J. Lombardo, on the brief).

PER CURIAM

Defendant Michael Rowek appeals from convictions for driving while intoxicated (DWI), N.J.S.A. 39:4-50; careless driving, N.J.S.A. 39:4-97; and possession of a controlled dangerous substance (CDS) in a motor vehicle, N.J.S.A. 39:4-49.1, after a trial de novo based on the municipal record. We affirm as to the driving charges but reverse and vacate as to the possession charge.

Defendant raises the following issues on appeal:

> I. THE LAW DIVISION ERRED IN FINDING DEFENDANT GUILTY OF [DWI] BEYOND A REASONABLE DOUBT.
>
> II. THE LAW DIVISION ERRED IN FAILING TO GIVE ANY WEIGHT TO DEFENDANT'S EXPERT'S TESTIMONY.
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> III. THE CONVICTION FOR POSSESSION OF [A CDS] WHILE DRIVING MUST BE VACATED BECAUSE THERE WAS A LACK OF EVIDENCE THAT DEFENDANT POSSESSED A CDS.

On August 9, 2020, at around noon, defendant struck the left side of a landscaper's trailer that was parked on the side of a small dead-end street in Montville Township. The impact caused defendant's SUV to swerve across the street, onto the front lawn of a nearby house. His driver's side and front

airbags deployed, and his vehicle tipped up on two wheels. Defendant was not visibly injured.

Police were summoned. Officer David Chieppa—who later testified at trial as the State's sole witness—was the first responder. The street was not crowded and had little traffic; it was sunny outside. Officer Chieppa found defendant outside, on the lawn, in the process of reaching into the SUV to retrieve items. He asked defendant for his driving credentials; defendant complied.

Officer Chieppa noted defendant was "stumbling and swaying" as he searched for his credentials. As their interaction continued, Chieppa observed defendant's speech was slurred, and he appeared to have a "sleepy" or "tired and nonchalant" demeanor that did not "fit" the circumstances. When asked what his destination was, and how he came to hit the truck, defendant claimed he had been driving to his office in Totowa. He could not explain why he had decided to turn down a dead-end residential street some distance from Totowa, or how he hit the truck. He claimed to suffer from periods where he would lose awareness of himself and "black out."

Based on the officer's experience, Chieppa suspected defendant was intoxicated.[1] Upon looking into the car, he saw numerous loose "whole and half" pills scattered throughout the vehicle. A bag defendant was carrying also contained numerous prescription bottles, including some labelled "Suboxone," which is a prescription narcotic used to treat opioid addiction. Some bottles did not list the defendant's name. None of the pills were introduced as evidence or analyzed. Defendant also had a powdery substance on his face, in his nostril, and a bruise from a hypodermic needle on his right arm.

Officer Chieppa suspected drug use. Defendant claimed the pills were either prescribed to him by a doctor, or that they were dietary supplements. He claimed at various times to be taking certain medications for depression, as well as vitamin supplements, Adderall, and a drug called "Bubrieion"—which does not exist, but may be a mispronunciation of Buprenorphine, a pseudo-narcotic used to treat opioid use disorder. Buprenorphine is Suboxone's main ingredient.

Chieppa asked if defendant was willing to perform a field sobriety test (FST), to which defendant agreed. Defendant also stated he suffered from a back issue and flat feet, which affected his balance. He had substantial

[1] Officer Chieppa based this suspicion on the fact he encounters intoxicated people "three to four times a month."

difficulty performing the tests. He stumbled, frequently swayed, lost his balance, and had some difficulty complying with directions. Additionally, his pupils were "pinpoint," which Officer Chieppa testified his experience led him to believe defendant was intoxicated.

Officer Chieppa took defendant into custody, where he was read his rights and consented to a number of tests, including an "alcotest" for blood alcohol, which turned up negative (0.0%). Defendant was also given a urine test for other substances. However, the results of this urine test were not admitted into evidence because the expert who analyzed the results was seemingly unavailable to testify. Officer Chieppa testified he is not a "drug recognition expert," though he claimed to be familiar with the signs of drug abuse.

Defendant was charged, pled not guilty, and the matter proceeded to trial in the municipal court.

Defendant called his own witness, a neurologist, Dr. Nabil Yazgi. Dr. Yazgi began treating defendant several months after the incident in question, in December 2020. The two, however, knew each other socially for years prior to defendant's treatment.

Dr. Yazgi opined defendant sought treatment to address episodes of "blacking out." The doctor performed a number of neurological tests on defendant, including an MRI,[2] and reviewed police reports as well as medical records obtained from Chilton Hospital, where defendant had been admitted on March 3, 2021. It was the doctor's opinion defendant suffered from "transient ischemic attacks" which led to "transient global amnesia" (TIA and TGA, respectively). These are circulatory system conditions, which describe a lack of blood flow to the brain. They are characterized by disorientation, a confused demeanor, and short-term forgetfulness. When pressed on cross examination as to whether drug use—like heroin, methamphetamines, and fentanyl could cause TGA, or present substantially similar effects, Dr. Yazgi admitted they could. He also disclosed he was aware of defendant's past use of heroin and sleeping pills.

The municipal court delivered its opinion in an oral decision, concluding:

> I would find . . . defendant guilty on all three charges. The court[] notes . . . [Officer] Chieppa had sufficient experience, adequate credentials, frequency of the prior encounters, the similar circumstances, was on duty in uniform dispatched to an accident as I mentioned, saw first-hand, was able to observe the

[2] Dr. Yazgi stated the MRI came back "within normal limits."

> defendant, observed the scene, observed the contents of the vehicle, contents of a bag that the defendant was carrying with him and participated in a conversation . . . . The . . . driver's appearance on the video, [a] picture's worth a thousand words is the . . . time sworn statement.

The matter then proceeded to the Law Division for de novo review. The Law Division agreed with the decision of the municipal court on substantially similar grounds, and sentenced defendant to an eight-year loss of license, two years ignition interlock, 180 days jail time, and costs and penalties totaling $1,390. This appeal followed.

When the Law Division conducts a trial de novo on a record previously developed in the municipal court, our review is limited. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005). The Law Division is "bound to give due, although not necessarily controlling, regard to the opportunity of a [municipal court judge] to judge the credibility of the witnesses." Ibid. (alteration in original) (internal quotations omitted) (citing State v. Johnson, 42 N.J. 146, 157 (1964)). We determine whether there is sufficient credible evidence present in the record to support the Law Division's conclusions. Ibid.

Finally, when the Law Division concurs with the municipal court, the two-court rule applies. "Under the two-court rule, appellate 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." State v. Locurto, 157 N.J. 463, 474 (1999).

Defendant's chief argument on appeal is evidentiary: because Officer Chieppa, the sole witness, was not qualified as a drug recognition expert, and because the State failed to produce any physical evidence defendant was actually under the influence of a prohibited substance, the State's case must necessarily fail as a matter of law because it cannot prove—beyond a reasonable doubt—defendant was in fact intoxicated.

N.J.S.A. 39:4-50 makes it an offense to operate "a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug . . . ." "Under the influence" means "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs." State v. Tamburro, 68 N.J. 414, 421 (1975).

Defendant turns to State v. Bealor, 187 N.J. 574 (2006) to support his argument. Bealor concerned a suspected case of driving under the influence of marijuana and alcohol, and presented a substantially similar legal question to the present case. Id. at 578-79. The facts are highly relevant; in Bealor, the defendant exhibited certain behavior signs of intoxication, his eyes were

"droopy" and his knees "sagged." Id. at 578. Officers found open cans of beer in his car, detected the odor of marijuana and alcohol on him, and found a pipe in his pocket when performing a pat-down. Ibid.

After arresting Bealor, officers obtained a urine sample, which tested positive for marijuana metabolite. Id. at 581. An expert testified to this fact. Id. at 580. Bealor's defense was that the observations of the lay officers, when coupled with the physical evidence, did not amount to a showing that defendant was in fact "influenced" by the drug. Id. at 581. He further asserted "marijuana intoxication really cannot be proven without an expert" who could testify defendant's behavior was impacted by the drug. Ibid. In Bealor's view, it would be a "leap of faith" to conclude "having some substance in your urine" meant being under the influence of it. Ibid. He asserted an expert needed to testify not to the mere presence of a substance, but the effect of that substance at the relevant time period. Ibid.

Our Supreme Court disagreed. The Court first considered the State's argument the effects of marijuana consumption were of such widespread knowledge as to permit a lay opinion[3] to establish cannabis intoxication on its own, as is allowed when considering the effects of alcohol consumption. The

[3] N.J.R.E. 701 allows a "lay witness [to] give an opinion on matters of common knowledge and observation." Id. at 586.

Court rejected this view, finding the State had failed to prove the effects of marijuana intoxication were now matters of common knowledge. Id. at 586.

The Bealor Court then turned to whether the evidence presented—observations of the officers, coupled with the physical presence of marijuana metabolite in Bealor's urine—was sufficient to prove defendant was under the influence of marijuana while he operated a motor vehicle. Id. at 588.

The court observed "expert proofs are not a necessary prerequisite for a conviction for driving while under the influence of alcohol." Ibid. Therefore, an alcohol conviction could be sustained on indicia of intoxication—a defendant's demeanor and physical appearance—coupled with proofs of the cause of intoxication—i.e., the smell of alcohol, an admission of the consumption of alcohol, or lay opinion testimony the defendant appeared drunk. Ibid. The Court also noted "the driving while intoxicated statute does not require that the particular narcotic . . . be identified." Id. at 589 (quoting State v. Tamburro, 68 N.J. 414, 421 (1975)).

Thus, the Court ultimately held "lay opinion in respect of the cause of intoxication other than from alcohol consumption is not admissible because, unlike alcohol intoxication, '[n]o such general awareness exists as yet with regard to the signs and symptoms of the condition described as being "high" on

[marijuana].'" Id. at 577 (alteration in original). However, "lay observations of . . . intoxication, coupled with additional independent proofs tending to demonstrate defendant's consumption of narcotic[s] . . . constitute proofs sufficient to allow the fact-finder to conclude . . . the defendant was intoxicated beyond a reasonable doubt . . . ." Ibid. (emphasis added).

Applying this rule to Bealor's facts, the Court concluded:

> Even if limited solely to the time of his arrest, the fact of defendant's intoxication was amply proved by [the officer's] fact testimony in respect to defendant's erratic and dangerous driving, his slurred and slowed speech, his "bloodshot and glassy" eyes, his droopy eyelids, his "pale and flushed" face, his "fumbl[ing] around the center console and his glovebox searching for all his credentials," the smell of burnt marijuana on defendant, his sagging knees and the "emotionless stare on his face." Also, on cross-examination, [the officer] testified without objection that defendant was intoxicated at the time of his arrest. Finally, the State incontrovertibly proved, through qualified experts, the presence of marijuana in defendant's blood stream at the time of the arrest and its likely source.
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> [Id. at 590 (second alteration in original).]

Finally, Bealor also noted that "[p]rosecutors . . . routinely qualify local and state police officers to testify as experts on the subject of marijuana intoxication. Expert testimony only requires that a witness be qualified by knowledge, skill, experience, training, or education." Id. at 592 (quoting

N.J.R.E. 702). The Court suggested that because police officers may deal with intoxicated people frequently and are trained to some degree regarding the effects of illegal drugs, they may be routinely qualified as experts. Ibid. See also State v. Olenowski, 253 N.J. 133, 139 (2023) (adopting expert witness standard in Daubert[4] as opposed to former Frye[5] standard, which may impact a court's analysis of police officer expert testimony).

In sum, Bealor stands for the proposition that lay observation—plus some other sort of corroborative evidence—provides adequate support for a conviction under the DWI statute. Cases with similar fact patterns have considered a wide variety of other corroborative evidence, but usually involve either admissions or physical scientific results. Tamburro, 68 N.J. at 417 (defendant admitted to taking narcotics that day); State v. Franchetta, 394 N.J. Super. 200, 203 (App. Div. 2007) (blood test revealed cocaine metabolites).

Here, the issue is whether the record contains enough corroborative evidence to satisfy the Bealor standard. There are several possibilities: 1) The results of the FST, including defendant's restricted pupils; 2) the fact defendant had powder on his face and in his nostril; 3) the "track mark"

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[4] Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993).

[5] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

indicating intravenous drug use on defendant's forearm; and 4) the fact defendant was in possession of pills. Cases involving narcotics present differently and are subject to a different standard of review. Bealor, 187 N.J. at 577. Alcohol (and marijuana) can be detected by scent, which is not the case with an opioid. Therefore, these cases need an additional level of corroborative sensory evidence.

First, the FST. The Law Division relied heavily on this evidence, observing that defendant failed to complete the tests, and was unable to stand or follow directions. The video evidence showed defendant attempting to comply with the directions, while stating multiple times he has balance issues due to back problems and flat feet.

Similarly, the testimony defendant's eyes were "pinpoint" provides some corroboration. The incident took place on a sunny August day, at around noon. At the time he conducted the tests, Officer Chieppa noted the possibility the sun was impacting defendant's eyes and stated "I'm not getting any direct nystagmus." The Law Division, however, went into a detailed analysis of the position of the sun to justify its reliance on the evidence of restricted pupils.

The other physical evidence—the "powder" on defendant's face, the track mark, and the pills within the car—also provide corroboration.

Rationally, the powder could have come from the airbag, particularly if defendant's face struck the bag, which would usually happen when a driver's airbag deploys, but as the Law Division noted, defendant had no powder on his shirt, only his face and nose. The track mark indicates the use of a hypodermic needle within a period of several days, but cannot be directly linked to the timeframe of defendant's driving. Finally, pills were present in the car, some cut in half.

The police here obtained a urine sample with defendant's consent, but failed to present that evidence at trial. Bealor explicitly relied on defendant's properly admitted urine test, and had additional evidence supporting guilt beyond defendant's demeanor and unsteadiness, such as open alcohol containers in the car and the scent of marijuana. Bealor, 187 N.J at 590. While less than overwhelming, we conclude the culmination of the above factors—the totality of the circumstances—adequately supports a finding there was sufficient corroborative evidence to rely on Officer Chieppa's lay testimony that defendant was intoxicated. Id. at 577.

Defendant next contends the court committed reversible error by "completely discounting Dr. Yazgi's testimony because [defendant] had met Dr. Yazgi fifteen to twenty years ago at his office and may have had one or

two of [defendant's] clients as patients." Defendant cites no caselaw in support of this claim, because precedent is directly contrary to his assertion. State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000) ("[R]eviewing court[s] must give deference to the findings of the trial judge which are substantially influenced by his or her opportunity to hear and see the witnesses and to have the 'feel' of the case . . . ."). We reject this argument.

Finally, defendant argues the State presented insufficient evidence he was in possession of CDS while driving the vehicle.

There are five elements associated with the violation of N.J.S.A. 39:4-49.1. They include: 1) operation of a motor vehicle; 2) on a highway; 3) while in knowing possession; 4) of CDS or prescription legend drugs; 5) located on the person of the operator or within the vehicle. The only element disputed is number four: "of CDS."

The State presented two pieces of evidence at trial—Officer Chieppa's testimony he saw defendant in possession of Suboxone, and the dashcam footage. Two portions of the dashcam are relevant. Defendant stated he takes a prescription for "bubrieion"; and later, officers examined certain pill bottles defendant had in his possession and subsequently asked him "what's the

Suboxone for?" Defendant appeared confused when confronted with this question.

"Bubrieion" is not a drug. However, Buprenorphine is. It is one of the two main components of Suboxone, which is a specific brand of prescription drug used to treat opioid abuse disorder. It is possible, by the time police confronted defendant about the Suboxone they discovered when defendant permitted them to look in his bag, that he had already explained where it came from: he was prescribed the drug and took it to treat opioid addiction. He just identified it by its active ingredient, rather than its brand name—a common way of speaking (e.g., "ibuprofen" vs. "Advil"). Furthermore, Officer Chieppa testified as follows:

> Q: Can you think of anything else that you saw either in the car or in the bag of the defendant at that time?
>
> A: There was a prescription pill bottle that didn't belong to the defendant, had someone else's name. And contained within one of the prescription pill bottles was packaged [S]uboxone.
>
> [(Emphasis added).]

This testimony does not establish that Suboxone was not prescribed to defendant, just that one of the several prescription bottles was labelled "Suboxone," and one of any of the prescription bottles may have been

prescribed to someone other than defendant. Moreover, the evidence did not establish any of the substances found in the car were CDS. No laboratory verification or toxicology evidence was presented at trial.

Driving with a properly prescribed medication is not against the law, nor does a driver violate the statute by failing to produce a prescription upon being stopped—the substances may be transported so long as kept in the container in which they were lawfully dispensed. N.J.S.A. 2C:35-24.

We conclude the evidence of defendant's possession of CDS is insufficient: Officer Chieppa was not qualified as an expert. The State did not produce scientific analysis confirming the contents of what was seized, did not produce the physical evidence that was undoubtedly seized during the stop, and could not attest to the chain of custody.

The prosecution here has presented an insufficient case for conviction because the element of unlawful possession of CDS cannot be satisfied on the evidence in the record. Thus, as to that charge, we reverse.

Affirmed in part, and reversed and vacated in part. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION