

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0224-10T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BARBARA SALKEWICZ,

Defendant-Appellant.

Submitted December 20, 2011 - Decided January 3, 2012

Before Judges Fisher and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Municipal Appeal Nos. 07-09 and 11-10.

Levow & Associates, P.A., attorneys for appellant (Evan M. Levow, of counsel and on the brief; Michael B. Mankowski, on the brief).

Marlene Lynch Ford, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Supervising Assistant Prosecutor, of counsel; Meghan M. Clark, Assistant Prosecutor, on the brief).

PER CURIAM

Following a trial de novo in the Law Division, defendant Barbara Salkewicz appeals from her August 16, 2010 conviction on a charge of driving while intoxicated (DWI), N.J.S.A. 39:4-50. Defendant was sentenced as a second DWI offender, and the judge

imposed a two-year drivers license suspension, thirty days of community service, forty-eight hours in the Intoxicated Drivers Resource Center, a two-year revocation of defendant's motor vehicle registration, and appropriate fines and penalties. We agree with the Law Division judge's determination that the proofs concerning defendant's erratic driving and poor performance on the roadside tests were sufficient to establish defendant's guilt beyond a reasonable doubt. For reasons that we shall explain, the judge lacked the authority to additionally conclude that the police satisfied all of the Alcotest requirements imposed by State v. Chun, 194 N.J. 54, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008). We affirm defendant's conviction, based solely on her erratic driving and poor performance on the field sobriety tests.

I.

On the night of October 3, 2008, Manchester Township police officer Adam Emmons was on patrol on Route 70 in the area of Buckingham Drive, when he noticed a blue Saab with unilluminated license plates. Officer Emmons continued to observe the vehicle, which was being operated by defendant, as the vehicle made a right turn onto County Road 571 eastbound. The officer described defendant's erratic operation of the vehicle as follows:

When [the vehicle] made the right turn, it . . . made a wide right turn, it went into the left-hand lane, and then went to the right-hand lane without using a turn signal. While traveling in the right-hand lane eastbound, the vehicle turned back into the left-hand lane without using a turn signal. And while in the left-hand lane, the vehicle began to drive over the center line. . . . [T]he driver's side front [and] rear tire[s] crossed the center line and was in the westbound lane of 571 with half the vehicle.

After observing defendant's vehicle swerving, making improper lane changes, and crossing over the center line, Officer Emmons activated his overhead lights and effectuated a motor vehicle stop. He administered a field sobriety test. In light of his observations of defendant, and her poor performance on the roadside sobriety tests, Officer Emmons arrested defendant for DWI and transported her to police headquarters where Sergeant James Delane administered the Alcotest examination. Defendant's blood-alcohol content (BAC) as shown on the Alcotest was .15%.

Defendant thereafter filed a motion to suppress the Alcotest results, based on a claim that Sergeant Delane failed to continuously visually observe her for the twenty-minute period required by Chun, supra, 194 N.J. at 79. Defendant's suppression motion was heard before the Manchester Township Municipal Court on February 4, 2009. Because the suppression motion was confined to the issue of the twenty-minute Chun

observation period, the State limited the testimony of Officer Emmons and Sergeant Delane accordingly. At the conclusion of the hearing, the municipal court judge concluded that Sergeant Delane was able to, and did, in fact, observe defendant for at least twenty minutes prior to the administration of the first Alcotest, and the judge consequently denied the suppression motion.

As soon as the judge denied her suppression motion, defendant entered a conditional guilty plea on the basis of a per se violation of N.J.S.A. 39:4-50, stemming from the Alcotest reading of .15%. Defendant's conditional guilty plea specifically reserved her right to file an appeal in the Law Division challenging the municipal court judge's determination that Sergeant Delane had waited the twenty minutes required by Chun before administering the Alcotest. The judge imposed sentence, but agreed to stay the sentence pending the Law Division's review of the denial of defendant's motion to suppress the Alcotest results.

On October 2, 2009, rather reach a decision on the suppression motion, the Law Division ordered the matter remanded to the municipal court, concluding that defendant's appeal to the Law Division was interlocutory in light of the municipal court judge's failure to have addressed the question of whether defendant's guilt could also be established based upon

defendant's erratic driving and poor performance on the field sobriety test. The judge's October 2, 2009 order "remanded [the matter] back to the Manchester Township Municipal Court for disposition on the observational prong of the [DWI] charge[.]"

On March 5, 2010, before the municipal court, the municipal prosecutor reversed course and conceded that the State could not prove the State v. Chun "20-minute issue" beyond a reasonable doubt. The municipal prosecutor explained that the State would be proceeding solely on the basis of the observational evidence, namely, defendant's erratic driving and her performance on the field sobriety tests. At that point, the parties reached a stipulation that Officer Emmons had probable cause to stop defendant's vehicle; and that if the officer were to testify before the municipal court, he would testify that based upon his experience and training, he believed defendant was driving while intoxicated. The parties agreed that the videotape of the field sobriety tests would be admitted in evidence. The record reflects that the DVD was played for the judge.

After viewing the videotape, and before making any findings of fact, the municipal court judge observed that he was at a disadvantage because of the parties' stipulation. The judge stated:

Maybe I'm going outside the box, . . .
but the truth of the matter is that I've
tried enough DUI cases to know that when an

officer testifies as to what the officer observed, they talk about things such as slurred speech, watery eyes, facial movements, detecting alcohol on the breath. All of these factors are things that are included in the officer's observation.

Defense counsel responded, "but those are things that are not before you because of the stipulation." He continued, "that's exactly what's not in the record, any of those extraneous or additional facts. There's a straightforward stipulation that the officer will testify that, in his opinion, lay personal opinion and professional opinion, that [defendant] was under the influence, period." Defense counsel stated, "we don't get into the specific facts. That actually was the point of the stipulation."

The parties and the judge then proceeded to analyze defendant's performance on the field sobriety tests, as shown on the videotape. The videotape is not part of the record on appeal.

After the parties and the municipal court judge viewed the videotape, defense counsel argued that defendant's poor performance on two of the "balance" tests was attributable to defendant wearing "high heels" and suffering from Graves disease. Defense counsel noted that the videotape showed Officer Emmons asking defendant, before he administered the field sobriety tests, whether she was suffering from any medical

problems that would interfere with her balance, and she apparently answered in the affirmative, mentioning that she had an "autoimmune" disorder, Graves disease. The judge questioned defense counsel about a report provided by his expert Gilbert Snowden, a retired New Jersey State Trooper. That report is not part of the record on appeal. Snowden's report apparently concerned the training given to local police departments and the State Police concerning the administration of field sobriety tests to drivers suffering from certain medical conditions. When the judge asked defense counsel whether Snowden's report stated that defendant's Graves disease "interfere[d] with her ability to . . . balance," defense counsel answered, "there's not a medical opinion that says that overtly."

The municipal court judge then proceeded to make detailed findings of fact concerning defendant's poor performance on the field sobriety tests, noting that defendant lost her balance several times and "deviated so far to the left of the sidewalk" while performing the heel-to-toe test that she "almost . . . fell." He also described her as "staggering" during some portions of the test and "entirely unsuccessful" in performing the one-leg stand. After noting that defendant admitted on the videotape that she had consumed two glasses of wine, the municipal court judge found defendant guilty of driving while intoxicated, based upon her admission that she had consumed

alcohol, her poor performance on the field sobriety tests and her erratic driving. The municipal court imposed sentence, but agreed to stay the sentence pending defendant's appeal to the Law Division.

The de novo appeal to the Law Division was heard on August 6, 2010. The proceeding began with the Law Division judge's observation that the municipal prosecutor lacked the authority on remand to acknowledge that the State could not meet its burden of proof regarding the Alcotest results. The judge stated, "that was totally without authorization. That was totally contrary to the remand order. The municipal court had no jurisdiction over the Alcotest readings per my order of October 2nd[, 2009]." The judge then proceeded to sua sponte vacate the State's dismissal of the Alcotest readings.

Next, the judge reviewed the municipal court judge's findings of fact concerning the twenty-minute Chun observation period. The judge deferred to the municipal court judge's credibility findings concerning the testimony of Sergeant Delane, and concluded that the twenty-minute observation period required by Chun was satisfied. For that reason, the judge affirmed the denial of defendant's motion to suppress the Alcotest results. The judge observed that because defendant's guilty plea had been conditioned only upon her appeal from the denial of the motion to suppress -- and the denial of that

motion had been now affirmed -- her guilty plea based on the Alcotest results should be reinstated. He found her guilty of DWI based on the Alcotest reading of .15% BAC.

The judge turned next to defendant's erratic driving and poor performance on the field sobriety tests. After viewing the videotape, the Law Division judge found that defendant operated the car "on the wrong side of the road," and while being questioned on the videotape, had admitted to the consumption of alcohol. The judge then made detailed findings of fact concerning defendant's performance on the field sobriety tests. Describing the heel-to-toe test, the judge noted that defendant had not completed the test successfully, as she walked with "considerable distance" between the toe of one foot and the heel of the other, despite Officer Emmons's instruction that she keep her toes pressed tightly against her heel. The judge also noted that defendant "didn't even walk straight" while performing the tests because she "was walking with her feet from side to side."

Commenting on defendant's performance on the next test, which involved taking nine steps forward and nine steps back with her hands pressed to her side, the judge concluded that defendant was "swaying," "had obvious balance problems, . . . did not continue in a straight line [and] actually went off the sidewalk at one point in time." The third test the judge described involved defendant standing with her

feet together, hands at her side, lifting one leg and counting 1-1000, 2-1000, 3-1000 until the officer told her to stop. Reviewing that portion of the videotape, the judge stated that defendant attempted this test on three occasions and, "as the tests progressed, she did worse and worse and worse" until after her third unsuccessful attempt, when Officer Emmons stopped the testing and placed defendant in handcuffs.

The judge rejected defendant's argument that her high-heeled shoes and Graves disease excused her poor performance on the field sobriety tests. As for defendant's high heels, the judge noted that it was impossible to tell from the videotape how high the heels actually were, as the legs of the pants defendant was wearing came all the way to the ground. He concluded that if defendant's shoes posed a problem, she could have said so to Officer Emmons, or removed her shoes before performing the tests, but defendant had not done so. For those reasons, the judge rejected defendant's assertion that her high heels contributed to, or caused, her poor performance on the tests.

As for the Graves's disease, the judge remarked that defendant's claim on the videotape that the disease caused her to have tremors was belied by the videotape itself, which showed no such thing. The judge also commented that nothing in Trooper

Snowden's expert report stated that Graves disease is known to contribute to poor performance on the field sobriety tests.

Ultimately, the judge made the following findings:

We have operation. We have erratic operation, operating on the wrong side of the road. We have [defendant's] admission of consumption of alcohol. We have an opinion from a police officer that [defendant is] under the influence of alcohol. We have a videotape that shows all of these balance tests that she did poorly on each and she did fail also . . . to follow instructions with regard to more than one of the tests. She was starting to do the tests before the officer had completed his instructions and before he had completed his demonstration of the test. She didn't always keep her hands at her side. At different occasions [sic] she had her hands up in the air and using her hands for balance.

On a de novo basis, considering all of the evidence that was stipulated in and my observations on the videotape, it's my finding that she was guilty . . . per the observational prong of operating this motor vehicle while intoxicated. So, I would, on a de novo basis, find her guilty of operating while under the influence[.]

The judge imposed the same sentence that had been imposed in the municipal court. The judge ordered defendant to immediately surrender her drivers license, which she did. We denied her motion for a stay of the drivers license suspension pending appeal.

On appeal, defendant raises the following claims:

I. DUE TO THE PROCEDURAL IRREGULARITIES AND MANNER IN WHICH THE "TRIAL" WAS CONDUCTED, DEFENDANT WAS DENIED DUE PROCESS OF LAW.

II. BECAUSE A PROPER OBSERVATION PERIOD WAS NOT MAINTAINED IN THIS CASE, THE BREATH TESTING RESULTS MUST BE SUPPRESSED.

II. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS INTOXICATED.

II.

In a trial de novo in the Law Division, the judge is obliged to determine the case completely anew based on the record made in the municipal court, giving due regard, although not necessarily controlling weight, to the opportunity of the municipal court judge to evaluate the credibility of the witnesses. State v. Johnson, 42 N.J. 146, 157 (1964). The judge in a trial de novo must make his or her own findings of fact based upon the record, limited to the record that was created in the municipal court. State v. Locurto, 157 N.J. 463, 472 (1999).

In our review of the Law Division's findings of fact, we are obliged to affirm so long as those findings "could reasonably have been reached upon sufficient credible evidence present in the record." Johnson, supra, 42 N.J. at 162. We should not alter the Law Division's factual findings merely because we might have reached a different conclusion. Ibid.

Only when we are "thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction, then, and only then . . . should [we] appraise the record as if [we] were deciding the matter at inception and make [our] own findings and conclusions." Ibid.

We turn to Point I, in which defendant maintains that she was denied due process of law by the "procedural irregularities" that marked the Law Division's handling of her de novo appeal. In particular, she asserts that the Law Division judge erred by refusing to hear the appeal from the adverse determination of her pretrial motion to suppress; and that the judge compounded that error by deeming the municipal court proceedings interlocutory and ordering the parties to conduct a trial in the municipal court on defendant's performance on the field sobriety tests. She also asserts that the judge lacked the authority to make a post-trial decision to admit the Alcotest readings into evidence once the prosecutor had conceded before the municipal court on October 2, 2009 that the State could not satisfy the Chun requirement of a continuous twenty-minute observation period. Finally, she maintains that the judge lacked the authority to conclude that her conditional guilty plea in the municipal court relieved the State of its obligation to satisfy all of the prerequisites for the admission of the Alcotest

results at trial, and, as a result, the judge erred in concluding that the Alcotest results were admissible.

As is evident, defendant has advanced a number of arguments in Point I. As a threshold matter, we agree with defendant's contention that when the matter first came before the Law Division on October 2, 2009 as an appeal from the denial of defendant's motion to suppress, the Law Division judge was obliged to determine that issue. Ultimately, defendant was not harmed by the improper remand, because the remand resulted in the State's concession before the municipal court on March 5, 2010 that it could not prove beyond a reasonable doubt the twenty-minute period of continual observation that Chun requires.

Defendant is correct in arguing that the judge erred in considering the results of the Alcotest in finding defendant guilty. Even though it had successfully defeated defendant's motion to suppress the Alcotest results, the State conceded in the municipal court that it could not prove beyond a reasonable doubt that the twenty-minute observation period required by Chun had occurred. As a result, defendant was duly permitted to withdraw her guilty plea and the trial in the municipal court consisted solely of the State's so-called observational proofs. Because the State made no attempt to prove its case based on the Alcotest reading, the Law Division judge erred and exceeded his

authority by finding her guilty by relying on the testimony taken at the earlier suppression hearing regarding the Alcotest results. We thus vacate the Law Division judge's determination that defendant was guilty of DWI insofar as he relied on the Alcotest results.

Because of that determination, we need not address defendant's claim in Point II that the Law Division erred when it reviewed the testimony of Sergeant Delane and concluded that Sergeant Delane waited the twenty minutes required by Chun before performing the Alcotest.

III.

We turn to Point III, in which defendant contends that the Law Division judge erred when he concluded that her performance on the field sobriety tests, and her flawed operation of her motor vehicle, established a violation of N.J.S.A. 39:4-50. To establish a violation of that statute, the State must prove beyond a reasonable doubt that defendant was "under the influence of intoxicating liquor[.]" N.J.S.A. 39:4-50. To prove a defendant's intoxication, the State is entitled to rely on observational evidence such as a defendant's driving, "demeanor and physical evidence," as well as "proofs as to the cause of intoxication - i.e., the smell of alcohol, an admission of the consumption of alcohol, or a lay opinion of alcohol intoxication." State v. Bealor, 187 N.J. 574, 588-89 (2006).

Here, the evidence presented before the municipal court was more than sufficient to establish that defendant was under the influence of alcohol while operating her vehicle. First, defendant was driving her car on the wrong side of the road. We recognize that defendant told Officer Emmons that when she bent over to pick up an item that she had dropped, she temporarily lost her vantage point and was unable to determine that her vehicle had drifted over the double yellow line onto the opposing side of the roadway. However, the fact that defendant suggests an innocent explanation for driving on the wrong side of the road "is not fatal to the State's case." State v. Brown, 80 N.J. 587, 599 (1979). Although a defendant may proffer an innocent explanation for his or her conduct, that explanation will not exclude a finding of guilt where the evidence is sufficient to leave the factfinder firmly convinced that the defendant is guilty of the offense charged. Ibid. For that reason, we reject defendant's assertion that the judge erred when he relied upon her grossly erratic driving as evidence that she was intoxicated.

That evidence, when combined with defendant's poor performance on the field sobriety tests, and admission that she had consumed alcohol, was more than sufficient to establish her guilt on the DWI charge. Bealor, supra, 187 N.J. at 588-89. It bears repeating that the record establishes defendant began the

tests before being instructed to do so, repeatedly lost her balance, was unable to complete the tests and was swaying back and forth. When combined with defendant's admission that she had been drinking, and her erratic driving, the proofs were sufficient to demonstrate her guilt beyond a reasonable doubt.

Defendant's claims regarding her high-heel shoes and Graves disease are unconvincing. As to her high heels, the videotape apparently shows her walking without any difficulty over to the area where the tests began. From that fact, we conclude, as did the trial judge, that it was defendant's intoxication, and not her high heels, that caused her to perform poorly. We note again, relying on Brown, supra, 80 N.J. at 599, that a defendant's proffered explanation for her poor performance will not carry the day when the proofs are otherwise sufficient to warrant a finding of guilt on the DWI charge.

As for defendant's claim of Graves disease, we have no basis to quarrel with the Law Division's conclusion that nothing in Snowden's report established that defendant's Graves disease explained her poor performance on the field sobriety tests. As we have noted, Snowden's report is not part of the record on appeal. For that reason, we have been provided with no meritorious basis to reject the judge's findings on that issue.

In sum, the evidence presented to the Law Division in the trial de novo consisting of defendant driving on the wrong side

of the road, admitting to the consumption of alcohol, and failing the field sobriety tests, was more than sufficient to establish her guilt on the charge of driving while intoxicated.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION