

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5842-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PATRICIA DRISCOLL,

Defendant-Appellant.

Submitted December 14, 2010 - Decided February 24, 2011

Before Judges Payne and Koblitiz.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Municipal Appeal
No. 2007-080.

Latham & Watkins, LLP, attorneys for appellant
(Scott G. Kobil and Matthew N. Gibbon, on
the briefs).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Maria
I. Guerrero, Special Deputy Attorney
General/Assistant Essex County Prosecutor,
of counsel and on the brief).

PER CURIAM

Defendant Patricia Driscoll appeals her second conviction
of driving while intoxicated, N.J.S.A. 39:4-50. She was
sentenced to thirty days of community service, forty-eight hours

of Intoxicated Driver Resource Center (IDRC) classes, and her driving privileges were revoked for two years. Appropriate fees, fines and penalties were assessed. On appeal, defendant argues that the Law Division erred in finding her guilty on the basis that she could not prove her defense beyond a reasonable doubt.¹ After reviewing the argument in light of the applicable law, we are constrained to agree and reverse.

At trial in the municipal court, Detective Charles Zampino of the Fairfield Police Department testified to the following facts. At 12:24 a.m. on June 2, 2007, he observed defendant driving at a very slow rate of speed on Route 46. Defendant then exited Route 46, and in doing so, she drove over the solid line and onto the shoulder of the roadway. The car then made a slow, wide left turn, and the car's front tire hit the curb. Zampino said the car then drove through a red light, stopping suddenly to make a right turn. Zampino stopped the car and spoke to defendant. She informed him that she came from a club where she had been dancing with friends and was now lost.

Defendant appeared disoriented, her pupils were constricted, her speech was slow and slurred, and she kept

¹ She was also convicted in municipal court of careless driving, N.J.S.A. 39:4-97, and failure to observe traffic signals, N.J.S.A. 39:4-81. The court merged the failure to obey traffic signals conviction into the conviction for careless driving. Defendant does not appeal this conviction.

licking her lips and sticking out her tongue. Zampino conducted road-side sobriety tests, noting that defendant swayed when walking. Zampino found no nystagmus (involuntary eye movements thought to be brought on by alcohol intoxication²) after administering the horizontal gaze nystagmus test (HGN). Defendant told him that she suffered from Lyme disease and could not perform the "walk and turn" test. She could not stand on one foot while counting as instructed. She was unable to recite the alphabet beginning at the letter "K." After the "finger count" test was demonstrated by Zampino, defendant also failed two attempts at that field sobriety test. Defendant was arrested and taken to police headquarters.

Fairfield Police Officer Christopher Nicholas testified that defendant had a zero reading on the breathalyzer. He testified that he administered the Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966). Defendant then indicated she had slept only two and one-half hours the previous night, had Lyme disease, and was under the care of a doctor who had prescribed Paxil and Fioricet with codeine. Defendant indicated she had most

² See State v. Doriguzzi, 334 N.J. Super. 530, 536-38 (App. Div. 2000) (explaining that HGN tests are not generally accepted by the scientific community).

recently taken one Fioricet with codeine pill on the morning of June 1.

Nicholas testified that defendant was cooperative, polite and calm, but her coordination was poor, her face flushed and her speech slurred. She had watery eyes and droopy eyelids. However, he testified that her eyes were able to focus on stimuli and follow quickly. Nicholas testified that he again administered field sobriety tests, which defendant was unable to complete successfully. Nicholas said that he measured defendant's pupils as constricted in darkness and in room light, and they showed little to no reaction to a flashlight. Defendant's blood pressure and temperature were at the low-normal range. He also found no nystagmus after again administering the HGN. Nicholas, a certified drug recognition expert, testified that the combined results of all of the tests he administered indicated that defendant "was impaired and was unable to operate a motor vehicle safely due to the fact that she was under the influence of a narcotic."

Defendant had in her possession a small pill bottle with six blue-gray tablets. Her urine test revealed the presence of codeine and butalbital with no quantitative analysis. She stated that she was under the care of Dr. Nabil Yagzi, who prescribed the medication she took to treat headaches. She said

her prescription for Fioricet with codeine, the blue-gray tablets, called for one pill every four hours as needed.

Defendant testified to the following facts. She was "fast dancing" with her friends at a club that night. She felt fine when leaving the club, but had little memory of what followed. She recalled being disoriented. She was diagnosed with Lyme disease in 1990 and never made a full recovery. Her symptoms include headaches, arthritis and joint pain, memory loss, disorientation, flu-like symptoms, difficulty sleeping, and trouble staying awake.

Dr. Yagzi, defendant's treating doctor and an expert in neurology, was unavailable to testify in municipal court as he was attending a funeral outside of the country. He was allowed to testify at the trial de novo in the Law Division. R. 3:23-8(a). Dr. Yagzi testified to the following facts. Defendant suffered from chronic intractable headaches, which upon occasion caused her to become disoriented and lose her balance. Beginning in 1998, he had prescribed Fioricet with codeine (also containing caffeine, acetaminophen and butalbital) every four to six hours as needed. A few years before he added Paxil, to be taken once a day at bedtime. Paxil may enhance the effects of both the codeine and butalbital contained in Fioricet with codeine.

Although the Physicians' Desk Reference³ indicates that Fioricet with codeine may impair a patient's mental and/or physical abilities required for driving, Dr. Yagzi concluded that it would not affect defendant's driving if taken as prescribed because her brain had adapted to the medication regimen through long-term use. He said the codeine would be detectable in urine for up to forty-eight hours and the butalbital for up to seven days.

Dr. Yagzi believed all of defendant's symptoms at the time of the motor vehicle stop on June 2 were due to Lyme disease, fatigue and potential presyncope (which he said was a condition of near-fainting including symptoms of dizziness, disorientation, confusion, loss of balance and mild cognitive dysfunction). The blood pressure and temperature results were normal for defendant. Although defendant was successfully treated for Lyme disease, she still suffered from poor balance, lack of coordination and clumsiness, which worsened when she was fatigued or suffering from a headache.

Although initially deciding to let Dr. Yagzi testify in the proceedings in the Law Division so the court could "rule whether, in fact, he produce[d] a reasonable doubt or not with

³ Physicians' Desk Reference is a reference book that lists potential side effects of prescription medication. See Feldman v. Lederle Labs, 97 N.J. 429, 436 (1984).

regard to the allegations alleged against defendant," the court stated on June 9, 2009, after hearing Dr. Yagzi's testimony, that the defense "has the burden of proof with regard to raising the defense in this matter."

The court gave an oral opinion on the record on June 16, 2009, finding defendant guilty of driving under the influence. In this oral opinion the court discussed Dr. Yagzi's testimony, stating,

On balance I don't find the doctor's testimony credible. While there were certain symptoms that were exhibited by the defendant at the time of the traffic stop, this expert could not render an opinion beyond a reasonable doubt that . . . the symptoms were caused by a medical condition and not by the ingestion of a controlled dangerous substance.

. . . .

The observations of the defendant are common in patients with fatigue, headaches, as well as those with alcohol or drug intoxication. However, the symptoms exhibited may have been the result of use or ingestion of a controlled dangerous substance as confirmed by the lab reports, which are entered into evidence. Therefore, as a reasonable doubt exists as [to] the [etiology] of the observed symptoms, the defendant cannot sustain the burden of proving beyond a reasonable doubt the defense offered in this case.

[Emphasis added.]

Defendant raises the following arguments on appeal:

THE LAW DIVISION COMMITTED PLAIN ERROR BY IMPOSING ON DEFENDANT THE BURDEN TO PROVE HER INNOCENCE BEYOND A REASONABLE DOUBT, AND BECAUSE THE LAW DIVISION CONCLUDED THAT REASONABLE DOUBT EXISTED, DEFENDANT'S CONVICTION FOR DRIVING WHILE INTOXICATED SHOULD BE OVERTURNED

- A. Standard of Review
- B. The Law Division applied an erroneous burden of proof when it imposed upon Defendant the burden of proving her case beyond a reasonable doubt.
- C. By incorrectly imposing the burden of proof on Defendant, the Law Division's decision constitutes plain error.
- D. Defendant's conviction for driving while intoxicated should be vacated and Defendant should be acquitted on this charge because the State failed to meet its burden of proof beyond a reasonable doubt.
 - 1. Reasonable doubt exists from the record
 - 2. Because reasonable doubt exists, Defendant must be acquitted

The State argues that because the court indicated at one point that it did not find Dr. Yagzi credible, it did not intentionally shift the burden of proof but was merely somewhat confusing in its verbiage. Thus, the State argues that, at most, we should remand the matter to the Law Division "so that

the court may clarify its findings.” We agree with the State that the trial court intended to find defendant guilty and did so. As the State argues, on the evidence presented, the court could have found defendant guilty beyond a reasonable doubt, using the standard of proof that our law requires. See, e.g., State v. Snyder, 337 N.J. Super. 59, 61-62 (App. Div. 2001). The State presented sufficient evidence to sustain a guilty verdict had the fact-finder been convinced beyond a reasonable doubt of her guilt.

On the other hand, defendant presented evidence that she suffered from Lyme disease, headaches and fatigue, which could explain her poor driving and poor performance on field sobriety tests. She had a prescription for a medication that explained the presence of drugs in her urine. This evidence could have easily raised a reasonable doubt in the fact-finder’s mind. The fact-finder found a reasonable doubt yet convicted defendant nonetheless. If we remand to the fact-finder for clarification, we would be inviting the court to make a finding inconsistent with its stated finding of reasonable doubt. Findings are not formulaic phrases lacking serious import. When the trial court finds a reasonable doubt, we accord great weight to that finding. We do not accept that a finding of reasonable doubt is

merely a poor word choice or result of some confusion in the court's mind.

Because the court incorrectly transferred the burden of proof to defendant at the end of the testimony on June 9, 2009, without objection by the defense, defendant frames her argument in terms of "plain error." We do not agree that a plain error analysis pursuant to Rule 2:10-2 is appropriate where the trial court shifts the burden of proof in its oral decision. At this point the trial is over, and defense counsel is not required to interrupt the court to register an objection. Moreover, even in a "plain error" analysis, finding defendant guilty because defendant has raised a reasonable doubt but failed to prove her defense beyond a reasonable doubt is "clearly capable of producing an unjust result." R. 2:10-2. Based on the trial court's findings, defendant is not guilty of driving under the influence.

Reversed.

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


CLERK OF THE APPELLATE DIVISION