

STATE OF NEW JERSEY, Plaintiff-Respondent,
v.
JOSEPH B. GAETA, Defendant-Appellant.

[No. A-0201-12T4.](#)

Superior Court of New Jersey, Appellate Division.

Argued July 9, 2013.
Decided July 17, 2013.

Joseph P. Rem, Jr., argued the cause for appellant (Rem Zeller Law Group; attorneys; Mr. Rem, of counsel; Lisa R. LeBoeuf and James B. Sepowitz, on the brief).

Jacqueline Choi, Assistant Prosecutor, argued the cause for respondent (John L. Molinelli, Bergen County Prosecutor, attorney; Ms. Choi, of counsel and on the brief).

Before Judges Ashrafi and St. John.

**NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE APPELLATE DIVISION**

PER CURIAM.

Defendant Joseph B. Gaeta was convicted of Driving While Intoxicated (DWI), N.J.S.A. 39:4-50. Because the vehicle he was driving was an all-terrain vehicle (ATV) and not a car, truck, or similar motor vehicle, he argues on appeal that the penalties imposed upon him in accordance with the DWI statute are an illegal sentence. He contends that statutory provisions applicable specifically to ATV's, N.J.S.A. 39:3C-28 and -30, that were still applicable at the time of his offense limited the penalty that could be imposed to a fine of \$100 to \$200. We agree.

Although the cited statutes were amended in 2009 so that the standard DWI penalties would apply to a person driving an ATV while intoxicated, those amendments had not yet taken effect at the time of defendant's offense. The pre-2009 versions of the statutes were still in effect. Therefore, we reverse the sentence imposed and remand to the municipal court to resentence defendant within the limits of the pre-amendment versions of N.J.S.A. 39:3C-28 and-30.

The case proceeded in the municipal court by way of stipulated facts. On December 15, 2011, defendant, a Midland Park police officer, participated in DWI training at the Bergen County Police Academy. His volunteer role was to consume beer under controlled conditions so that other trainees could observe the effects of alcohol and learn to detect the visible signs of intoxication by means of field sobriety tests. As of 11:25 a.m. that day,

defendant had a blood alcohol concentration (BAC) of .129%, according to a handheld breathalyzer device used at the police academy.

If called to testify at the trial, defendant would say he did not drink any alcoholic beverages after 11:30 that morning. He would testify that, after the training session, he went to his home and spent several hours there in the company of Officer

Canonico, also a Midland Park police officer.

At 3:13 p.m. that day, defendant was off-duty and driving an ATV on Godwin Avenue in Wyckoff. Officer Canonico was following him in a car. As defendant made a turn onto Greenhaven Avenue, he failed to control the ATV, and it turned over and crashed.

Sergeant Michael Ragucci of the Wyckoff Police Department investigated at the scene of the accident. If called to testify at the trial, both Sergeant Ragucci and Officer Canonico would testify that, in their opinion, defendant was intoxicated at the time of the accident. At 4:10 p.m. on the date of the accident, a blood sample was properly drawn from defendant by a nurse at a hospital, and it revealed a BAC of .135%, that is, above the .08% limit for a per se violation under the DWI statute.

Five summonses were issued to defendant, including one charging DWI in violation of N.J.S.A. 39:4-50. At the beginning of the municipal court trial, the prosecutor conceded that defendant was not guilty of two of the offenses charged, lack of registration and lack of insurance for the ATV, and so, the prosecutor voluntarily dismissed those summonses. The factual stipulations at trial were part of an agreement between defendant and the prosecutor by which the State agreed to dismiss two additional summonses, for operating an ATV on a public road and failure to wear a helmet, if defendant was found guilty of the DWI offense and sentenced on that charge. There was no agreement as to the appropriate sentence to be imposed on the DWI charge.

Based on the stipulated facts, the municipal court found defendant guilty of DWI. Defendant then argued that the sentence that could be imposed was limited by the provisions of N.J.S.A. 39:3C-28 and-30 to a monetary fine. The court rejected that position and concluded that the usual penalties under N.J.S.A. 39:4-50 would be imposed. The conviction being defendant's first DWI offense, the court sentenced him within the appropriate range of sentences under N.J.S.A. 39:4-50 to: a fine of \$306, \$33 in court costs, \$50 V.C.C.B. penalty, \$100 drunk driving enforcement fund surcharge, \$75 to the Safe Neighborhoods Services Fund, \$100 state municipal surcharge, seven months loss of driving privileges, and twelve hours at the Intoxicated Driver Resource Center. The court stayed the sentence pending appeal to the Law Division.

In the Law Division, defendant did not challenge the finding of guilt on the DWI charge but only argued again that the legal penalty for his offense was limited by the cited statutes applicable to operation of an ATV on public highways and properties. After hearing the arguments of counsel, the Law Division also rejected defendant's arguments and imposed the same sentence as the municipal court. Again, the court stayed execution of the sentence. This appeal followed.

Before us, defendant repeats the single argument that he pursued in the trial courts:

THE COURT BELOW ERRED IN FINDING THAT THE APPROPRIATE PENALTIES APPLICABLE TO OFFICER GAETA ARE THOSE UNDER N.J.S.A. 39:4-50, RATHER THAN N.J.S.A. 39:3C-28.

Defendant's argument is based on the effective date of the penalty provisions of N.J.S.A. 39:3C-28 and 30.

As they read now, those statutes indicate that the appropriate penalties for defendant's offense are the same as those that would apply had he been driving a car or other motor vehicle while intoxicated. Before its 2009 amendment, however, N.J.S.A. 39:3C-30 stated in relevant part:

Owners and operators of snowmobiles and all-terrain vehicles shall, when operating such across a public highway or on public lands or waters, comply with the following provisions of chapter 4 of Title 39 of the Revised Statutes: R.S. 39:4-48 through R.S. 39:4-51 The failure to comply with any of these provisions shall be a violation of this act and the penalty for such a violation shall be as provided in section 28 of P.L. 1973, c. 307 (C. 39:3C-28) rather than the penalty provided in the sections cited above.
[Emphasis added.]

Thus, the statute provided that DWI, N.J.S.A. 39:4-50, was an offense that applied to a person driving an ATV on public highways or lands, but the penalty for the offense came under N.J.S.A. 39:3C-28 rather than N.J.S.A. 39:4-50.

Before the 2009 amendments, N.J.S.A. 39:3C-28 provided in relevant part:

Any person who shall violate any provisions of this act, if no other penalty is specifically provided, or any rule or regulation promulgated pursuant to this act shall be punished by a fine of not less than \$100 or more than \$200.

Consequently, argues defendant, before the 2009 amendments, the penalty for a DWI offense while operating an ATV was limited to a fine of \$100 to \$200.

The relevant 2009 amendment, L. 2009, c. 275, § 30, deleted from section 30 the underscored last sentence that we quoted previously. Therefore, the full range of penalties provided by N.J.S.A. 39:4-50 became applicable to a person who operates an ATV on a public highway or land while intoxicated.

However, the 2009 amendments had a conditional effective date. As part of the amending legislation, the Commissioner of the Department of Environmental Protection (DEP) was required to "designate and make available three sites on State-owned land for the use of snowmobiles, all-terrain vehicles, and dirt bikes, one each in the northern, central, and southern part of the State." L. 2009, c. 275, § 38. The effective date of the 2009 amendment relevant to this appeal was to be the first day of the third month after the designation of the first such public site. L. 2009, c. 275, § 41. The State concedes that, at the time of defendant's violation, and also at the time of the proceedings in the two trial courts, the DEP

had not yet made the required designation of a public site available for ATV users. The State also concedes that, consequently, the relevant 2009 amendment applying the usual DWI penalties to one driving an ATV was not in effect at the time of defendant's DWI offense.

The State contends, however, and the trial courts agreed with the State, that the pre-amendment versions of N.J.S.A. 39:3C-28 and-30 did not limit the penalties applicable to defendant's offense to a fine of not more than \$200. The Law Division's ruling, from which this appeal is taken, concluded that the two statutes had to be read together and that the \$100 to \$200 fine provision only applied to violations that did not otherwise have penalty provisions applicable. To reach its conclusion, the Law Division focused upon a 1991 amendment, which added the clause "if no other penalty is specifically provided," to section 28. L. 1991, c. 322, § 8. The Law Division reasoned that, since the DWI statute has its own penalty provisions, those penalties were "specifically provided" and therefore applicable to defendant's offense even under the pre-2009 version of the statute.

While this construction of N.J.S.A. 39:3C-28 is a reasonable one, we cannot ignore the explicit language of N.J.S.A. 39:3C-30 stating that the penalty for violation of the DWI statute while operating an ATV, "shall be as provided in section 28 . . . rather than the penalty provided in the" DWI statute. (Emphasis added.) The Law Division's interpretation of section 28 leaves the "rather than" language of section 30 with no meaningful effect. Until the previously underscored and quoted language of section 30 was deleted from the statute by the 2009 amendments, it was also reasonable to read the two statutes together as designating the \$100 to \$200 fine range of section 28 as applicable, unless an alternative penalty provision was specifically provided by the ATV legislation itself, that is, by L. 1973, c. 307; amended by L. 1985, c. 375; L. 1991, c. 322; and L. 2009, c. 275. Our research has revealed one section of the ATV legislation that designates a different penalty for a violation than that provided in section 28. N.J.S.A. 39:3C-20(c), pertaining to failure to carry liability insurance for an ATV provides for a fine range of \$25 to \$100 instead of the \$100 to \$200 range of section 28. Thus, the "specifically provided" language of section 28 that the Law Division relied upon has meaning and effect within the ATV legislation itself. It is not necessary to attribute a legislative intent to the "specifically provided" language to make the standard DWI penalties applicable in order to give effect to the 1991 amendment of section 28.

Even if we were to read sections 28 and 30 as inconsistent and therefore ambiguous, we would be required to resolve that inconsistency in favor of the defendant. The rule of lenity applicable to the interpretation of a quasi-criminal statute requires that defendant be subject to the lesser penalty. See [United States v. Bass, 404 U.S. 336, 348, 92 S. Ct. 515, 523, 30 L. Ed. 2d 488, 497 \(1971\)](#) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."); [State v. Ciancaglini, 204 N.J. 597, 606 \(2011\)](#) ("any reasonable doubt concerning the meaning of a penal statute must be 'strictly construed' in favor of the defendant"); [State v. Gelman, 195 N.J. 475, 482 \(2008\)](#) ("the doctrine of lenity. . . holds that when interpreting a criminal statute, ambiguities that cannot be resolved by either the statute's text or extrinsic aids must be resolved in favor of the defendant"). Here, the lesser penalty is the fine range provided by N.J.S.A. 39:3C-28 rather than the penalties applicable under N.J.S.A. 39:4-50.

Finally, the State argues that because an ATV fits the definition of motor vehicle as stated in N.J.S.A. 39:1-1, defendant could have been charged and sentenced without reference to the penalty provisions of N.J.S.A. 39:3C-28 and -30. However, the specific provisions governing operation of an ATV control application of the more general motor vehicle statutes. See, e.g., [Wilson v. Unsatisfied Claim & Judgment Fund Bd., 109 N.J. 271, 278 \(1988\)](#) ("In general, when there is a conflict between general and specific provisions of a statute, the specific provisions will control.").

We hold that the sentence that could be imposed upon defendant was limited by N.J.S.A. 39:3C-28 and-30 to a monetary fine because the amendments of those statutes had not yet taken effect at the time of defendant's offense.^[1]

Reversed and remanded to the municipal court for imposition of a penalty as limited by the pre-2009 amendment of N.J.S.A. 39:3C-28 and 30. We do not retain jurisdiction.

[1] According to the State's brief on appeal, the DEP opened the first of three ATV public sites in Cape May County on January 13, 2013, thus triggering the effective date of the relevant 2009 amendments. Assuming that fact to be accurately stated, our holding in this case will have no effect on future DWI violations committed while operating an ATV. The full range of penalties contained in N.J.S.A. 39:4-50 will apply.

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