SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0623-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GREGORY TANASHIAN,

Defendant-Appellant.

Argued October 24, 2017 – Decided November 3, 2017

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. 004-08-14.

John Vincent Saykanic argued the cause for appellant.

Elizabeth R. Rebein, Assistant Prosecutor, argued the cause for respondent (Gurbir S. Grewal, Bergen County Prosecutor, attorney; Ms. Rebein, of counsel and on the brief).

PER CURIAM

Defendant appeals from his de novo conviction for driving while intoxicated (DWI), N.J.S.A. 39:4-50. This case involves allegations that defendant drove under the influence of an

inhalant, not alcohol. Erroneous evidentiary rulings, which may have influenced credibility findings, together with cumulative errors deprived defendant of a fair trial. We therefore reverse and remand.

Defendant had an accident in a parking lot at approximately 10:00 a.m. (the parking lot accident), for which he received no motor vehicle tickets. Defendant was allegedly involved in a hit-and-run accident later that morning (the hit-and-run accident), for which he received two tickets: careless driving, N.J.S.A. 39:4-97; and leaving the scene of an accident, N.J.S.A. 39:4-129(b). At approximately 3:40 p.m. the same day, defendant's vehicle struck a tree (the tree accident), and he received two additional tickets: one for DWI, N.J.S.A. 39:4-50, and one for careless driving, N.J.S.A. 39:4-97.

Defendant moved to sever the tickets relating to the hit-and-run accident and the tree accident; dismiss the charges on discovery grounds; suppress urine-test results; and exclude testimony from the State's drug recognition expert (DRE), Officer Salvatore LoCascio. The Municipal Court judge granted defendant's motion to sever the tickets, and denied the motions to dismiss the tickets, suppress the urine-test results, and exclude the officer's testimony. The Municipal Court judge then tried the case on the tree accident charges.

The State produced testimony from three witnesses: Officer John Brown; Officer LoCascio; and Monica Tremontin, an expert toxicologist. Defendant produced testimony from Dr. Richard Saferstein. The State stipulated to Dr. Saferstein's qualifications as an expert in the field of forensic science.

Officer Brown responded to the scene of the tree accident. When he arrived at the scene, the officer observed defendant standing outside his vehicle, which had struck a tree located on someone's lawn. No other vehicle was present, although defendant eventually told the officer that another vehicle ran him off the road.

Officer Brown noticed red-paint scrapes, which were purportedly from the hit-and-run accident, on the side of defendant's vehicle. Brown testified that defendant produced his credentials in a "[s]low lethargic manner," his complexion was pale, and he "didn't look quite right." The officer conducted field sobriety tests, suspected defendant was under the influence, and arrested him after verbally administering his Miranda[1] rights. Officer Brown had the vehicle towed from the scene, and transported defendant to police headquarters.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Defendant arrived at the police station and agreed to provide a urine sample. Defendant gave breath samples, which showed Alcotest results of 0.0%. As a result, Officer Brown contacted the Bergen County Police Department and requested that its DRE, Officer LoCascio, perform a drug influence evaluation of defendant.

Officer LoCascio arrived at the police station and conducted the examination. He testified that defendant looked "sluggish, and he appeared drowsy" and "drunk-like." According to the officer, defendant's speech was "slow, thick and slurred" and defendant admitted to taking Xanax, Ambien, and Klonopin.

Officer LoCascio performed a Horizontal Gaze Nystagmus test, a Vertical Gaze Nystagmus test, and a Romberg balance test, all of which defendant failed. The officer noticed that defendant's eyelids were tremoring and his eyes were dilated beyond the average threshold; his breath had a chemical odor; his tongue had a brownish tint to it; and his eyes were bloodshot and droopy. Defendant counted the passage of thirty-five seconds in seventy-five seconds. Officer LoCascio concluded that defendant was under the influence of an inhalant.

Ms. Tremontin analyzed defendant's urine sample using a Gas Chromatography Mass Spectroscopy. Ms. Tremontin testified that she tested a urine sample that leaked, which meant "there was the

possibility of the vapor . . . escaping from the container with the urine in it." She tested that sample twice: one analysis was negative, and the other showed an indication of difluoroethane (DFE). Ms. Tremontin concluded that she did not have a proper sample, and requested another sample from the original specimen. She then tested the new sample twice, and both were positive for DFE.

Dr. Saferstein testified that the State's method of testing defendant's urine could not prove that he was under the influence of DFE when the tree accident occurred. He opined that the testing could only show that DFE was present in the urine, but could not show the quantity, which would clarify the timing of when defendant may have been under the influence of DFE. Dr. Saferstein testified that traces of DFE may be present in a urine sample for up to seventy-two hours after use and that defendant's positive urine test does not prove he was under the influence while driving.

The Municipal Court judge found defendant guilty of DWI.[2] In reaching that verdict, she found the State's witnesses to be credible. The Municipal Court judge suspended defendant's license for two years, and imposed the proper fines and penalties.

[2] The Municipal Court judge then dismissed the careless driving ticket from the tree accident, and the other two tickets related to the hit-and-run accident.

Defendant then appealed from his DWI conviction to the Law Division.

In the Law Division, the judge conducted a de novo trial. He deferred to the credibility findings of the Municipal Court judge, and found defendant guilty of DWI. The judge then suspended defendant's license for two years, imposed the same penalties defendant had received in municipal court, and then stayed the sentence pending this appeal.

On appeal, defendant argues:

> POINT I
> THE LAW DIVISION JUDGE ERRED IN NOT FINDING THAT THE MUNICIPAL COURT JUDGE DID NOT ABUSE HER DISCRETION IN HER EVIDENTIARY RULINGS BY THE ADMISSION OF THE "NEW JERSEY POLICE CRASH INVESTIGATION REPORT" (S-1), THE "FIELD SOBRIETY CHECKLIST" (S-2), THE LETTER OF SERGEANT FIRST CLASS KEVIN M. FLANAGAN (S-3), THE "DRUG INFLUENCE EVALUATION" (S-4), AND THE "LOG OF DRUG INFLUENCE EVALUATION" (S-5); THE MUNICIPAL COURT VIOLATED NOT ONLY DEFENDANT'S SIXTH AMENDMENT CONFRONTATION RIGHTS, BUT VIOLATED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL, VIOLATED THE UNITED STATES SUPREME COURT'S RULING IN CRAWFORD V. WASHINGTON,[] AND VIOLATED THE NEW JERSEY SUPREME COURT'S RULING IN STATE V. KUROPCHAK.
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> POINT II
> THE LAW DIVISION FINDING OF GUILT DE NOVO SHOULD BE REVERSED AS TO THE DWI CONVICTION AND A FINDING OF "NOT GUILTY" SHOULD BE ENTERED; THE LAW DIVISION COMMITTED CLEAR ERROR IN FINDING DEFENDANT GUILTY AND THE INTERESTS OF JUSTICE DEMAND INTERVENTION AND CORRECTION AS THE STATE FAILED TO PROVE THE REQUISITE ELEMENTS OF DEFENDANT'S OPERATION OF

A MOTOR VEHICLE WHILE UNDER [THE] INFLUENCE OF DRUGS BEYOND A REASONABLE DOUBT.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO EXCLUDE THE STATE'S EXPERT WITNESS AND IN REFUSING TO CONDUCT A FRYE[3] HEARING SINCE THE DRE PROGRAM AND THE DRE WITNESS WERE BOTH UNQUALIFIED UNDER EVIDENCE RULE 702 AND PURSUANT TO STATE V. DORIGUZZI; THE ADMISSION OF THE DRE EXPERT TESTIMONY VIOLATED THE DEFENDANT'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

POINT IV

THE DWI CONVICTION MUST BE REVERSED AND THE SUMMONSES DISMISSED (OR, AT THE VERY LEAST, ALL EVIDENCE AND THE DEFENDANT'S STATEMENTS SUPPRESSED) AS THE ARRESTING OFFICER LACKED PROBABLE CAUSE TO ARREST THE DEFENDANT; THE TRIAL COURT WAS CLEARLY MISTAKEN AND THE INTERESTS OF JUSTICE DEMAND INTERVENTION AND CORRECTION.

POINT V

THE TRIAL COURT WAS CLEARLY MISTAKEN IN FAILING TO SUPPRESS THE DEFENDANT'S URINE SPECIMEN WHICH WAS OBTAINED AT HEADQUARTERS WITHOUT A WARRANT OR VALID CONSENT; THE INTERESTS OF JUSTICE DEMAND INTERVENTION AND CORRECTION.

POINT VI

THE COURTS BELOW ERRED IN FAILING TO SUPPRESS OR GIVE LITTLE WEIGHT TO THE TESTIMONY OF THE STATE'S CHEMIST REGARDING HER ANALYSIS OF THE DEFENDANT'S URINE BASED ON DEFECTIVE CHAIN OF CUSTODY AND A LEAKING CONTAINER IN WHICH THE URINE WAS STORED; THE TRIAL COURT ABUSED ITS

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[3] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (outlining expert testimony, authoritative literature, and judicial recognition as the methods of determining general acceptability of scientific methods).

DISCRETION IN ADMITTING TESTIMONY AS TO THE URINALYSIS RESULTS.

POINT VII
THE NUMEROUS ERRORS THAT OCCURRED AT TRIAL DEPRIVED DEFENDANT OF HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL MANDATING A REVERSAL OF HIS DWI CONVICTION.

The following general standards guide our review. When a defendant appeals to the Law Division from a conviction entered in a municipal court, the judge is required to conduct a de novo review of the record, giving "due regard to the municipal judge's opportunity to view the witnesses and assess credibility." State v. Golin, 363 N.J. Super. 474, 481 (App. Div. 2003) (citing State v. Johnson, 42 N.J. 146, 157 (1964)). On appeal from the Law Division, we must determine whether the judge's findings "could reasonably have been reached on sufficient credible evidence present in the record." Johnson, supra, 42 N.J. at 162. "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." R. 2:10-2.

N.J.S.A. 39:4-50(a) prohibits operating a motor vehicle "while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug." "[T]he phrase 'narcotic, hallucinogenic or habit-producing drug' includes an inhalant . . . ." Ibid. Here, the State maintained that defendant was

under the influence of DFE. Although DFE is not listed in the statute, the Supreme Court has held that N.J.S.A. 39:4-50(a) "does not require that the particular narcotic be identified." State v. Tamburro, 68 N.J. 414, 421 (1975).

"A conviction for DWI requires proof beyond a reasonable doubt." State v. Kuropchak, 221 N.J. 368, 382 (2015). The State attempted to prove defendant was under the influence of DFE by offering testimony from two experts and by introducing testimony from Officer Brown's observations of defendant at the scene of the tree accident and police station. Critical to accepting the State's theory of the case was the believability of these witnesses, because without accepting their expert opinions and observation testimony, the State would be unable to show defendant was under the influence of DFE. Here, we conclude the Municipal Court judge's credibility determinations "may have [been] unduly influenced" by multiple layers of inadmissible hearsay. Id. at 374.

I.

We begin by addressing defendant's contention as to the admissibility of a police crash investigation report (S-1); a field sobriety checklist (S-2); a letter congratulating Officer LoCascio (S-3); a drug influence evaluation report (S-4); and a log of drug influence evaluations (S-5). Defense counsel

repeatedly objected to the admissibility of these documents on hearsay grounds.

We accord "substantial deference to a trial court's evidentiary rulings." State v. Morton, 155 N.J. 383, 453 (1998), cert. denied, 532 U.S. 931, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001). "[T]he decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982). Such is the case here.

Officer Brown prepared S-1, which is a five-page crash investigation report. The assistant prosecutor properly presented S-1 to the officer during his testimony, solely as an aid to refresh his recollection. At the conclusion of all testimony, however, the State moved S-1 into evidence to prove the truth of what the entire report asserted. S-1 is therefore inadmissible hearsay even though the officer testified and was subject to cross-examination.

S-1 also contains multiple embedded hearsay statements from other declarants, including an alleged witness to the hit-and-run accident, a police officer who reported what that individual told him about the hit-and-run accident, Officer LoCascio, and statements from defendant's wife. At no point did the State lay

a proper foundation to move S-1 into evidence, including any of the multiple layers of hearsay.

S-2 is a one-page document prepared by Officer Brown after completing the field sobriety tests. The officer testified about performing the tests and the results. Certainly he could use S-2 to refresh his recollection if need be, but the document is considered hearsay and the State laid no foundation for its admissibility. Additionally, S-2 contains embedded hearsay from Officer LoCascio by reporting his opinion that defendant was under the influence of an inhalant.

S-3 is an April 20, 2010 letter to Officer LoCascio from a sergeant of the Alcohol/Drug Test Unit of the Department of Law and Public Safety. The sergeant congratulated the officer on becoming a DRE expert, and made other comments in the letter as to the officer's qualifications as an expert. Officer LoCascio testified about his own qualifications. If he needed S-3 to refresh his recollection, then he could have used the document. Otherwise, S-3 is hearsay and the State failed to lay a foundation for its admissibility at trial.

Officer LoCascio prepared S-4, which is his drug influence evaluation report. The officer could have used S-4 to refresh his recollection during his testimony, however, the document is considered hearsay and inadmissible unless it falls into a hearsay

exception. S-4 also contains additional statements from Officer Brown, who told Officer LoCascio that defendant's wife had told him defendant possessed a large quantity of computer cleaning solvents, which the wife said defendant had ingested. The State did not lay a foundation for the admissibility for S-4 or for the embedded hearsay statements under any exception to the hearsay rule, or even under N.J.R.E. 703.

S-5 is a seven-page hearsay document purportedly logging Officer LoCascio's drug evaluations of numerous individuals not involved in this case. The officer testified at the trial and could have recited this information, subject to relevancy grounds, and if he was unable to do so, then the officer could have used S-5 to refresh his recollection.

In Kuropchak, the Court concluded that the admissibility of a Drinking Driving Questionnaire and a Drinking Driving Report contained inadmissible hearsay and "may have unduly influenced the municipal court's credibility findings." Kuropchak, supra, 221 N.J. at 373-74. We too conclude that the embedded hearsay statements contained in S-1 to S-5, especially the statements by defendant's wife about his ingestion of cleaning solvents, may have influenced the Municipal Court judge's findings that the State's witnesses testified credibly. Moreover, the admissibility of embedded hearsay statements from the wife and purported witness

to the hit-and-run accident deprived defense counsel of the opportunity to cross-examine them.

II.

Defendant contends that the police seized his urine sample in violation of his federal and state constitutional rights. Defendant argues that the police violated his rights by obtaining his urine specimen without proper consent or a warrant. Defendant urges us, at the very least, to remand like the Supreme Court did in State v. Verpent, 221 N.J. 494 (2015) and State v. Adkins, 221 N.J. 300 (2015). We agree and remand on this issue for further proceedings.

The Supreme Court in Adkins, held that it would apply Missouri v. McNeely, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), retroactively. Adkins, supra, 221 N.J. at 313. McNeely, held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." McNeely, supra, 569 U.S. at 165, 133 S. Ct. at 1568, 185 L. Ed. 2d at 715. Adkins further held that law enforcement should "present to the court their basis for believing that exigency was present in the facts surrounding the evidence's potential dissipation and police response under the circumstances

to the events involved in the arrest." Adkins, supra, 221 N.J. at 317.

Under certain circumstances, courts have held obtaining warrantless urine samples subsequent to arrest to be constitutional. In State v. Malik, 221 N.J. Super. 114, 118, 120 (App. Div. 1987), we concluded that a request for urine fell under the incident to arrest exemption and the exigency exemption to the warrant requirement. We further stated that "a person arrested by the police with probable cause to believe that [he or] she has recently ingested a controlled dangerous substance has no federal constitutional right to prevent being required to give a urine sample." Id. at 122. We explained that "urinalyses are commonplace in these days of periodic physical examinations and do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." Ibid.

After its decision in Adkins, the Supreme Court remanded in Verpent, supra, 221 N.J. at 495. Verpent involved a defendant voluntarily providing a urine sample following DRE testing to police who did not have a warrant for it. State v. Verpent, No. A-3807-10 (App. Div. July 2, 2012) (slip op. at 5), rev'd 221 N.J. 494 (2015). The Supreme Court ordered a new suppression hearing to address exigency "on a newly developed and fuller record in light of . . . Adkins." Verpent, supra, 221 N.J. at 494. As in

Verpent, we too remand to develop a more complete record, after which the Municipal Court judge should re-visit defendant's motion to suppress the urine sample.

III.

We reject defendant's contention that the Municipal Court judge erred by failing to conduct a Frye hearing and permitting Officer LoCascio to testify as a DRE.

In a criminal case, we ordinarily review de novo a trial judge's decision after a Frye hearing. State v. McGuire, 419 N.J. Super. 88, 123-24, 130 (App. Div.), certif. denied, 208 N.J. 335 (2011). Here, the question is whether the Municipal Court judge erred by not conducting a Frye hearing as to Officer LoCascio. Generally, a trial judge has discretion in determining the sufficiency of an expert's qualifications "and [his or her decision] will be reviewed only for manifest error and injustice." State v. Ravenell, 43 N.J. 171, 182 (1964), cert. denied, 379 U.S. 982, 85 S. Ct. 690, 13 L. Ed. 2d 572 (1965). Such is not the case here.

Expert testimony only requires that a witness be qualified "by knowledge, skill, experience, training, or education." N.J.R.E. 702. Here, the Municipal Court judge properly admitted the DRE testimony. New Jersey courts have not invalidated DRE protocol or DRE experts. See e.g., State v. Franchetta, 394 N.J.

Super. 200 (App. Div. 2007). Moreover, the Municipal Court judge permitted extensive testimony from Officer LoCascio about his qualifications and did not abuse her discretion when she found him to be a DRE. The Supreme Court has also found that police officers were eligible experts on marijuana intoxication pursuant to N.J.R.E. 702 because of their specialized training "in detecting drug-induced intoxication." State v. Bealor, 187 N.J. 574, 592-93 (2006).

IV.

We reject defendant's contention that the arresting officer lacked probable cause.

The probable cause to arrest standard is "a 'well grounded' suspicion that a crime has been or is being committed" by the defendant. State v. Waltz, 61 N.J. 83, 87 (1972) (quoting State v. Burnett, 42 N.J. 377, 387 (1964)). "Probable cause exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed." Schneider v. Simonini, 163 N.J. 336, 361 (2000) (first and second alterations in original) (quoting Brinegar v. United States, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1310-11, 93 L. Ed.

1879, 1890 (1949)), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001).

Probable cause for driving under the influence will be found where an officer "ha[d] reasonable grounds to believe that [the driver was] operating a motor vehicle in violation" of the DWI statute. N.J.S.A. 39:4-50.2; see also Strelecki v. Coan, 97 N.J. Super. 279, 284 (App. Div. 1967). In assessing probable cause, a judge considers the totality of the circumstances. State v. Moore, 181 N.J. 40, 46 (2004). The facts are viewed "from the standpoint of an objectively reasonable police officer." State v. Basil, 202 N.J. 570, 585 (2010) (quoting Maryland v. Pringle, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769, 775 (2003)).

Here, Officer Brown had reasonable grounds to believe defendant was operating a motor vehicle in violation of the DWI statute. Defendant was outside his vehicle after the tree accident, produced his credentials lethargically, giggled at Officer Brown, failed the field sobriety tests, and denied that he had been in an accident.

V.

We reject defendant's argument that the court failed to suppress testimony from Ms. Tremontin because of an alleged defective chain of custody as to the leaking urine container. The United States Supreme Court has made clear "it is not the case[]

that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 n.1, 129 S. Ct. 2527, 2532 n.1, 174 L. Ed. 2d 314, 322 n.1 (2009). Rather, the Court explained that gaps in chain of custody go to the weight of the evidence, not its admissibility. Ibid.; see also Morton, supra, 155 N.J. at 446-47. Furthermore, the positive DFE test results came from the second urine sample, which had not leaked. Even if the State failed to demonstrate the chain of custody, such a failure would go to the weight of the evidence and not the admissibility.

After considering the record, arguments at oral argument before us, and the briefs, we conclude that defendant's remaining arguments are "without sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(2). In reversing the DWI conviction, we do not mean to suggest that the State may ultimately not prevail. Rather, we emphasize that we premise the reversal primarily on the potentially infected credibility determinations flowing from the multiple layers of embedded hearsay. The outcome on remand will depend on the proofs presented.

Reversed and remanded for a new trial in the municipal court. In fairness to the Municipal Court judge who tried the case and

made the credibility findings, we remand to a different Municipal Court judge for further proceedings consistent with this opinion. We do not retain jurisdiction.