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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2570-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AMY BLOODWORTH,

Defendant-Appellant.

Argued October 4, 2017 – Decided November 3, 2017

Before Judges Manahan and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Municipal Appeal
No. 6076.

Nabil N. Kassem argued the cause for appellant
(Kassem & Associates, PC, attorneys; Mr.
Kassem and Dominique J. Carroll, on the
brief).

Marc A. Festa, Senior Assistant Prosecutor,
argued the cause for respondent (Camelia M.
Valdes, Passaic County Prosecutor, attorney;
Mr. Festa, of counsel and on the brief).

PER CURIAM

Defendant Amy Bloodworth appeals her conviction, following a trial de novo, for driving while intoxicated (DWI), N.J.S.A. 39:4-50, and for refusal to submit a breath test, N.J.S.A. 39:4-50.4a. Having considered defendant's argument in light of the facts and applicable law, we affirm.

On February 2, 2015, Officer Glen Arthur and Officer Seabrooks of the Clifton Police Department were dispatched on a report of a vehicle stuck in a snowbank with the driver behind the steering wheel, possibly incapacitated. Prior to the arrival of police, neighborhood residents reported hearing a loud crash. From their window, the residents witnessed a 2014 Jeep Grand Cherokee reverse from one snowbank into another. As the vehicle was lodged into the snowbank, the driver continued to accelerate, causing the tires to spin. One resident stated the driver appeared to be slumped over the steering wheel. He, along with other residents, proceeded outside to help the distressed driver, later identified as defendant, and assisted her out of the vehicle.

On arrival, Officer Arthur observed the Jeep lodged in a snowbank. Defendant was standing approximately four feet beside the vehicle and was noticeably swaying. Officer Arthur approached defendant and questioned her about the accident. As defendant responded she "ha[d] no idea" what happened, a strong odor of alcohol was detected on her breath. Defendant was then asked if

she had been drinking, to which she responded with slurred speech, "[w]ay too much." The officer reported that defendant was having difficulty standing and observed a glassy look in her eyes and a dazed appearance. Moreover, he saw defendant's purse on the sidewalk that visibly contained a half-empty bottle of alcohol and medications, and also observed a visibly open container of alcohol on the vehicle's passenger side floor. Due to the officer's observations, defendant was asked to perform standard field sobriety tests. Defendant responded that she was unwilling to perform the tests without a lawyer present. Subsequently, defendant was arrested, advised of her Miranda rights, and placed into the patrol car.

While being transported to police headquarters, defendant was falling asleep and periodically crying out for her parents. After being escorted into headquarters with assistance, defendant was asked to submit a breath sample. She responded by saying "[n]o," and shaking her head indicating the same. Defendant was then processed without further incident and charged with driving while intoxicated, N.J.S.A. 39:4-50; refusal to submit a breath test, N.J.S.A. 39:4-50.4a; possession of an open alcoholic beverage in a motor vehicle, N.J.S.A. 39:4-51b; and failure to display motor vehicle insurance and registration, N.J.S.A. 39:3-29. A Drunk Driver Observation Report was prepared which indicated: defendant

had a strong odor of an alcoholic beverage; was pale and difficult to awaken; had watery and bloodshot eyes; had difficulty walking; and was falling and grasping for support. Defendant pled not guilty. A municipal trial followed.

At the conclusion of the municipal trial, the judge found defendant guilty of DWI, refusal to submit to a breath test, and possession of an open container. The State moved for, and was granted, dismissal of the remaining charges. This being defendant's third DWI offense, the judge sentenced her to: 180 days county jail, 90 days of which could be served in an inpatient program; 10 year loss of driver's license; installation of ignition interlock device for the loss of license time period with an additional 3 years thereafter; completion of the required hours at the Intoxicated Driver Resource Center (IDRC) in accordance with defendant's individual treatment classification; and ordered to pay appropriate fines and penalties. As per the refusal charge, defendant was sentenced to a consecutive duplicate sentence as the DWI. A fine was imposed on the open container offense.

Defendant filed an appeal to the Law Division. At the conclusion of argument, the judge held there was sufficient evidence in the record to support defendant's convictions due to observational evidence. Based upon the finding that the State's witnesses were credible, the judge held the State had proven

operation and found defendant guilty of DWI and refusal to submit to a breath test. Defendant was found not guilty of possession of an open alcoholic container. A matching sentence to the municipal court sentence was imposed, and defendant's request for a stay pending appeal was denied. This appeal followed.

Defendant raises the following points on appeal.

POINT I

[DEFENDANT] WAS DENIED HER RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS THE LAW DIVISION LACKED SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT ITS FINDINGS BEYOND A REASONABLE DOUBT THAT [DEFENDANT] OPERATED THE MOTOR VEHICLE IN QUESTION WHILE INTOXICATED.

POINT II

THE LAW DIVISION LACKED SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD TO SUPPORT ITS FINDINGS BEYOND A REASONABLE DOUBT THAT [DEFENDANT] REFUSED TO PROVIDE A BREATH SAMPLE. (RAISED BELOW)

POINT III

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHTS AT TRIAL.

- A. [DEFENDANT] WAS DENIED HER FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE FAILURE OF HER TRIAL ATTORNEY TO INVESTIGATE VIABLE DEFENSES WHICH COULD HAVE VALIDATED

[DEFENDANT'S] CLAIM SHE WAS NOT THE DRIVER OF THE VEHICLE IN QUESTION.

B. [DEFENDANT] WAS DENIED HER FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE FAILURE OF HER TRIAL ATTORNEY TO FILE A PRE-TRIAL MOTION TO DISMISS THE CHARGES BASED UPON THE STATE'S FAILURE TO PROVIDE THE REQUIRED DISCOVERY REGARDING OFFICER ARTHUR'S QUALIFICATIONS TO OPERATE AN ALCOTEST.

POINT IV

THE LAW DIVISION ERRONEOUSLY APPLIED THE LAW WITH RESPECT TO ANALYZING [DEFENDANT'S] CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, SPECIFICALLY BY MISAPPLYING THE TEST SET FORTH IN STATE V. ALLAH.¹

POINT V

THE LAW DIVISION ERRONEOUSLY APPLIED THE LAW WITH RESPECT TO ANALYZING [DEFENDANT'S] MOTION FOR A DIRECTED VERDICT, SPECIFICALLY BY MISAPPLYING THE TEST SET FORTH IN STATE V. REYES² AS THE STATE'S EVIDENCE FELL SHORT OF WHAT WAS NECESSARY TO SUSTAIN [DEFENDANT'S] CONVICTION.

POINT VI

THE LAW DIVISION ERRONEOUSLY DETERMINED THAT OFFICER ARTHUR WAS CREDIBLE DESPITE NUMEROUS INCONSISTENCIES FOUND THROUGHOUT HIS TESTIMONY AND POLICE REPORT.

¹ 170 N.J. 269 (2002).

² 50 N.J. 454 (1967).

POINT VII

[DEFENDANT'S] CONVICTION SHOULD BE REVERSED ON
THE BASIS OF CUMULATIVE ERROR.

In an appeal from a de novo hearing on the record, we consider only the action of the Law Division and not that of the municipal court. State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001) (citation omitted). Therefore, when a defendant appeals a conviction of violating a motor vehicle law, the scope of review is both narrow and deferential. State v. Stas, 212 N.J. 37, 48-49 (2012). The function of the reviewing court is to determine whether the findings of the Law Division "could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). When the findings and conclusions of the Law Division are held to meet that criterion, our "task is complete," and we "should not disturb the result" even if we "might have reached a different conclusion" or if the result was a close one. Ibid.

We "defer to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). As such, a Law Division judge in a trial de novo must make findings of fact based upon the record made in the municipal

court where the case was tried. State v. Ross, 189 N.J. Super. 67, 75 (App. Div.), certif. denied, 95 N.J. 197 (1983). The judge's function "is not the appellate function governed by the substantial evidence rule but rather an independent fact-finding function" Ibid. (citations omitted).

Defendant asserts her convictions must be vacated as they are against the weight of the evidence. Defendant argues there was not proof beyond a reasonable doubt of operation or intent to operate the vehicle and refusal to submit a breath test. Further, defendant raises several ineffective assistance of counsel claims.

To sustain a conviction for DWI, the State must prove beyond a reasonable doubt that defendant operated an automobile while under the influence of intoxicating liquor. State v. Ebert, 377 N.J. Super. 1, 10 (App. Div. 2005); State v. Grant, 196 N.J. Super. 470, 477 (App. Div. 1984). "Independent of breathalyzer results, an alternative finding of intoxication may be based upon observational evidence to find a defendant guilty beyond a reasonable doubt of DWI." State v. Liberatore, 293 N.J. Super. 580, 589 (Super. Ct. 1995) (citing State v. Slinger, 281 N.J. Super. 538, 543 (App. Div. 1995)).

The term "operates" as used in N.J.S.A. 39:4-50(a) has been broadly interpreted. State v. Tischio, 107 N.J. 504, 513 (1987), appeal dismissed, 484 U.S. 1038, 108 S. Ct. 768, 98 L. Ed.

2d 855 (1988); State v. Mulcahy, 107 N.J. 467, 478 (1987). "Operation may be proved by any direct or circumstantial evidence – as long as it is competent and meets the requisite standards of proof." State v. George, 257 N.J. Super. 493, 497 (App. Div. 1992) (citations omitted). Courts have consistently adopted a practical and broad interpretation of the term "operation" in order to express fully the meaning of the statute. Tischio, supra, 107 N.J. at 513; State v. Morris, 262 N.J. Super. 413, 417 (App. Div. 1993).

The Court first discussed the scope of "operation" in State v. Sweeney, 40 N.J. 359, 360-61 (1963). In affirming the defendant's conviction, the Court held:

[A] person "operates" – or for that matter, "drives" – a motor vehicle under the influence of intoxicating liquor, within the meaning of N.J.S.A. 39:4-50 . . . when, in that condition, he enters a stationary vehicle, on a public highway or in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle[.]

[Ibid.]

Evidence of "intent to move the vehicle" satisfies the statutory requirement of operation so that actual movement is not required. Id. at 361.

Here, we find no basis for error in the Law Division convictions. First, the judge found there was sufficient credible evidence which supported the finding that defendant operated the vehicle. We agree. When approached by the officer outside of the vehicle, defendant smelled of alcohol, had bloodshot eyes, and seemed dazed. In addition, two residents testified that they witnessed defendant slumped over the steering wheel in the driver's seat with the engine running. One of the residents also testified to assisting defendant out of the driver's side of the vehicle. There was ample credible evidence to support that defendant operated the vehicle beyond a reasonable doubt.

The record similarly supports the judge's finding that defendant refused to submit a breath test. The four elements necessary to sustain a conviction for refusal to submit a breath test are:

(1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequence of not doing so; and (4) defendant thereafter refused to submit to the test.

[State v. Marquez, 202 N.J. 485, 503 (2010); N.J.S.A. 39:4-50.4a].

When a defendant is informed of their right regarding breath test for blood-alcohol content, "anything substantially short of unauthorized, unequivocal assent to the officer's request that the arrested motorist take the test constitutes a refusal to do so." Liberatore, supra, 293 N.J. Super. at 588-89. An officer must only read the second statement of the consequences of refusal if the suspected motorist gives an ambiguous or conditional answer short of an unequivocal "yes." See N.J.S.A. 39:4-50.2(e).

The record reflects that the officer read defendant the first nine paragraphs of the Attorney General Standard Statement for Operating Vehicles, which advised her of the statutory requirement to submit to a breath test. In response, defendant responded "no" and shook her head as indicative of her response. The judge found the officer's testimony to be credible and was corroborated by the police report in evidence. Given our review of the record and our standard of review, we find no reason to disturb the judge's determinations.

We briefly respond to defendant's arguments relating to ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant bears the heavy burden of proving two essential elements: (1) that trial counsel "performed below a level of reasonable competence"; (2) "a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different." State v. Fritz, 105 N.J. 42, 60-61 (1987) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). Our Supreme Court has expressed a preference for resolving ineffective assistance of counsel claims on collateral review. State v. Preciose, 129 N.J. 451, 459-60 (1992). However, where the allegedly deficient conduct is a matter wholly within the trial record, an appellate court may review the claim on direct appeal. State v. Castagna, 187 N.J. 293, 313 (2006) (citing Allah, supra, 170 N.J. at 285). Here, since defendant's claim of ineffective assistance of counsel rests upon evidence, such as failure to investigate, lies outside the record, it is not ripe for direct review.


Instead, "[i]ssues of ineffective assistance that require the presentation of evidence lying outside the trial record are best preserved for the [post-conviction relief] stage." Preciose, supra, 129 N.J. at 460; State v. Hess, 207 N.J. 123, 145 (2011); State v. Dixon, 125 N.J. 223, 262 (1991). Typically, a "defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction and at which the trial judge can rule upon the claims including the issue of prejudice." State v. Sparano, 249 N.J. Super. 411, 419 (1991). Thus, "a [post-conviction relief] proceeding would be the appropriate forum to

evaluate the strategy of defendant's trial counsel . . . and other issues requiring information that is not in the record before the [c]ourt." State v. McDonald, 211 N.J. 4, 30 (2012). For these reasons, we decline to address defendant's ineffective assistance of counsel claims and preserve them for post-conviction relief.

Defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION