SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2986-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ARMOND DECICCO,

Defendant-Appellant.

Submitted March 27, 2017 – Decided April 5, 2017

Before Judges Sabatino and Haas.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Municipal Appeal No. 04-02-15.

Levine, Staller, Sklar, Chan & Brown, P.A., attorneys for appellant (Paul T. Chan and Anthony Morgano, on the briefs).

Diane Ruberton, Acting Atlantic County Prosecutor, attorney for respondent (John J. Lafferty, IV, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Armond DeCicco appeals his conviction of driving while intoxicated ("DWI"), N.J.S.A. 39:4-50. He contends that the

State's proofs at trial in the municipal court were insufficient to establish beyond a reasonable doubt that he "operated" the vehicle in violation of the statute. He further contends that he was deprived of a speedy trial because of the two-year delay between his arrest and his conviction.

For the reasons that follow, we reverse defendant's conviction because we agree with his contentions concerning the insufficiency of the State's proofs of operation. That determination makes it unnecessary for us to reach the speedy trial issue, which, in any event, cannot be appropriately evaluated on the presently-inadequate record.

I.

The record reflects that after midnight on July 4, 2012, a State Trooper on patrol in Buena Vista Township responded to a report of an "erratic driver" at a local campground. Once the Trooper arrived, he and his partner were directed by campground security officers to an area where the driver had last been seen.

At or about 1:24 a.m., the Trooper observed a car parked in a field. The car was behind a trailer next to a water slide. It was not on a roadway or paved parking area. As the Trooper approached the car, he saw defendant in the driver's seat holding a can of beer in his hand. No one else was in the car. The keys were in the ignition, but the car engine was not running.

The Trooper testified that he could feel heat coming from the front fender of the car and heard a "crackling sound" coming from the engine. He suggested this would be consistent with recent use of the car engine. However, he acknowledged on cross-examination that the engine could have been making that sound if defendant had turned the engine on to use the air conditioning that summer night.

Defendant admitted to the officers that he had been at a friend's house earlier that day and that he had consumed approximately three beers there before coming to the campground. He recalled having the first beer at about 6:00 p.m., more than seven hours before the officers found him parked in the campground field.

Defendant, who was apparently homeless, had been evicted from the campground in the past. He was not authorized to stay there overnight. He claimed that he had come to the campground to pick up his mail, and that he was staying there to "sleep[] it off."

After defendant failed field sobriety tests, the police administered the Alcotest to him. His blood alcohol content ("BAC") measured 0.09, slightly above the 0.08 BAC legal limit. See N.J.S.A. 39:4-50(a).

Defendant was represented by pro bono counsel in the municipal court trial, held approximately one year after the incident. After the State presented most of its proofs, including the testimony

of the Trooper, defendant's attorney objected to the Alcotest BAC readings being admitted into evidence, although she had apparently consented previously to their admission. That objection resulted in the case being adjourned. The case was not resumed until approximately one year later, when, at that resumed session, the Alcotest proofs were admitted.

Defendant did not testify or call any witnesses. One of the key points his counsel disputed at trial was whether the State had proven defendant's "operation" of his vehicle while intoxicated, either when driving to the campground or with respect to an alleged prospective intention to drive as of the moment the police encountered him.

The municipal judge found defendant guilty. With respect to the disputed issue of operation, the judge noted several times in his oral opinion that defendant had admitted that he had driven to the campground. The judge also adopted the testimony of the Trooper — who he found to be a credible witness — that defendant's car at the time of the 1:24 a.m. encounter was "still warm" and its "engine was still crack[l]ing." Additionally, the judge found defendant had an "intent to drive" from the campground "because he knew that he wasn't welcome there."

The Law Division upheld the finding of defendant's guilt on de novo review.

II.

Defendant now appeals, and raises the following points in his brief:

POINT I

A. STANDARD OF REVIEW.

POINT II

A. THE STATE FAILED TO ESTABLISH THE OPERATION ELEMENT OF N.J.S.A. 39:4-50.

B. OPERATION REQUIRES ACTUAL OR INTENDED MOVEMENT OF A VEHICLE.

1. THERE IS NO EVIDENCE THAT MR. DECICCO WAS INTOXICATED WHEN HE DROVE TO THE CAMPGROUND.

2. THERE IS NO EVIDENCE THAT MR. DECICCO INTENDED TO LEAVE AT THE TIME OF THE ARREST, OR MADE EFFORTS TO LEAVE, THE CAMPGROUND WHILE INTOXICATED.

POINT III

DEFENDANTS CONVICTION SHOULD BE REVERSED BECAUSE OF THE SUBSTANTIAL AND PREJUDICIAL DELAY IN FAILING TO PROVIDE DEFENDANT WITH A SPEEDY TRIAL.

A. SUMMARY OF SPEEDY TRIAL RIGHTS LAW
B. LENGTH OF DELAY
C. REASONS FOR THE DELAY
D. ASSERTION OF RIGHT TO SPEEDY TRIAL
E. PREJUDICE TO THE DEFENDANT

REPLY POINT I

CONTRARY TO THE STATE'S ARGUMENT, THE EVIDENCE DID NOT SUPPORT AND THE LOWER COURTS DID NOT

FIND THAT DEFENDANT ACTUALLY DROVE HIS VEHICLE INTOXICATED.

REPLY POINT II

NO EVIDENCE WAS PROFFERED THAT MR. DECICCO MADE EFFORTS TO DRIVE HIS VEHICLE OFF THE CAMPGROUND WHILE INTOXICATED.

In assessing these points, we recognize that, when reviewing a trial court's decision on an appeal from the municipal court, we generally "determine whether sufficient credible evidence in the record supports the Law Division's decision." State v. Gibson, 429 N.J. Super. 456, 462-63 (App. Div. 2013) (citing State v. Johnson, 42 N.J. 146, 162 (1964)), rev'd on other grounds, 219 N.J. 227 (2014). We must afford substantial deference to the factual findings made by the municipal court and the Law Division. See State v. Reece, 222 N.J. 154, 166 (2015) (citing State v. Locurto, 157 N.J. 463, 470-71 (1999)). Our task is to determine whether there is sufficient credible evidence in the record to support the determination of guilt. Johnson, supra, 42 N.J. at 162.

When both a municipal court and the Law Division have made consistent factual findings, "appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Reece, supra, 222 N.J. at 166

(quoting Locurto, supra, 157 N.J. at 474). On the other hand, if the evidence in the record is manifestly insufficient to support a defendant's guilt beyond a reasonable doubt of all required elements, we are constrained to set aside the conviction. See, e.g., State v. Stas, 212 N.J. 37, 58-59 (2012); State v. Daly, 64 N.J. 122 (1973).

Under N.J.S.A. 39:4-50(a):

> (a) . . . a person who operates a motor vehicle while under the influence of intoxicating liquor . . . or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood . . . shall be subject:
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> . . . .
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> (3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days in a county jail or workhouse, except that the court may lower such term for each day, not exceeding 90 days, served participating in a drug or alcohol inpatient rehabilitation program approved by the Intoxicated Driver Resource Center and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years. For a third or subsequent violation, a person also shall be required to install an ignition interlock device under the provisions of P.L.1999, c.417 (C.39:4-50.16 et al.).
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> [N.J.S.A. 39:4-50(a) (emphasis added).]

N.J.S.A. 39:1-1, the general definitional section for the Title 39 traffic laws, defines an "operator" as "a person who is in actual physical control of a vehicle or street car." N.J.S.A. 39:1-1.

Title 39 does not define the term "operates." However, the Supreme Court has instructed in case law that, under N.J.S.A. 39:4-50, a person "operates" a vehicle when, while intoxicated, "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[.]" State v. Sweeney, 40 N.J. 359, 361 (1963).

Later cases have expanded the location element, holding that the drunk driving statute applies to "operation of a vehicle irrespective of where it took place[.]" State v. McColley, 157 N.J. Super. 525, 528 (App. Div. 1978) (citing State v. Magner, 151 N.J. Super. 451, 453 (App. Div. 1977)). The "nature of the property on which the driving occurred" is therefore "irrelevant[.]" Ibid.

There are essentially three primary ways to establish a DWI defendant's intent to drive. These include: (1) "observation by the arresting officer," (2) "evidence of an intent to drive after the moment of arrest," or (3) "a confession by defendant that he

was driving." State v. Prociuk, 145 N.J. Super. 570, 573 (App. Div. 1976), overruled on other grounds by, State v. Stiene, 203 N.J. Super. 275, 280 (App. Div. 1985). Operation can be established when a person is "found intoxicated at the wheel of the vehicle with the engine off at a position other than a normal one for parking." State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984). Such circumstances are sufficient for a court to find that the person "drove the car and did so while under the influence of alcohol." Ibid. (quoting State v. Chapman, 43 N.J. 300, 301 (1964)).

Here, the two investigating officers did not observe defendant driving his car. In fact, it is undisputed that, when they encountered him, the car's engine was not running and the ignition key was in the "off" position. That leaves the State with having to prove beyond a reasonable doubt that defendant either had (1) recently driven the car while intoxicated or (2) intended to drive while drunk after the time of arrest. Affording all due deference to the factual findings of the municipal court and the Law Division, we conclude that the State here failed to satisfy its evidential burden to prove either of these two alternative theories of "operation."

In assessing the State's theory of recent driving while intoxicated, we are mindful of defendant's admissions to the

officers that he had driven to the campground after drinking three beers at his friend's house. However, those statements do not establish a clear timeline to substantiate that defendant was, in fact, intoxicated when he drove.

Defendant stated that he had arrived at the campground around midnight or 12:30 a.m., approximately six or more hours after he consumed what he claimed to be his first of three beers at his friend's house at around 6:00 p.m. The record does not specify how far from the campground the friend's residence was located. Nor was there any testimony establishing what time defendant had his last drink there. We also do not know when defendant began drinking at the campground or how much he actually drank there, or how it affected his measured BAC of 0.09.

Although the Trooper alluded to receiving hearsay reports from unidentified persons at the campground that defendant had been driving there in an erratic manner, the State produced no such eyewitnesses at the trial. Consequently, the hearsay statements made by those declarants, who were never subjected to cross-examination, were not competent evidence of defendant's recent driving. See N.J.R.E. 802 (disallowing hearsay unless authorized by an exception); State v. Kent, 391 N.J. Super. 352 (App. Div. 2007) (applying principles under the Confrontation Clause to DWI prosecutions).

It is speculative to infer from these limited proofs that defendant was actually intoxicated when he drove to the campground. Moreover, the fact that his car engine was warm and making noises at 1:24 a.m. does not by itself establish beyond a reasonable doubt that he had been driving around the campground in an intoxicated condition. As the Trooper frankly acknowledged on cross-examination, it is conceivable that the engine was warm and making sounds because defendant had turned on the air conditioning of his parked car. It would not be surprising that a person would do so to cool off on a warm summer night.

Nor do the State's proofs, even when viewed on appeal in a light most favorable to the prosecution, suffice to establish beyond a reasonable doubt that defendant intended to drive away from the campground in the wee hours of the morning in an intoxicated condition. To the contrary, defendant asserted to the officers that he had parked in the field intending to sleep there.

If, hypothetically, defendant had been directed by campground officials or the authorities to leave the campground, that does not necessarily mean that he would have driven his car off the site in an intoxicated condition. For instance, if that situation arose, he might have called a third party to come pick him up, or he might have walked off the site, leaving his car behind and bearing the risk that it would be towed away.

Conceivably, had the police not located defendant parked in the field, he would have remained there undetected until the morning, or some later time when he had sobered up. It was already very late at night. It is not difficult to imagine that defendant had hoped to remain on site, undisturbed or undetected, until the morning.

Case law in somewhat analogous, albeit not identical, circumstances supports defendant's arguments for reversal. For example, in State v. DiFrancisco, 232 N.J. Super. 317 (Law Div. 1988), the defendant initially was found guilty of DWI by the municipal court. In that case, a police officer found the defendant "slumped over in the driver's seat" of his vehicle, which had ended up in a ditch. Id. at 319. The defendant was passed out, and "[h]is foot was on the brake, the keys were in the ignition and the engine was warm." Ibid. The officer found the defendant in the ditch at 3:10 a.m., although the officer had previously driven by the ditch "between midnight and 12:30 a.m." and had not seen anyone there. Id. at 319-320. On de novo review, the Law Division held in DiFrancisco that the defendant was not guilty because his car was inoperable and, "[w]hile the facts permit an inference that he was driving at some time prior to 3:10 a.m., there is no proof that he did so while he was intoxicated." Id. at 323.

Also illustratively, in Daly, supra, 64 N.J. at 122, the defendant was convicted of DWI by the municipal court, but on appeal was deemed to lack the requisite intent to operate his vehicle. In Daly, the defendant was arrested while sitting in his car, which was running, parked outside of a tavern. Id. at 124. The defendant, who was intoxicated at the time, claimed that he was only in his car to keep warm, and that he planned to drive home "in a little while." Ibid. The defendant had been sitting in his car for over an hour since the tavern had closed. Id. at 125. The Supreme Court found that these circumstances indicated the defendant had no intention to drive until he was sober, and the State could not demonstrate the necessary intent to operate. Ibid.

Although we appreciate our limited scope of review, this case represents an exceptional situation in which a defendant's conviction of DWI must be set aside because the State did not meet "the most rigorous burden of persuasion imposed by law[,]" State v. Campbell, 436 N.J. Super. 264, 269 (App. Div. 2014), by demonstrating his guilt beyond a reasonable doubt. The State's proofs were simply too attenuated here to meet that burden, and its case was too dependent on hypothetical assumptions. Defendant's conviction is accordingly reversed.

In light of our disposition, we need not reach defendant's second argument alleging a deprivation of his right to a speedy trial. See State v. Cahill, 213 N.J. 253 (2013). In any event, the record is insufficient to reflect who was responsible for all or portions of the two-year delay between the date of arrest and the date of trial, a breakdown of which is a critical aspect of the speedy trial analysis. Id. at 264. See also Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Had it been necessary to reach this issue, we would have remanded the case to develop the record further to detail the actual chronology. In particular, the trial court would need to identify which party, if any, had been responsible for the various adjournments granted over time.

Reversed. The Law Division shall issue a corresponding order reflecting our disposition within twenty days.