

**NOT FOR PUBLICATION WITHOUT THE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

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
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-4704-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SO YOUNG HAN,

Defendant-Appellant.

Submitted November 17, 2016 - Decided February 27, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Municipal Appeal
No. 009-26-14.

Kimm Law Firm, attorneys for appellant
(Michael S. Kimm and Adam Garcia, on the
brief).

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

PER CURIAM

Defendant So Young Han appeals from a June 5, 2015 Law
Division order convicting her of driving while intoxicated (DWI),
N.J.S.A. 39:4-50, after a trial de novo. Defendant entered a

conditional guilty plea and reserved her right to appeal the denial of her motion to dismiss the offenses. In his de novo review, the Law Division judge rejected defendant's argument suggesting the circumstances she faced presented an emergency, which justified her driving a vehicle despite being impaired. The judge convicted defendant of DWI and imposed the same sentence as the Leonia Municipal Court judge, suspending defendant's driving privileges for ninety days, ordering her to attend twelve hours of instruction at an intoxicated driver's resource center, and imposing applicable fines and court costs.

On appeal, defendant argues:

EMERGENCY EXCUSE/JUSTIFICATION WAS PRESENT WHEN DEFENDANT SO YOUNG HAN'S FRIEND [JANE]¹ WAS BLEEDING PROFUSELY FROM HER HEAD, FACE AND MOUTH AND MS. HAN REASONABLY BELIEVED THAT [JANE] WAS EXPERIENCING MEDICAL EMERGENCY WHICH REQUIRED HER DRIVING . . . TO THE EMERGENCY ROOM.

We affirm.

We derive the facts from the municipal court record of the hearing on defendant's motion to dismiss, which included testimony from defendant's friend, Jane, and documentary evidence. On May 1, 2013, defendant and Jane patronized a Fort Lee karaoke bar. Jane agreed to serve as the "designated driver." As the two walked

¹ We refer to defendant's friend with a pseudonym.

toward Jane's vehicle to go home, Jane "slipped," fell, and struck her forehead against a piece of jagged concrete. Jane's wound was bleeding and she testified she "couldn't breathe 'cause the blood was . . . dripping all over." Defendant suggested she call an ambulance, but Jane insisted she could not wait because she felt as if she were having a heart attack and "was dying." Jane "forced [defendant] to drive the car" to the hospital.

While driving to the hospital, a Leonia police officer observed defendant make an illegal turn and effected a motor vehicle stop. The officer called an ambulance, which took Jane to the hospital. Hospital records, introduced by defendant, revealed Jane's facial lacerations required ninety stitches. Police issued summonses to defendant for failure to observe a traffic control device, DWI, and careless driving.

The municipal court judge denied defendant's motion to dismiss. Pursuant to a negotiated agreement, defendant entered a conditional guilty plea to DWI, but reserved her right to raise the defense of justification on appeal. The State dismissed the other traffic offenses.

Defendant appealed from the conviction. Following trial de novo in the Law Division on the municipal court record, the judge convicted defendant and imposed the same sentence as the municipal court. This appeal ensued.

When a defendant appeals from a Law Division conviction of violating a motor vehicle law, the scope of our review is both narrow and deferential. State v. Stas, 212 N.J. 37, 48-49 (2012). We review the Law Division judgment under a sufficiency of the evidence standard noting under Rule 3:23-8(a), "the Law Division's judgment must be supported by sufficient credible evidence in the record." State v. Rivera, 411 N.J. Super. 492, 497 (App. Div. 2010) (quoting State v. Ugrovics, 410 N.J. Super. 482, 487 (App. Div. 2009)).

When the findings and conclusions of the Law Division meet that criterion, our "task is complete," and we "should not disturb the result," even if we "might have reached a different conclusion." State v. Johnson, 42 N.J. 146, 162 (1964). See also State v. Barone, 147 N.J. 599, 615 (1997) (stating an appellate court may not "weigh the evidence, assess the credibility of the witnesses, or make conclusions about the evidence.").

In our review, 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) (citing State v. Jamerson, 153 N.J. 318, 341 (1998)). However, when the Law Division's judgment rests entirely on its interpretation of the law, our scope of review is plenary,

without affording any special deference to the trial court's interpretation of the law and the legal consequences that flow from established facts. Rivera, supra, 411 N.J. Super. at 497 (citing Manalapan Realty, L.P. v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995)).

Defendant maintains the judge erred in rejecting her affirmative defense of justification based upon medical necessity. She argues, as a matter of law, the State failed to show the defense, as proven, was inapplicable beyond a reasonable doubt.

Justification is a recognized affirmative defense to alleged criminal conduct under the Code. State v. Saavedra, 222 N.J. 39, 75 (2015). N.J.S.A. 2C:3-2(b) provides for use of a justification defense, stating:

Conduct which would otherwise be an offense is justifiable by reason of any defense of justification provided by law for which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Accordingly, the burden of proof rests with a defendant to establish the essential elements of the justification defense by a preponderance of the evidence. State v. Toscano, 74 N.J. 421, 442 (1977). See also N.J.S.A. 2C:1-13(d)(1). This does not negate the State's continuing obligation to establish beyond a reasonable

doubt the essential elements of the offense charged. See N.J.S.A. 2C:1-13(a), (b) (providing generally that an affirmative defense need not be disproved until there is evidence supporting such defense).

However, the offense at issue is not a violation of the Criminal Code, rather defendant was charged with a violation of the motor vehicle laws. See State v. Fogarty, 128 N.J. 59, 64 (1992) (instructing DWI is not an offense under New Jersey's Criminal Code). Nevertheless, "a person 'charged with a motor vehicle offense does not forfeit all constitutional and common-law defenses.'" State v. Romano, 355 N.J. Super. 21, 29 (App. Div. 2002) (quoting Fogarty, supra, 128 N.J. at 64). "[C]ommon-law defenses may be available as long as they have not been precluded by the statute defining the offense." Ibid. (quoting Fogarty, supra, 128 N.J. at 70).

In Romano, a panel of this court examined an established set of underlying facts and concluded the common-law defense of necessity applied "so as to warrant an acquittal of the DWI charge." Id. at 28. The panel listed the elements of the defense, as follows:

- (1) There must be a situation of emergency arising without fault on the part of the actor concerned;

(2) This emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;

(3) This emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and

(4) The injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong.

[Id. at 29 (quoting State v. Tate, 194 N.J. Super. 622, 628 (App. Div. 1984), rev'd on other grounds, 102 N.J. 64 (1986)).].

Here, when the Law Division judge applied this four-pronged test, he concluded the elements were not met and denied defendant's motion to dismiss the DWI charge. The judge found defendant faced an emergency situation, which she did not cause, and further, "the emergency was imminent and compelling to raise a reasonable expectation of harm." However, noting Jane was taken to the hospital after the police called for an ambulance, the judge found defendant reasonably could have avoided commission of the prohibited act by seeking assistance from someone in the bar, which was still open, or obtaining and by dialing 9-1-1. The judge also considered the nature of the emergency. He found Jane's injury, although serious, was not sufficient "to outmeasure" the committed wrong.

The judge distinguished the facts presented in Romano, which we recognized were "so bizarre and remote from the public policy underlying the law that even a [c]ourt as committed as this one to the strict enforcement of the drunk-driving statutes can pause to make certain that no injustice has been done."² Romano, supra, 355 N.J. Super. at 33 (alteration in original) (quoting Fogarty, supra, 128 N.J. at 74 (Stein, J., dissenting)). The judge concluded defendant was not justified in driving a vehicle while impaired by alcohol and found her guilty.

Following our review, we determine the record fully supports the judge's findings, to which we defer. As the Law Division judge correctly noted, defendant committed an offense proscribed by N.J.S.A. 39:4-50, when she operated a vehicle while under the influence.³ In rejecting the justification defense, the judge correctly identified reasonable alternatives available to

² In Romano, the defendant left a restaurant intoxicated when three angry men brutally beat and threatened to kill him. Romano, supra, 355 N.J. Super. at 24. He made it to his car and drove 350 yards without turning on the headlights and was stopped by police. Ibid. The defendant, covered in blood, immediately informed the officer he had been "jumped" and asked for help. Ibid. We found the defendant's actions were justified, because no realistic alternative to avoid his pursuers existed. Id. at 35.

³ We reject as meritless defendant's urging to apply justification to the illegal turn, suggesting if the turn were justified, defendant could not be charged with DWI. R. 2:11-3(e)(2).

defendant to avoid driving while intoxicated. Unlike the defendant in Romano, defendant had a cell phone and could have called 9-1-1 for aid, or returned to the business for assistance, or requested another drive Jane to the hospital.

The record also supports the finding regarding the severity of the emergency, noting it did not outweigh the commission of the prohibited conduct. Defendant contends her action was no different than a driver speeding because a pregnant passenger was in labor. We reject such an analogy. The significant dangers posed by drunk drivers remains "one of the chief instrumentalities of human catastrophe." State v. Mulcahy, 107 N.J. 467, 479 (1987) (quoting State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984)). The evidence presented does not support a medical emergency sufficient to justify getting behind the wheel when under the influence of alcohol. Unlike the brutal, deadly attack upon the defendant in Romano, who drove to save his own life, defendant was not acting to save Jane's life, or prevent irreparable injury.

The Law Division judge properly concluded the evidence did not support the elements of justification as a defense. Defendant's conviction will not be disturbed.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION