SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5280-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MELISSA A. MERSMANN, a/k/a
MELISSA ARRINGTON,

Defendant-Appellant.

Argued telephonically July 13, 2017 – Decided October 11, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 15-01-0152.

Mitchell A. Ansell argued the cause for appellant (Ansell Grimm & Aaron, PC, attorneys; Mr. Ansel1, on the brief).

Monica do Outeiro, Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Monmouth County Prosecutor, attorney; Mary R. Juliano, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following the denial of her motion to suppress, defendant Melissa A. Mersmann pled guilty to fourth-degree operating a motor vehicle during a period of suspension by operating a motor vehicle while her license was suspended for a second or subsequent violation of N.J.S.A. 39:4-50 or N.J.S.A. 39:4-50(a), contrary to N.J.S.A. 2C:40-26(b). The court sentenced defendant to a one-year term of probation with a mandatory 180 days to be served in the county jail. The judge released defendant on her own recognizance and granted bail pending appeal.

On appeal, defendant raises the following contentions:

> I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE MOTOR VEHICLE STOP AND INVESTIGATIVE DETENTION WAS NOT SUPPORTED BY A REASONABLE ARTICULABLE SUSPICION OF A MOTOR VEHICLE OFFENSE.
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> II. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT WAS THE OPERATOR OR HAD THE INTENT AND ABILITY TO OPERATE THE FORD EXPLORER.

We reject these contentions and affirm.

I.

We derive the following facts from the record. On the evening of October 1, 2014, Ciara Seig called 9-1-1 and reported that she was traveling on Route 36 in Union Beach and saw someone driving a white Ford Explorer "all over the road like they're drunk . . . all over the road, like, swerving in and out of the lanes[,]"

using "no blinker[,]" "almost crashing into the curb[,]" and "like crazy driving . . . really like all over." Seig gave a description of the vehicle, its license plate number, and its route of travel. She followed the Explorer to the parking lot of the Shore Café and saw the driver and passenger exit the vehicle. She stayed on the phone with the 9-1-1 operator until she saw a Union Beach patrol car arrive where the Explorer was parked, and then left.

Special Class II Officer Joseph Russo from the Union Beach Police Department responded to the parking lot of the Shore Café and parked his patrol car approximately five feet from the rear of the Explorer. He saw a female, later identified as Susan Svenson, standing outside the passenger side door. Russo confirmed that the license plate number of the Explorer was the same as the number Seig had provided to the 9-1-1 operator. The vehicle was owned by defendant's husband.

The Explorer was parked when Russo arrived, but as he approached the rear, he heard the engine start and the person sitting in the driver's seat, later identified as defendant, yell to Svenson "Get in the car, let's go." Russo saw the brake lights illuminate and yelled to defendant not to move the vehicle and to turn off the engine. After ten seconds, defendant complied. The vehicle never moved. Russo touched the hood and felt "it was

really hot." He did not fear that defendant would drive away because his patrol car was blocking the Explorer.

Russo asked defendant for her credentials and told her to remain in the Explorer. Defendant did not comply and as she exited the vehicle, fell out and had to hold onto the door to prevent herself from falling to the ground. Russo smelled the odor of an alcoholic beverage coming from defendant's breath as she fell out of the Explorer.

When Russo asked defendant how she and Svenson arrived at the Shore Café, she initially said "Susan," but then said "no one drove." Defendant admitted she had no driver's license, and dispatch confirmed it was suspended. Svenson pointed to defendant when Russo asked how she and defendant arrived at the Shore Café. When Russo told defendant that he saw her in the driver's seat, she denied it and said she did not know how the Explorer got to the Shore Café.

Russo saw that defendant and Svenson had food all over their clothing and asked Svenson what happened. She replied that they had gone to a bar at approximately 6:00 p.m. and had a few drinks, went to Taco Bell, then were driving around and defendant was "all over the place, and the food spilled all over them from [defendant] driving erratically." When Russo asked defendant again who was driving the Explorer, defendant again said that no one was driving

and she did not know how the vehicle got to the Shore Café. Russo administered field sobriety tests to defendant, which she did not perform satisfactorily. During one test, defendant started to fall over and Russo grabbed her before she fell down. Russo arrested defendant for driving while intoxicated (DWI).

Defendant filed a motion to suppress her arrest based, in part, on the lack of probable cause that she operated or intended to operate the Explorer. In denying the motion, the motion judge noted that proof of actual operation is not necessary, but rather, operation can be established by circumstances which indicate an intent to operate. The judge made detailed factual findings and concluded based on the totality of the circumstances there was probable cause that defendant operated the Explorer within the meaning of N.J.S.A. 39:4-50(a) and relevant case law. This appeal followed.

II.

Defendant contends in Point I the motor vehicle stop and investigative detention were not supported by a reasonable and articulable suspicion that she committed a motor vehicle offense. Defendant argues that because Russo did not see her operating the Explorer, there was no corroboration of the information Seig

provided to the 9-1-1 operator about the driver's erratic driving.[1] We disagree.

Our Supreme Court has established the standard of review applicable to consideration of a trial judge's ruling on a motion to suppress:

> Appellate review of a motion judge's factual findings in a suppression hearing is highly deferential. We are obliged to uphold the motion judge's factual findings so long as sufficient credible evidence in the record supports those findings. Those factual findings are entitled to deference because the motion judge, unlike an appellate court, has the opportunity to hear and see the witnesses and to have the feel of the case, which a reviewing court cannot enjoy.
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> [State v. Gonzalez, 227 N.J. 77, 101 (2016) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).]

The trial court's legal conclusions, however, are subject to de novo review. State v. Hreha, 217 N.J. 368, 382 (2014). Applying these standards, we discern no reason to reverse the denial of defendant's motion to suppress.

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[1] Defense counsel improperly stated in defendant's merits brief, with no support in the record whatsoever, that Seig "provided a fictitious telephone number to the [9-1-1] operator" and "may have intentionally misidentified herself to the [9-1-1] operator." "[I]t is inappropriate and may be sanctionable for an attorney to include facts outside the record." Pressler & Verniero, Current N.J. Court Rules, comment 3 on R. 2:6-2(a)(4) (2018). Thus, we disregard those statements.

"[W]hen the anonymous tip is conveyed through a 9-1-1 call and contains sufficient information to trigger public safety concerns and to provide an ability to identify the person, a police officer may undertake an investigatory stop of that individual. [Our Supreme] Court has previously treated an anonymous 9-1-1 call as more reliable than other anonymous tips." State v. Gamble, 218 N.J. 412, 429 (2014). An investigative stop of a vehicle is allowable based on an anonymous 9-1-1 call reporting erratic driving. State v. Golotta, 178 N.J. 205, 209 (2003). The Court in Golotta held that a 9-1-1 call establishes reasonable suspicion for a stop when it: (1) conveys that the caller witnessed an ongoing offense that implicates a risk of imminent death or serious injury to a person or the public; (2) was placed close in time to the caller's first-hand observations; and (3) provides a sufficient quality of information, such as vehicle description, license plate number and direction, to ensure the vehicle stopped is the same one the caller identified. Id. at 221-22.

In Navarette v. California, 572 U.S. ___, ___, 134 S. Ct. 1683, 1690-91, 188 L. Ed. 2d 680, 689-91 (2014), the Supreme Court favorably referred to Golotta, and used a similar rationale in holding that an anonymous 9-1-1 call claiming eyewitness knowledge of dangerous driving contained sufficient indicia of reliability. Independent police corroboration is not required. Id. at ___, 134

S. Ct. at 1691-92, 188 L. Ed. 2d at 690-91 (rejecting independent corroboration by recognizing that "allowing a drunk driver a second chance for dangerous conduct [that could then be observed by a police officer] could have disastrous consequences"); Golotta, supra, 178 N.J. at 226 (holding that "a police officer need not wait for corroboration that might be fatal to an innocent member of the public or to the driver himself").

The facts of this case satisfy the factors prescribed in Golotta. Seig reported the Explorer's erratic driving as she witnessed it and provided a vehicle description, the license plate number, the direction in which the vehicle was travelling, and the location where it had stopped. What Seig witnessed as she followed the Explorer was indicative of drunk driving that implicated a risk of imminent death or serious injury to a person or the public. See Navarette, supra, 572 U.S. at ___, 134 S. Ct. at 1690-91, 188 L. Ed. 2d at 689-91 (noting that driving "all over the road," "crossing over the center line," and "weaving back and forth" are "dangerous behaviors" indicative of drunk driving). Because the Golotta factors were satisfied, Seig's 9-1-1 call provided the requisite reasonable suspicion for the stop of the Explorer and the investigative detention.

III.

Defendant contends in Point II that the judge erred in finding she operated the Explorer or had the intent and ability to operate it. This contention lacks merit.

N.J.S.A. 39:5-25 expressly authorizes a law enforcement officer to "arrest without warrant any person who the officer has probable cause to believe has operated a motor vehicle in violation of [N.J.S.A.] 39:4-50 . . . regardless of whether the suspected violation occurs in the officer's presence." "[A] person who operates a motor vehicle while under the influence of intoxicating liquor . . . with a blood alcohol concentration of 0.08% or more" is guilty of DWI. N.J.S.A. 39:4-50(a). The term "operate" 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).

Proof of actual operation is not required. Ibid. Intent to move a motor vehicle is "operation" under the statute. Ibid. Our Supreme Court has held that

> 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 and 39:4-50.1, 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[.]
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> [State v. Sweeney, 40 N.J. 359, 360-61 (1963).]

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

We have held there is probable cause to arrest a defendant for DWI based on "intent to operate" where he was "behind the wheel of a vehicle with its lights on and its engine running at a time when his breath disclosed a heavy odor of alcohol." State v. George, 257 N.J. Super. 493, 496-97 (App. Div. 1992). In State v. Mulcahy, 107 N.J. 467, 480, the Court applied a pragmatic understanding of "operating a motor vehicle" consistent with the underlying legislative purpose, ruling that the apparently intoxicated defendant's attempt to put his key into the vehicle's ignition constituted operation of a motor vehicle within the meaning of the DWI statutes.

There is sufficient credible evidence in this case that defendant intended to operate the Explorer. She was sitting in the driver's seat at the steering wheel with the engine on and brakes engaged, and she yelled to her passenger to "Get in the car, let's go." Even though defendant's vehicle never moved, "engaging of the engine in a moving vehicle is not required for a

conviction" for driving under the influence and, in turn, probable cause of such. State v Stiene, 203 N.J. Super. 275, 279 (App. Div.), certif. denied, 102 N.J. 375 (1985).

Defendant's conviction is affirmed, and the matter is remanded to the trial court for imposition of sentence.