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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-5673-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES CARTER,

Defendant-Appellant.

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Submitted February 28, 2017 – Decided March 31, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey,  
Law Division, Monmouth County, Municipal  
Appeal No. 14-075.

Tonneman & Connors, L.L.C., attorneys for  
appellant (Cheryl E. Connors, of counsel and  
on the briefs).

Christopher J. Gramiccioni, Monmouth County  
Prosecutor, attorney for respondent (Mary R.  
Juliano, Assistant Prosecutor, of counsel and  
on the brief).

PER CURIAM

Defendant Charles Carter appeals from his convictions of driving while intoxicated (DWI), N.J.S.A. 39:4-50, and refusal to take a breath test, N.J.S.A. 39:4-50.2, following a trial de novo

in the Law Division. We affirm because the findings supporting the convictions are based on substantial, credible evidence in the record.

I.

The facts were established at a one-day trial, during which Howell Township Police Corporal William Bommer (Bommer) and defendant testified.

On February 28, 2014, Bommer was on routine patrol in a marked police vehicle. Using a radar gun, Bommer clocked the vehicle driven by defendant to be travelling at sixty miles per hour in a forty-mile-per-hour zone. Bommer then initiated a motor vehicle stop. When Bommer asked defendant for his license and registration, he observed defendant to be fumbling and he smelled alcohol. Bommer then asked defendant to step out of the vehicle so that he could conduct field sobriety tests. Bommer first asked defendant to perform the heel-to-toe test, but defendant failed that test because his feet were apart, his arms were up, and he was swaying. Bommer next asked defendant to perform the one-legged stand test, but defendant refused to perform that test. Bommer then administered the nystagmus test and defendant failed

that test because the tracking of his eyes were jerky and he was unable to follow the stimulus without moving his head.<sup>1</sup>

Based on Bommer's observations, he concluded that defendant was under the influence and arrested him for DWI. While transporting defendant to the station, Bommer testified that defendant was yelling and screaming in the back of the car and "making no sense."

Bommer initially took defendant to the Howell Police Station. The Alcotest machine at that station was being serviced and, therefore, defendant was taken to the Wall Police Station. At the Wall Police Station, defendant was given his Miranda<sup>2</sup> rights. Defendant was also read the standard statement concerning a breath test. When initially asked to perform the test, defendant refused to do the test without his attorney. Defendant was then read the follow-up statement, but he again refused to perform the breath test. Defendant was therefore charged with DWI, refusal, speeding, and reckless driving.

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<sup>1</sup> The horizontal gaze nystagmus test can be used to establish probable cause to arrest, but it is not sufficiently reliable for admission as proof the defendant was driving under the influence of alcohol. See State v. Doriguzzi, 334 N.J. Super. 530, 546 (App. Div. 2000).

<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Defendant's testimony was in stark contrast to the testimony provided by Bommer. Defendant testified that two police officers stopped his vehicle. He went on to explain that when one of the officers asked for identification, he had difficulty retrieving the documents due to a broken spring in the glove compartment.

Defendant also testified that he had a spinal cord operation after being injured in a truck accident in 1995 and that caused him pain and difficulty in moving. In addition, defendant stated that he had a broken toe and he was wearing a small boot shoe. Defendant claimed that he followed the officer's instruction concerning how to walk and the only other test that was administered was an "eye test." Following his arrest, defendant testified that he was taken directly to the Wall Police Station, was not advised of his Miranda rights, and was not asked to take the test until he was back at the Howell Police Station.

Having observed the testimony at trial, the municipal court judge found Bommer to be credible and defendant to be incredible. Relying on the officer's observations and testimony, the municipal judge found defendant guilty of speeding, DWI, refusal, and reckless driving. The court merged the reckless driving into the DWI conviction.

On de novo review in the Law Division, the Law Division judge also found Bommer credible. Specifically, the Law Division judge

reviewed the transcript of the testimony and gave due deference to the municipal judge's credibility findings. The Law Division judge then made findings of facts based on Bommer's testimony. After detailing the fact findings, the Law Division found that the State had proven beyond a reasonable doubt that defendant was guilty of speeding, DWI, and refusal.

The Law Division then sentenced defendant as a first-time offender to pay fines, costs, assessments, and surcharges. Defendant's driving license was revoked for three months for the DWI and seven months for the refusal, but those revocations were run concurrently. Defendant was also ordered to spend twelve hours at the Intoxicated Drivers Resource Center (IDRC). Defendant now appeals his convictions for DWI and refusal.

## II.

On this appeal, defendant makes two arguments:

POINT ONE – THE STATE FAILED TO SATISFY ITS BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS GUILTY OF REFUSAL AND DWI

POINT TWO – THE TRIAL COURT ERRONEOUSLY DEFERRED TO THE MUNICIPAL COURT'S FINDINGS

Our standard of review is limited following a trial de novo in the Law Division conducted on the record developed in the municipal court. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005). In such an appeal, we consider only the

action of the Law Division and not the municipal court. State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001). We focus our review on "whether there is 'sufficient credible evidence . . . in the record' to support the trial court's findings." State v. Robertson, \_\_\_ N.J. \_\_\_, \_\_\_ (2017) (slip op. at 8) (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). On a legal determination, in contrast, our review is plenary. State v. Kuropchak, 221 N.J. 368, 383 (2015). Nevertheless, we will reverse only after being "thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction." Johnson, supra, 42 N.J. at 162.

Defendant contends that the evidence presented at trial did not support the convictions for DWI and refusal. In that regard, defendant asserts that the Law Division improperly credited the testimony of Bommer and did not give due consideration to his testimony. The trial record does not support such an argument.

A. DWI

To sustain a conviction for DWI, the State must prove beyond a reasonable doubt that defendant operated a motor vehicle while under the influence of alcohol or drugs. N.J.S.A. 39:4-50; State v. Ebert, 377 N.J. Super. 1, 10 (App. Div. 2005). It is well established that a police officer's observation of a defendant is

sufficient grounds to sustain a DWI conviction. See State v. Cryan, 363 N.J. Super. 442, 454-55 (App. Div. 2003) (sustaining DWI conviction based on proofs of defendant's bloodshot eyes, hostility, and strong odor of alcohol).

Here, the Law Division judge credited Bommer's testimony regarding both his observations and defendant's failure to perform field sobriety tests. In that regard, the Law Division judge noted that Bommer smelled alcohol, saw defendant fumbling for his papers, and then conducted a series of sobriety tests, which defendant failed.

Defendant takes issue with various findings by the Law Division judge, but in essence, defendant is simply disputing credibility findings. The Law Division judge expressly acknowledged and relied upon the credibility findings made by the municipal court judge. That deference was proper. Because the Law Division judge is not in a position to evaluate the credibility of witnesses, he or she should defer to the credibility findings of the municipal court judge. Clarksburg Inn, supra, 375 N.J. Super. at 639. Furthermore, when the Law Division agrees with the municipal court, the two-court rule must be considered. "[A]ppellate 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." Robertson, supra, \_\_ N.J. at \_\_ (slip op. at 8) (alteration in original) (quoting State v. Locurto, 157 N.J. 463, 474 (1999)).

#### B. Refusal

To establish refusal to provide a breath sample, the State must prove

(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 consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test.

[State v. Marquez, 202 N.J. 485, 503 (2010) (citing N.J.S.A. 39:4-50.2(e), 39:4-50.4a(a); State v. Wright, 107 N.J. 488, 490 (1987)).]

Here, the Law Division found that Bommer had probable cause to believe defendant had been driving while under the influence. Following his arrest, defendant was read the standard statement and asked to provide a breath sample, which he refused to do without his lawyer being present. Bommer then read the appropriate follow-up statement, but defendant again refused to take the test. That evidence is sufficient to prove beyond a reasonable doubt defendant's refusal to provide a breath sample.



Finally, defendant contends that the Law Division judge "totally and wholly deferred to the findings of the municipal court." A review of the Law Division judge's written opinion demonstrates the opposite. The Law Division judge clearly understood that his role was to make independent findings based on a de novo review. The Law Division judge then memorialized his findings and conclusions in a written opinion. In making the factual findings, the Law Division judge gave appropriate deference to the credibility findings of the municipal court judge. Having reviewed the record, we discern no error.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION