

**NOT FOR PUBLICATION WITHOUT THE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-0758-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANIEL Y. KWAK,

Defendant-Appellant.

Argued January 30, 2018 — Decided February 21, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Municipal Appeal
No. 004-09-16.

John S. Avery argued the cause for appellant
(Avery & Avery, attorneys; John S. Avery, on
the briefs).

Jenny Zhang, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for respondent (Dennis Calo, Acting
Bergen County Prosecutor, attorney; Michael R.
Philips, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Daniel Y. Kwak appeals from a September 16, 2016 order of the Law Division finding him guilty of driving while intoxicated on a de novo review of his conviction from the Fort Lee municipal court. We affirm.

On June 20, 2015, defendant was pulled over while driving erratically on the George Washington Bridge and charged with driving while intoxicated (DWI), N.J.S.A. 39:4-50; careless driving, N.J.S.A. 39:4-97; speeding, N.J.S.A. 39:4-98; and failure to signal when making a lane change, N.J.S.A. 39:4-126.

In the Fort Lee municipal court, defendant filed a motion to suppress evidence based on lack of probable cause for an arrest. At the suppression hearing, the State presented testimony from Port Authority Police Officer Juan Guzman. According to Guzman, at approximately 6:30 a.m. on June 20, 2015, he observed a black Acura pass his vehicle. Guzman sped up and followed the Acura. Guzman estimated that the Acura was traveling fifty to sixty-five miles per hour in a forty-five miles-per-hour zone. Guzman testified that he saw the Acura move from Lane Three to Lane Five and back to Lane Three without signaling, and then swerve within Lane Three. According to Guzman, the erratic driving of the person in the Acura affected other vehicles on the roadway.

Guzman activated his police lights and siren. Using the police car's public address system, Guzman instructed defendant,

who was driving the Acura, to pull over in a safe location. Instead of pulling over as instructed, defendant exited the bridge, stopping his Acura in the middle of the one-lane exit ramp. Based on his observation of defendant's erratic driving, Guzman felt it was unsafe for defendant to drive to another location.

Guzman approached defendant's car and noticed defendant's eyes were watery and bloodshot and there was an odor of alcohol. When defendant produced his driving credentials, Guzman noticed defendant's hand motions were "very slow." Defendant told Officer Guzman he had two beers and a shot of whiskey. According to Guzman, defendant then began to cry and stated that "he could not afford another DWI."

Guzman told the municipal judge that he called for Officer Sama, who had specialized training in field sobriety tests. Arriving at the scene, Sama determined it was unsafe to conduct a field sobriety test in the area where defendant's car was stopped.

Because it was unsafe to conduct a field sobriety test on the exit ramp, Guzman handcuffed defendant and placed him in the police vehicle. Guzman did not read defendant his Miranda¹ rights because Guzman did not consider defendant to be under arrest. Guzman took

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

defendant to the Port Authority police station located just a few minutes away from where defendant's car was stopped.

Once inside the Port Authority police station, Guzman testified that defendant was handcuffed to a bench in the arrest processing area. At the station, field sobriety tests were administered and defendant was read his Miranda rights.

At the suppression hearing, defendant argued that he was arrested without probable cause following the motor vehicle stop. The municipal judge denied defendant's motion to suppress, finding that although Guzman did not have probable cause to arrest defendant without conducting field sobriety and alcohol tests, he did have reasonable suspicion to detain defendant for investigation.

The matter then proceeded to trial in the municipal court. At trial, the State presented testimony from Port Authority Police Officers Guzman, Pisciotta, and Sama. Guzman's testimony during the municipal court trial was consistent with his testimony during the suppression hearing. Sama also testified before the municipal court. Sama testified that defendant's face was flushed during the stop. Sama corroborated Guzman's statement that defendant was crying and stated he "could not afford another DWI." Sama observed defendant's eyes were bloodshot and watery, he was unsteady on his feet, and he had an odor of alcohol on his breath. Sama then

described the field sobriety tests performed at the police station. According to Sama, he conducted the walk-and-turn test and the one-leg stand test and observed defendant swaying and exhibiting actions that indicated alcohol impairment. As a result of the field sobriety tests and his observations, Sama opined that defendant was under the influence of "intoxicating liquor."

The municipal judge reviewed the trial testimony and found that defendant had slow hand movements when producing his credentials. The municipal judge further found Guzman and Sama credibly testified that defendant's eyes were bloodshot and watery, he was crying, and he had the odor of alcohol on his person. The municipal judge declined to consider defendant's statement to the officers that he could not afford another DWI. During the field sobriety tests, the municipal judge found that defendant raised his hands while completing the walk-and-turn test and defendant raised his hand and put his foot down during the one-leg stand test, leading Sama to conclude that defendant was under the influence of alcohol.

Based on these findings, the municipal judge determined that defendant was guilty of DWI and careless driving, but not guilty of failure to signal when making a lane change.² On the DWI charge,

² The State previously dismissed the speeding charge.

the municipal judge sentenced defendant to a two-year license suspension, forty-eight hours in the Intoxicated Driver Resource Center (IRDC), thirty days' community service, one year interlock device, and payment of fines and court costs. On the careless driving charge, defendant was required to pay a fine and court costs.

On April 21, 2016, defendant filed an appeal from his municipal court conviction in the Superior Court, Law Division. A trial de novo was conducted by the Law Division judge on September 16, 2016.

The de novo trial findings by the Law Division judge were substantially similar to the findings by the municipal court judge. The Law Division judge found defendant had an odor of alcoholic beverage on his person and was unsteady. Additionally, the Law Division judge determined defendant was under the influence of alcohol based on the results of the field sobriety tests.

The Law Division judge determined there was probable cause to arrest defendant at the scene of the motor vehicle stop. The finding of probable cause was based on defendant's swerving, changing lanes without signaling, and defendant's physical manifestations of intoxication.

Based on these determinations, the Law Division judge found defendant guilty of DWI and careless driving. He imposed the same sentence as the municipal court judge.

On appeal to this court, defendant argues the following:

POINT ONE

WHETHER BY AN ARREST ACKNOWLEDGED BY THE POLICE, BY THE PROSECUTION, OR A DE FACTO ARREST BASED ON THE CIRCUMSTANCES, DEFENDANT KWAK WAS UNDER ARREST THE MOMENT HE WAS PLACED IN HANDCUFFS ON THE ROADWAY.

POINT TWO

WERE IT NOT FOR THE ERRONEOUS FINDING OF LAW BY THE JUDGE AT THE PROBABLE CAUSE HEARING THAT DEFENDANT WAS NOT UNDER ARREST BUT RATHER UNDER INVESTIGATION, THE CASE WOULD HAVE BEEN DISMISSED FOR A LACK OF PROBABLE CAUSE.

POINT THREE

THE LAW DIVISION MISCONSTRUED AND IGNORED FACTS LEADING TO ITS FINDING AS TO THE EXISTENCE OF PROBABLE CAUSE AT THE TIME OF ARREST.

POINT FOUR

THE LAW DIVISION MISCONSTRUE[D] THE LEGAL STANDARD BY WHICH PROBABLE CAUSE IS JUDGED, LEADING IT TO AN ERRONEOUS FINDING THAT PROBABLE CAUSE EXISTED AT THE TIME OF ARREST.

POINT FIVE

THE COURT[']S FUNDAMENTAL MISAPPLICATION OF LOGIC LED IT TO EVIDENTIAL MISTAKES LEADING TO ITS FINDING OF GUILT.

In reviewing a judgment of the Law Division on a municipal appeal, we apply a sufficiency of the evidence standard. See State v. Ugrovics, 410 N.J. Super. 482, 487–88 (App. Div. 2009). We must "determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). "When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete and it should not disturb the result" Ibid.

Superior Court review of a municipal court conviction is conducted de novo on the record. R. 3:23-8. The Superior Court should defer to the municipal court's credibility findings. State v. Locurto, 157 N.J. 463, 470–71 (1999)(citing Johnson, 42 N.J. at 161–62). However, the municipal court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995). Thus, "[o]n a de novo review on the record, the reviewing court . . . is obliged to make independent findings of fact and conclusions of law, determining defendant's guilt independently but for deference to the municipal court's credibility findings." Pressler & Verniero, Current N.J. Court Rules, cmt. 1.1 on R. 3:23-8 (2018).

Defendant contends that he was placed under arrest at the scene of the motor vehicle stop. The State does not dispute that defendant was arrested at the scene of the motor vehicle stop. Importantly, the Law Division judge held that "Officer Guzman had probable cause to arrest defendant for DWI at the time of the motor vehicle stop." Because it is undisputed that defendant was arrested at the scene of the motor vehicle stop, we need not address defendant's arguments on this issue.

Defendant asserts that since the municipal court judge concluded there was no probable cause to arrest defendant at the scene of the motor vehicle stop, the case should have been dismissed for lack of probable cause. On appeal, defendant asks that we review the municipal court's judge's ruling on the motion to suppress. However, we do not consider the actions of the municipal court judge in reviewing defendant's DWI conviction, only the Law Division judge's determinations. State v. Palma, 219 N.J. 584, 591-92 (2014) (citing State v. Joas, 34 N.J. 179, 184 (1961)). Thus, defendant's argument that the municipal court judge erred in his probable cause determination is not properly before this court.

"A violation of [the DWI statute] may be proven 'through either of two alternative evidential methods: proof of a defendant's physical condition or proof of a defendant's blood

alcohol level.'" State v. Howard, 383 N.J. Super. 538, 548 (App. Div. 2006) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, 180 N.J. 45 (2004)). To make an arrest for DWI, the arresting officer need only have "'reasonable grounds to believe' that the driver was operating a motor vehicle in violation [of N.J.S.A. 39:4-50]". State v. Moskal, 246 N.J. Super. 12, 21 (App. Div. 1991) (alteration in original) (quoting Strelecki v. Coan, 97 N.J. Super. 279, 284 (App. Div. 1967)). Reasonable grounds can be based solely on the officer's observations. See State v. Liberatore, 293 N.J. Super. 580, 589 (Law Div. 1995) (holding that "observational evidence" may be sufficient to prove "a defendant guilty beyond a reasonable doubt of DWI"), aff'd, 293 N.J. Super. 535 (App. Div. 1996); Moskal, 246 N.J. Super. at 20-21 (holding that defendant's flushed face, "drooping and red" eyes, admission of drinking, and the strong odor of alcohol established probable cause for arrest).

Recognizing that "sobriety and intoxication are matters of common observation and knowledge, New Jersey has permitted the use of lay opinion testimony to establish alcohol intoxication." State v. Bealor, 187 N.J. 574, 585 (2006). Moreover, it is well-established that a police officer's subjective observation of a defendant is a sufficient ground to sustain a DWI conviction. See State v. Cryan, 363 N.J. Super. 442, 455-56 (App. Div. 2003).

Defendant cites State v. Bernokeits, 423 N.J. Super. 365 (App. Div. 2011) and State v. Jones, 326 N.J. Super. 234 (App. Div. 1999) for the proposition that probable cause cannot be based only on the odor of alcohol and defendant's admission to consuming alcohol before driving.

Having reviewed the record before the Law Division judge, we find that the probable cause determination and finding of guilt were based on more than defendant's admission and the odor of alcohol. The determinations by the Law Division judge were based on Officer Guzman's testimony citing behaviors evidencing defendant's intoxication, including unsteadiness, watery eyes, and excessive slowness in producing his driving information. We conclude that the probable cause determination and subsequent DWI conviction properly considered the officer's observation of defendant's driving, including the switching of lanes without signaling, swerving his car, and stopping his car in the middle of the road. Defendant's conviction was also based on the results of the field sobriety tests. Given the totality of the circumstances, we concur with the Law Division judge that there was probable cause to arrest defendant for DWI at the time of the motor vehicle stop and that the State met its burden of proving beyond a reasonable doubt that defendant was guilty of DWI.

Affirmed.