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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-1175-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LUCIA POLITO,

Defendant-Appellant.

Argued April 26, 2018 – Decided May 4, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Municipal Appeal
No. 2016-01.

Samuel Louis Sachs argued the cause for
appellant (Samuel Louis Sachs, LLC, attorneys;
Samuel Louis Sachs, of counsel; Lauren E.
Scardella, on the brief).

Monica A. Martini, Assistant Prosecutor,
argued the cause for respondent (Angelo J.
Onofri, Mercer County Prosecutor, attorney;
Alycia I. Pollice-Beyroudy, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Following a trial de novo in the Law Division, defendant Lucia Polito was convicted of driving while intoxicated (DWI), N.J.S.A. 39:4-50(a). Because this was defendant's second DWI conviction, the judge sentenced her to a two-year driver's license suspension; ninety days in jail, with eighty-eight days suspended and the remaining two days to be served in the Intoxicated Driver Resource Center (IDRC) program; and thirty days of community service. The judge also imposed appropriate fines, costs, and surcharges, and ordered defendant to install an ignition interlock device for one year after completion of her suspension. We affirm.

The procedural history and facts of this case are set forth at length in the Law Division judge's opinion and need not be repeated here in the same level of detail. On December 5, 2014, Officer Luis Navas stopped defendant's car because of a traffic violation. While speaking to defendant, the officer detected the odor of alcohol on her breath. Defendant's eyes were droopy, red, and watery, and her speech was slow and slurred.

Officer Navas had defendant perform a series of standard field sobriety tests, including recitation of the alphabet and counting backwards. Defendant had difficulty performing both tasks. During defendant's first attempt at the "walk-and-turn test," the officer observed that defendant's "steps were not heel-to-toe." She then turned incorrectly on the second attempt, and

failed to follow the officer's direction to keep her hands at her sides. Officer Navas ended the "one-leg stand" test after defendant "swayed and put her foot down, complaining of pain in her right knee."

The officer arrested defendant for DWI and took her to the police station. While observing all of the required protocols, Officer Navas performed two chemical breath tests on defendant using the Alcotest machine. Defendant's blood alcohol content (BAC) measured 0.13% on both tests, well above the 0.08% BAC legal limit. See N.J.S.A. 39:4-50(a).

After considering all of the evidence submitted during the trial, the municipal court judge determined that Officer Navas was credible and, based upon his observations of defendant's condition and the results of the Alcotest, found defendant guilty of DWI beyond a reasonable doubt. Following a trial de novo, the Law Division judge rendered a detailed written opinion and likewise concluded that defendant drove her vehicle while intoxicated in violation of N.J.S.A. 39:4-50(a).¹ This appeal followed.

On appeal, defendant raises the following contentions:

¹ After the judge who conducted the trial de novo transferred to another vicinage, a different Law Division judge granted defendant's motion for a stay of her sentence pending appeal.

POINT I

THE LAW DIVISION ERRED IN NOT MAKING FINDINGS OF FACT WITH REGARD TO DEFENDANT'S EXPERTS DURING THE DE NOVO REVIEW OF DEFENDANT'S CONVICTION.

POINT II

ALLOWING THE STATE TO REOPEN ITS CASE-IN-CHIEF TO ADMIT ["]WORKSHEET A["] WAS A MISTAKEN EXERCISE OF DISCRETION.

POINT III

THERE WAS NOT SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD FOR THE LAW DIVISION TO CONCLUDE THAT THE STATE HAD PROVEN A PER SE CASE OF INTOXICATION.

POINT IV

BASED ON OFFICER NAVAS'S OBSERVATIONS, THERE WAS NOT SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD FOR THE LAW DIVISION TO CONCLUDE THAT THE STATE HAD PROVEN THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

When the Law Division conducts a trial de novo on the record developed in the municipal court, our appellate review is limited. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005).

The Law Division judge was bound to give "due, although not necessarily controlling, regard to the opportunity of a [municipal court judge] to judge the credibility of the witnesses." . . . Our review is limited to determining whether there is sufficient credible evidence present in the record to support the findings of the Law Division judge, not the municipal court.

[Ibid. (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 157 (1964)).]

Because the Law Division judge is not in a position to judge the credibility of witnesses, he or she should defer to the credibility findings of the municipal court judge. Ibid. (citing State v. Locurto, 157 N.J. 463, 474 (1999)). Furthermore, when the Law Division agrees with the municipal court, the two-court rule must be considered. "Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of fact and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." State v. Reece, 222 N.J. 154, 166 (quoting Locurto, 157 N.J. at 474).

Applying these principles, we conclude that defendant's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). The Law Division's thorough analysis of all of the issues was comprehensive and correct, and we are satisfied there was sufficient credible evidence in the record to support his findings and conclusions. We therefore affirm defendant's DWI conviction substantially for the reasons expressed by the Law Division judge. We add only the following brief comments concerning the argument defendant raises in Point II.

After the State rested its case, defendant made a motion to suppress the results of the Alcotest because the State had neglected to introduce a "Tolerance Worksheet," also known as "Worksheet A," during its case in chief.² The State argued it was not required to introduce the worksheet, and the municipal court judge stated he was denying the motion because he "want[ed] to review the documents." Later in the trial, however, the State asked for permission to re-open its case so it could introduce the worksheet. After the judge granted the application, Officer Navas authenticated the document, and defendant had the opportunity to cross-examine him before it was admitted in evidence.

Contrary to defendant's contention, there was nothing untoward about the admission of the worksheet. The Supreme Court has long held that a judge has the discretion to reopen a case after one or both of the parties rest. State v. Wolf, 44 N.J. 176, 191 (1965) (holding that "when the ends of justice will be served by a reopening, it ought to be done"). While the State should have introduced the document in its case-in-chief, defendant suffered absolutely no prejudice by its late admission.

² "Worksheet A" must be submitted by the State where the Alcohol Influence Report (AIR) is offered into evidence and there are two reported test samples. State v. Chun, 194 N.J. 54, 150 (2008). It contains a series of mathematical calculations used to determine "[w]hether [the] [t]wo [b]reath [s]amples are in [t]olerance [u]nder [a]cceptable [t]olerance [s]tandard[s]." Id. at 155.

Defendant had ample opportunity to rebut the evidence presented in the worksheet and, at oral argument before us, did not dispute the mathematical accuracy of the information contained in it.

Affirmed. The stay pending appeal is vacated.

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



CLERK OF THE APPELLATE DIVISION