SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2541-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KATHLEEN GANSER,

Defendant-Appellant.

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Submitted April 6, 2022 – Decided April 22, 2022

Before Judges Whipple, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Municipal Appeal No. 11-20.

Levow DWI Law, LLC, attorneys for appellant (Evan M. Levow, of counsel and on the brief; Christopher G. Hewitt, on the brief).

Scott A. Coffina, Burlington County Prosecutor, attorney for respondent (Nicole Handy, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Kathleen Ganser moved to suppress evidence obtained after police ordered her to exit her vehicle during a motor vehicle stop and the investigation into whether she was driving while intoxicated (DWI), N.J.S.A. 39:4-50. The municipal court judge denied the suppression motion, accepted her conditional guilty plea to DWI, and sentenced her as a second offender. On de novo review, the Law Division judge also denied the suppression motion, imposed an identical sentence, and denied reconsideration. Defendant appeals the denial of her suppression motion.

Defendant raises the following point for our consideration:

> BECAUSE THE OFFICER LACKED A REASONABLE AND ARTICULABLE SUSPICION TO BELIEVE THAT THE DEFENDANT HAD BEEN OPERATING HER MOTOR VEHICLE WHILE INTOXICATED, HE HAD NO LEGAL BASIS TO ORDER HER OUT OF THE VEHICLE, THEREBY UNREASONABLY EXTENDING THE MOTOR VEHICLE STOP.

We find no merit in defendant's argument and affirm the denial of her suppression motion. Defendant does not otherwise challenge her conviction or her sentence.

We take the following facts from the record. Shortly after midnight on February 10, 2019, Officer Joshua J. Meeks of the Medford Township Police Department was traveling northbound on Dixontown Road in a marked patrol car when a black Jeep abruptly pulled out from a McDonald's restaurant parking

lot directly into his path and forced him to brake.[1] Meeks observed the Jeep straddle the double yellow line on Dixontown Road until it reached a traffic light. Meeks continued to follow the Jeep and observed it make a wide left turn onto Himmelein Road and crossed over double white lines marking a bike path, where it continued to straddle the bike lane lines for approximately seven seconds.

Meeks continued to follow the Jeep as it turned right onto Hartford Road and reached the intersection of Hartford and Hickory Roads, at which time Meeks activated his overhead lights and initiated a motor vehicle stop where it was safe to do so. The Jeep complied by immediately pulling over onto the shoulder.

The judge found Meeks' testimony to be credible and forthright. The judge noted there was "no indication that [Meeks] maintains any bias, and even though his recollection was refreshed by a review of his report" he appeared to have "a very clear . . . independent recollection of the stop and the facts . . . ."

Based on his credible testimony, the judge found Meeks had an "articulated [and] and reasonable suspicion . . . to support the motor vehicle stop

[1] The judge inferred from Meeks' testimony that the Jeep's "entrance onto Dixontown Road was abrupt and . . . got his attention."

based upon the observed violations" even though they occurred "some period of time" before the stop and were not captured on the dash camera video.

Meeks made an in-court identification of defendant as the driver of the Jeep. Meeks testified that after initiating the stop, he approached the Jeep on the driver's side and observed that defendant was the sole occupant. He requested defendant's driver's license, registration, and proof of insurance. Defendant produced her driver's license but "she was unable to locate her registration or insurance card."[2]

While speaking to the driver, Meeks observed that "[h]er eyes were a little glassy." When asked where she was coming from, defendant responded that she was coming from Ott's, a bar located "[a]pproximately three-tenths of a mile" from the McDonald's where he had first observed the Jeep.

While conversing with defendant from approximately three feet away, Meeks detected "an odor of alcoholic beverage emanating from inside the vehicle." Meeks acknowledged that the odor was initially "real slight" but "got a little bit stronger as she began speaking to [him]." Meeks recollected that when he asked defendant "if she had anything to drink," she responded, "yes, that she had two beers[.]" Meeks then had another officer respond to his location because he contemplated conducting field sobriety tests due to his observations

[2] The registration and insurance card were later found in the glove compartment.

and defendant's statements, and wanted to discuss that step with the other officer.

When Officer Kurt Denning arrived, Meeks asked him "to go up to the car and see if he can smell anything," in an effort to "confirm." Meeks told Denning that defendant was not slurring her words and the odor of alcohol was not strong. Denning suggested that instead, they should "just get her out" and "run her through one field sobriety test and see how she does[.]"

Meeks directed defendant to exit the vehicle without conducting any additional "pre-exit evaluation." Defendant was directed to perform certain balance tests, including a standing leg raise and a heel-to-toe walking test. Defendant repeatedly lost her balance and was unable to perform either test. After failing these tests, defendant was placed under arrest for DWI.

Defendant moved to suppress the evidence obtained from the motor vehicle stop. As we have noted, the judge found the vehicle stop was lawful. The parties were directed to submit briefs on whether defendant was lawfully removed from her vehicle under State v. Bernokeits, 423 N.J. Super. 365 (App. Div. 2011).

On May 21, 2020, the judge found that defendant's observed operation of the Jeep, her admission of drinking, the smell of alcohol, defendant's appearance, and her inability to locate the registration and insurance card, were

sufficient to allow Meeks to continue the investigation. While he denied the suppression motion, the judge agreed to review the dash cam video to determine whether it was lawful to remove defendant from her vehicle. After reviewing the video, the judge found that "under the totality of the circumstance[s]," Meeks had "a reasonable and articulable suspicion to advance the investigation." The judge reiterated that motion was denied.

On August 20, 2020, defendant entered a conditional guilty plea to the DWI, reserving her right to appeal the denial of her motion to suppress. Defendant, who weighed only 112 pounds, testified that she drank two high alcohol content beers, which she described as being like consuming four regular beers, which adversely affected her ability to operate a motor vehicle. Defense counsel acknowledged that defendant performed "very poorly" on the field sobriety tests and exhibited "significant balance issues[.]" Defendant acknowledged her inability to control her vehicle and her failure to maintain her lane of travel due to her level of intoxication. Defendant also acknowledged she lost her balance repeatedly during the field sobriety tests and that she was unable to perform the heel-to-toe walking and standing leg raise tests, which she attributed to her level of intoxication. Defendant stated she was pleading guilty because she was guilty of DWI.

The judge accepted the guilty plea and sentenced her as a second DWI offender to a two-year license suspension, forty-eight hours at an Intoxicated Driver Resource Center, thirty days of community service, three years of ignition interlock, and appropriate fines, assessments, surcharge, and costs. The judge stayed the sentence pending defendant's appeal to the Law Division.

The de novo appeal was heard by the Law Division on February 26, 2021. Judge Mark P. Tarantino issued an oral decision denying the motion to suppress the evidence obtained by the motor vehicle stop and after removing defendant from her vehicle to conduct field sobriety tests.

Based on his de novo review of the record, the judge found that Meeks' testimony was credible, and he had a clear recollection of the events. He did not embellish his testimony or avoid questions on cross-examination.

The judge further found that defendant was lawfully removed from her vehicle because Meeks had a reasonable suspicion that she had operated her vehicle while under the influence of alcohol. In support of that finding, the judge recounted the facts in detail. His findings included defendant pulling out of the McDonald's restaurant right in front of Meeks without stopping, causing Meeks to slow down. Defendant then straddled the yellow center line, sped up and down, took a wide turn, and crossed into a marked bike lane, where she remained for seven seconds. When stopped, defendant could not locate her

registration or insurance card, her eyes were glassy, and there was an odor of alcohol emanating from the vehicle. She admitted to drinking. Based on these observations and her admission, Meeks directed defendant to exit her vehicle to perform field sobriety tests. The judge found that action was lawful, reasonable, and appropriate.

The judge discounted the fact that not every detail was recorded by Meeks in his police report, noting that "[t]he report is supposed to be a summary of what occurred, and not a moment-by-moment historical record."

The judge distinguished the facts in Bernokeits, noting that in this case, defendant exhibited more signs of impaired condition than the defendant in Bernokeits. In addition, "roadside field sobriety testing does not require the police to have probable cause to arrest or to search, but rather, may be undertaken on the basis of reasonable, articulable suspicion alone that the defendant was driving intoxicated." Quoting from Terry v. Ohio, 392 U.S. 1, 21 (1968), the judge explained that a "reasonable suspicion is present when an officer is[] 'able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably . . . warrant that intrusion.'" Relying on State v. Locurto, 157 N.J. 463, 470 (1999), the judge emphasized that "[t]he State need not prove that the suspected motor vehicle violation has in

fact occurred; only that the officer has a reasonable, articulable, and objective basis . . . justifying the stop."

The judge then compared the reasons for the stop in this case with what occurred in Bernokeits. He noted that both the stop and the performance of field sobriety tests were found lawful in Bernokeits. The additional facts present in this case, which were not present in Bernokeits, provided even more justification for the stop and the removal of defendant from the vehicle to perform field sobriety tests.

After finding that the conditional plea was properly entered by defendant, the judge imposed the same sentence as the municipal court judge and declined to stay the suspension of defendant's driver's license pending appeal.

On March 30, 2021, the judge issued an oral decision denying defendant's motion for reconsideration of the denial of the suppression motion and the stay of sentence pending appeal.

We affirm the denial of defendant's motion to suppress the evidence obtained from the motor vehicle stop both before and after she was removed from the vehicle, substantially for the reasons expressed by Judge Tarantino in his oral decisions. We add the following comments.

In this appeal, defendant argues that the motor vehicle stop became an impermissible de facto arrest when the officer ordered her out of her car because

"the officers' conduct [was] more intrusive than necessary for an investigative stop." She claims that "while the officer did have a reasonable suspicion that the [d]efendant had committed a moving violation, the factors cited [by the court] did not justify the decision to order the [d]efendant out of her car for field sobriety testing." We are unpersuaded.

Our scope of our review of a decision granting or denying a suppression motion is limited. State v. Handy, 206 N.J. 39, 44-45 (2011). We "must uphold the factual findings underlying the trial court's decision, so long as those findings are 'supported by sufficient credible evidence in the record.'" State v. Evans, 235 N.J. 125, 133 (2018) (quoting State v. Elders, 192 N.J. 224, 243 (2007)). "An appellate court 'should give deference to those findings of the trial judge which are substantially influenced by his [or her] opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" Elders, 192 N.J. at 244 (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). A trial judge's credibility determinations should likewise be upheld if they are supported by sufficient, credible evidence. State v. S.S., 229 N.J. 360, 374 (2017).

Deference is especially appropriate when, as in this case, two judges have examined the facts and reached the same conclusion. "Under the two-court rule, appellate 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." Locurto, 157 N.J. 463, 474 (1999) (citing Midler v. Heinowitz, 10 N.J. 123, 128-29 (1952)). Accordingly, our review of the factual and credibility findings of the municipal court and Law Division judges "is exceedingly narrow." State v. Reece, 222 N.J. 154, 167 (2015) (quoting Locurto, 157 N.J. at 470). In contrast, we review a trial court's legal conclusions de novo. S.S., 229 N.J. at 380.

Here, our review of the record convinces us that the trial courts carefully considered the evidence before making factual determinations. The parallel factual and credibility findings made by the municipal court and Law Divisions judges were amply supported by substantial credible evidence in the record. Their legal conclusions comported with applicable legal principles.

The legal standard for initiating an investigative detention is well-established. "[A] police officer is justified in stopping a motor vehicle when he [or she] has an articulable and reasonable suspicion that the driver has committed a motor vehicle offense." Locurto, 157 N.J. at 470 (quoting State v. Smith, 306 N.J. Super. 370, 380 (App. Div. 1997)); accord Delaware v. Prouse, 440 U.S. 648, 663 (1979). To justify an investigative detention, the State must show the stop was "based on 'specific and articulable facts which, taken together with rational inferences from those facts,' [gave] rise to a reasonable suspicion

of criminal activity." State v. Rodriguez, 172 N.J. 117, 126 (2002) (quoting Terry, 392 U.S. at 21).

The reasonable suspicion standard requires only "some minimal level of objective justification for making the stop." State v. Nishina, 175 N.J. 502, 511 (2003) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)). Importantly, "the State is not required to prove that the suspected motor-vehicle violation occurred." Locurto, 157 N.J. at 470.

In this appeal, defendant does not contest the initial motor vehicle stop. She only challenges that she was ordered to exit the vehicle and submit to field tests, which she contends unreasonably prolonged the stop. In Pennsylvania v. Mimms, the United States Supreme Court considered the identical issue: "whether [a police officer's] order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment." 434 U.S. 106, 109 (1977). The Court focused its inquiry "not on the intrusion resulting from the request to stop the vehicle . . . but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped." Id. at 110. The Court weighed "the officer's interest" in ordering defendant out of the vehicle against "the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which

was admittedly justified, by the order to get out of the car." Id. at 109, 111. The Court reasoned:

> The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it.
>
> [Id. at 111.]

Ultimately, the Court concluded that "this additional intrusion [into the driver's personal liberty occasioned by the order to exit the vehicle] can only be described as de minimis . . . . Not only is the insistence of the police [that defendant stand alongside the vehicle] not a 'serious intrusion upon the sanctity of the person,'" the Court added, "but it hardly rises to the level of a 'petty indignity.'" Ibid. (quoting Terry, 392 U.S. at 1).

In State v. Smith, the Court concluded that, while "the New Jersey Constitution may afford greater protection than the Federal Constitution affords[,] . . . the Mimms test, as applied to drivers, satisfies the New Jersey Constitution as well." 134 N.J. 599, 611 (1994).

In Bernokeits, we held that, following a lawful motor vehicle stop, "the resultant request of a motorist to exit the vehicle is constitutionally permissible." 423 N.J. Super. at 370. "This is because once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in

scope to the circumstances that justified the traffic stop." Id. at 371. "Where the police have already lawfully decided that the driver shall be briefly detained, the additional intrusion of requesting him to step out of his vehicle has been described as 'de minimis.'" Ibid. (quoting Mimms, 434 U.S. at 111); accord Smith, 134 N.J. at 610.

When, as here, the initial stop was lawful due to observed motor vehicle violations, "a police officer is not precluded from broadening the inquiry of his stop '[i]f, during the course of the stop or as a result of the reasonable inquiries initiated by the officer, the circumstances give rise to [articulable and reasonable] suspicions'" that the driver is driving while intoxicated. Bernokeits, 423 N.J. Super. at 371 (alteration in original) (quoting State v. Dickey, 152 N.J. 468, 479-80 (1998)).

Here, the initial stop was lawful. Meeks observed defendant commit several motor vehicle violations, but also suspected defendant was driving while intoxicated due to the nature of her driving. Coupled with defendant's glassy eyes, the odor of alcohol emanating from the car, her inability to locate her registration and insurance card, and defendant's admission that she had been drinking and had recently left a nearby bar, clearly provided an articulable and reasonable suspicion that defendant was driving while intoxicated. Probable cause to arrest defendant for DWI was not required to conduct the field sobriety

testing. Id. at 373. The "administration of the field sobriety tests is more analogous to a Terry stop than to a formal arrest, and therefore may be justified by a police officer's reasonable suspicion based on particularized, articulable facts suggesting a driver's intoxication." Id. at 374. Therefore, expanding the scope of the initial traffic stop by ordering defendant to exit the vehicle at that point and detaining her for field sobriety testing was constitutionally permissible. Id. at 376. Moreover, "there is no indication that defendant was subjected to any unnecessary delay or was detained longer than the short period required to complete the roadside tests." Id. at 374.

Given the totality of the circumstances presented, Meeks had an articulable and reasonable suspicion that defendant was driving while intoxicated. He was not required to undertake additional evaluation of defendant before directing her to exit the vehicle. The Law Division correctly denied defendant's suppression motion.

Affirmed.