SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2829-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID A. JAGGIE,

Defendant-Appellant.

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Argued November 28, 2022 – Decided December 8, 2022

Before Judges Messano and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Municipal Appeal No. 24-20.

John R. Klotz argued the cause for appellant.

Lillian Kayed, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Lillian Kayed, on the brief).

PER CURIAM

Following a trial de novo in the Law Division, defendant David Jaggie was convicted of driving while intoxicated (DWI), N.J.S.A. 39:4-50, and refusal to submit to a breath test, N.J.S.A. 39:4-50.4a. He appeals, arguing that there was insufficient evidence to establish his guilt beyond a reasonable doubt and the testimony of his expert was improperly limited. We are not persuaded by those arguments, and we affirm defendant's convictions. We remand, however, so that the Law Division can impose a sentence. The Law Division mistakenly affirmed the sentence imposed by the municipal court instead of imposing a new sentence as required after a trial de novo.

I.

On February 11, 2019, the car defendant was driving was stopped and he was charged with several offenses, including DWI and refusal to submit to an alcohol breath test. The trial de novo in the Law Division was conducted on the municipal court record.

At trial in the municipal court, five witnesses testified: Officer Paul Pimenta, Officer Anthony Giardullo, Officer Paul Gawin, defendant, and defendant's expert Herbert Leckie. Officer Pimenta testified that in the early morning hours of February 11, 2019, he saw a vehicle in the Lincoln Tunnel veer sharply left and right and cross over the center lines of the roadway.

Pimenta stopped the vehicle, which had been driven by defendant, and when he spoke to defendant, he detected a strong smell of alcohol and saw that defendant's eyes were bloodshot and watery. Defendant told Officer Pimenta that he consumed two beers earlier that night.

Officer Giardullo then responded to the scene to administer field sobriety tests. Giardullo testified that defendant had difficulty getting out of his vehicle and got stuck in his seatbelt. Giardullo then administered three sobriety tests, but defendant was unable to perform any of the tests satisfactorily.

Defendant was placed under arrest and transported to Port Authority Police Headquarters where Officer Gawin attempted to administer a breath test. Gawin testified that he read defendant the New Jersey Attorney General's Standard Statement for Motor Vehicle Operations (the Standard Statement), which informed defendant that he was required to submit a breath sample and that if he refused, he would be charged. Gawin also explained the consequences of refusing to submit to the test, including license revocation, installation of an ignition interlock device, referral to a driver training program, and the imposition of various penalties. Thereafter, Gawin twice asked defendant whether he would give a sample of his breath and each time defendant refused

to submit a breath sample. Accordingly, defendant was charged with several offenses, including DWI, refusal, and unsafe lane change.

During his testimony, defendant explained that he had difficulties with sleeping and breathing and those difficulties sometimes affected his physical performance of activities. Leckie was qualified as an expert on field sobriety and breath tests. He opined that none of the field sobriety tests administered to defendant were performed correctly and were therefore unreliable. Leckie also testified that he had reviewed one of defendant's medical reports and opined that sleep-related conditions could affect a person's ability to drive and perform field sobriety tests. When Leckie attempted to testify about defendant's sleep apnea diagnosis and whether defendant had a sleep disorder, the State objected. The municipal judge sustained the objection and did not allow that testimony.

The municipal judge found defendant guilty of operating a motor vehicle while under the influence of alcohol, refusing to submit to a breath test, and failure to maintain a lane. In making those findings, the judge credited the testimony of the officers, including the observations made by Officers Pimenta and Giardullo. The municipal judge also found Officer Gawin's testimony credible concerning defendant's refusal to submit to a breath test. The municipal judge merged the convictions for DWI and refusal and sentenced defendant to a

three-year license suspension, installation of an interlock device in his vehicle for one year, a DWI driver training program, and payment of fines and costs.

Defendant filed an appeal requesting a trial de novo in the Law Division. After reviewing the municipal court record and hearing oral argument, on March 26, 2021, the Law Division issued a written opinion and order finding defendant guilty of DWI and refusal. The Law Division did not impose a new sentence as required under Rule 3:23-8(e). Instead, the Law Division affirmed the sentence imposed by the municipal court. Defendant now appeals from the Law Division's March 26, 2021 order.

II.

On this appeal, defendant makes four arguments, which he articulates as follows:

> POINT I – THE LAW DIVISION ERRED IN DENYING [DEFENDANT'S] CLAIM THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR DRIVING WHILE INTOXICATED.
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> POINT II – THE LAW DIVISION ERRED IN DENYING [DEFENDANT'S] CLAIM THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR REFUSAL.
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> POINT III – THE LAW DIVISION ERRED IN DENYING [DEFENDANT'S] CLAIM THAT THE COURT IMPERMISS[I]BLY LIMITED THE

TESTIMONY OF HIS EXPERT, HERB[ERT] LECKIE, AND THUS DENIED THE DEFENSE THE ABILITY TO PRESENT A FULL AND FAIR DEFENSE.

POINT IV – CUMULATIVE ERRORS DENIED THE DEFENDANT THE RIGHT TO A FAIR TRIAL.

On an appeal of a municipal conviction to the Law Division, the Law Division judge must decide the matter de novo on the record. State v. Monaco, 444 N.J. Super. 539, 549 (App. Div. 2016) (citing R. 3:23-8(a)(2)). This means that the Law Division judge must independently make his or her own factual findings, rather than determine whether the findings of the municipal judge were supported by sufficient credible evidence. State v. Heine, 424 N.J. Super. 48, 58 (App. Div. 2012); see also State v. Johnson, 42 N.J. 146, 157 (1964). In making findings about witness credibility, the Law Division judge should give "due" but "not necessarily controlling" weight to the municipal judge's credibility determinations, because the municipal judge had the opportunity to observe the testimony firsthand. State v. Adubato, 420 N.J. Super. 167, 176 (App. Div. 2011) (quoting Johnson, 42 N.J. at 157).[1]

[1] In his opinion, the Law Division judge correctly identified that he was to conduct a de novo review. At other places in the opinion, however, the judge sometimes stated that he was relying on the municipal judge's findings and deferring to the municipal judge's credibility findings. Our review of the record

When we review the Law Division judge's decision, our standard is different and more limited. We do not decide the facts de novo. Instead, we decide whether the Law Division judge's factual findings were supported by "sufficient credible evidence." State v. Locurto, 157 N.J. 463, 470-71 (1999) (quoting Johnson, 42 N.J. at 161-62); Monaco, 444 N.J. Super. at 549. Where both the municipal judge and the Law Division judge have found a witness credible, we owe particularly strong deference to the Law Division judge's credibility findings. State v. Robertson, 228 N.J. 138 (2017). We review the Law Division judge's legal conclusions de novo. See State v. Rivera, 411 N.J. Super. 492, 497 (App. Div. 2010).

1. The Conviction for DWI.

A person is guilty of DWI if he or she "operates a motor vehicle while under the influence of intoxicating liquor . . . or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood." N.J.S.A. 39:4-50(a). "Under the influence" of alcohol means a driver's "physical coordination or mental faculties are deleteriously

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satisfies us that the Law Division judge conducted an appropriate de novo trial. We remind Law Division judges, however, that they should use the appropriate de novo standard of review and make that clear in their oral or written findings of facts and conclusions of law.

affected." State v. Nunnally, 420 N.J. Super. 58, 67 (App. Div. 2011) (first quoting N.J.S.A. 39:4-50, and then quoting State v. Emery, 27 N.J. 348, 355 (1958)). The driver does not have to be "absolutely 'drunk'" or "sodden with alcohol." State v. Nemesh, 228 N.J. Super. 597, 608 (App. Div. 1988). So long as the alcohol "affects the [driver's] judgment or control . . . 'as to make it improper for him [or her] to drive,'" the driver is under the influence. State v. Cryan, 363 N.J. Super. 442, 455 (App. Div. 2003) (quoting Johnson, 42 N.J. at 165).

Proof of intoxication can be based on a police officer's observations. See State v. Slinger, 281 N.J. Super. 538, 543 (App. Div. 1995). Those observations may include "physical evidence of drunkenness, such as . . . failure of defendant to perform adequately on balance and coordination tests." State v. Ghegan, 213 N.J. Super. 383, 385 (App. Div. 1986); see also State v. Sisti, 209 N.J. Super. 148, 150-51 (App. Div. 1986) (finding that defendant was under the influence based on officer's observations of erratic driving, inability to produce driver's license, an alcoholic odor from defendant's breath, slow hand movements, and failure to pass a field test for balance).

Officer Pimenta testified that he saw defendant driving erratically, smelled alcohol on defendant's breath, saw defendant's eyes were bloodshot and

watery, and observed defendant fumble for his driving documents when asked to provide them. Officer Giardullo testified that defendant got tangled in his seatbelt while exiting his car and failed three field sobriety tests. Based on their observations of defendant, both Pimenta and Giardullo believed that defendant was under the influence of alcohol.

The municipal judge found both officers' testimony credible. The Law Division judge relied on those credibility findings and effectively adopted them. The credible testimony of the officers was sufficient to establish beyond a reasonable doubt that defendant had driven his vehicle while under the influence of alcohol in violation of N.J.S.A. 39:4-50(a).

2. The Conviction for Refusal to Submit to a Breath Test.

Under the implied consent statute, "[a] person who operates a motor vehicle on any public road, street or highway . . . in this State, shall be deemed to have given his [or her] consent to the taking of samples of his [or her] breath for the purposes of making chemical tests to determine alcohol concentration." N.J.S.A. 39:3-10.24(a). If a defendant refuses to provide a breath sample, a police officer must read the Standard Statement, which "inform[s] the person arrested of the consequences of refusing to submit to such test." N.J.S.A. 39:4-50.4a; State v. Marquez, 202 N.J. 485, 501 (2010).

Refusal is "a separate and distinct offense from [the] conviction of drunk driving." State v. Wright, 107 N.J. 488, 504 (1987). Our Supreme Court has outlined four elements to sustain a conviction for refusal to submit to a breath test:

> (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 [DWI]; (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.
>
> [Marquez, 202 N.J. at 503.]

An officer who reads the Standard Statement satisfies the requirement to inform the motorist of the consequences of refusal to submit to a breath test. Id. at 509-10.

The testimony by Officers Pimenta and Giardullo established that there was probable cause to believe that defendant had been driving while under the influence and he was therefore arrested for DWI. Officer Gawin testified that he read defendant the Standard Statement and defendant twice refused to submit to the test. The Law Division judge correctly found that Officer Gawin's testimony complied with the statutory requirements establishing that defendant had been requested to submit to the test but refused. The Law Division judge

also correctly rejected defendant's testimony that he could not recall saying no because that testimony does not undercut the testimony of Officer Gawin. Consequently, there was sufficient evidence to find defendant guilty of refusal.

3. The Testimony of Defendant's Expert.

Defendant argues that the Law Division erred in denying his claim that the municipal court improperly limited Leckie's testimony. The municipal court had sustained the State's objection when Leckie tried to testify about a diagnosis of sleep apnea which Leckie read in a medical report. The Law Division correctly agreed with the municipal court's decision to limit Leckie's testimony.

An expert must have a factual basis for an opinion. Townsend v. Pierre, 221 N.J. 36, 55 (2015). Under N.J.R.E. 703, facts or data on which an expert bases his or her opinion "need not be admissible in evidence" so long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The rule "permits a hearsay statement, such as a medical report by a non-testifying expert, to be referred to by a testifying expert for the purpose of apprising the [fact finder] of the basis for his [or her] opinion." Agha v. Feiner, 198 N.J. 50, 63 (2009). The rule "does not, [however], allow expert testimony to serve as 'a vehicle for the "wholesale [introduction] of otherwise inadmissible evidence."'" Ibid. (second alteration in

original) (quoting State v. Vanderweaghe, 351 N.J. Super. 467, 480-81 (App. Div. 2002)).

N.J.R.E. 808 limits the presentation of hearsay expert opinions. Specifically, that rule directs:

> Expert opinion that is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion tend to establish its trustworthiness. Factors to consider include the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion.

Together Rules 703 and 808 "limit the ability of a testifying expert to convey to [a fact finder] either (1) objective 'facts or data' or (2) subjective 'opinions' based on such facts, which had been set forth in a hearsay report issued by a non-testifying expert." James v. Ruiz, 440 N.J. Super. 45, 66 (App. Div. 2015). "In either instance, the testifying expert may not serve as an improper conduit for substantive declarations (whether they be objective or subjective in nature) by a non-testifying expert source." Ibid.

Leckie was permitted to reference the non-testifying doctor's medical report as it related to his opinion that defendant's sleep condition might have affected defendant's ability to drive or perform field sobriety tests. The Law

Division and municipal court were both correct in limiting Leckie from testifying about the doctor's diagnosis or whether defendant had a sleep disorder. The diagnosis and the issue of whether defendant had a sleep disorder require medical expertise. Leckie had no such expertise. Accordingly, Leckie could not offer an opinion outside his area of expertise by referencing a medical opinion in a report by a non-testifying medical doctor.

4. The Cumulative Errors.

Having rejected all of defendant's substantive arguments concerning errors, there are no cumulative errors warranting a reversal. In analyzing a claim of cumulative errors, the focus is whether the "cumulative effect can cast sufficient doubt on a verdict to require reversal." State v. Jenewicz, 193 N.J. 440, 443 (2008). The record establishes that defendant was accorded a fair trial.

5. The Sentence.

After conducting a trial de novo, the Law Division is required to impose a new sentence. State v. Moran, 202 N.J. 311, 325 (2010) (citing R. 3:23-8(e)). Here, the Law Division judge incorrectly affirmed the municipal court sentence. Accordingly, we remand so that the Law Division can impose a new sentence. That sentence cannot impose penalties beyond the penalties imposed in the municipal court. State v. Ciancaglini, 204 N.J. 597, 604 (2011). In remanding,

we vacate any previously entered stay of defendant's sentence. Accordingly, when defendant is sentenced, the sentence is to take effect immediately.

Affirmed in part and remanded. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION