SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3002-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM MONGILLO, JR.,

Defendant-Appellant.

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Argued October 13, 2022 – Decided December 30, 2022

Before Judges Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Municipal Appeal No. 07-06-2021.

Matthew W. Reisig argued the cause for appellant (Reisig Criminal Defense & DWI Law, LLC, attorney; Matthew W. Reisig, on the brief).

Shaina Brenner, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Annmarie Taggart, Acting Sussex County Prosecutor, attorney; Shaina Brenner, of counsel and on the brief).

PER CURIAM

Defendant William Mongillo appeals from a May 14, 2021 Law Division order, entered after a trial de novo on appeal from the shared Hopatcong and Stanhope municipal court, finding him guilty of driving while under the influence of intoxicating liquor (DUI), N.J.S.A. 39:4-50(a); refusal to submit to a breath test, N.J.S.A. 39:4-50.2; reckless driving, N.J.S.A. 39:4-96; and failure to maintain a lane, N.J.S.A 39:4-88(b). Defendant argues his convictions should be vacated and we should remand this matter because the trial court erred by failing to properly review and consider the exhibits received in evidence at the municipal trial. We find no merit to defendant's arguments and affirm.

I.

The following facts were adduced at the municipal court trial in February 2020. Prior to the start of testimony, the parties stipulated to the admission of a mobile video recording (MVR) into evidence. Defense counsel further agreed to waive the State's obligation to lay a factual and legal foundation for admitting the MVR into evidence.

The State's case consisted entirely of the testimony of Stanhope Police Department Sergeant Ryan P. Hickman. Hickman offered extensive testimony about his observations of defendant and his attempt to have defendant perform

a standard field sobriety test. Defense counsel did not object to the introduction and admission of the New Jersey Standard Statement for Motor Vehicle Operators (SSMVO) and Drinking Driving Questionnaire (DDQ) into evidence. At the end of the trial, the judge reserved decision.

In June 2020, the municipal court judge issued a ten-page decision finding defendant guilty of all charges based on Hickman's observations of defendant. The judge concluded Hickman observed defendant "swerv[ing]" while driving his car and failing to maintain a lane of travel by "crossing the double yellow lines twice."[1] After the officer initiated the stop and advised defendant he was swerving, defendant claimed to be "looking at his GPS" because he "needed directions to get home," although he was only twenty-five yards away. When Hickman asked defendant for his license, registration and insurance, defendant refused to make eye contact. Defendant's movements were "slow and deliberate," and he "dropped some paperwork" taken out of his glovebox. Hickman detected alcohol on defendant's breath as defendant spoke. When asked if he had been drinking, defendant admitted to consuming five beers over the course of three hours.

[1] The record reflects one of the observations was captured on video, while the other occurred prior to the video being activated.

Additionally, the judge determined Hickman directed defendant to get out of the car. Defendant "stumbled a little bit" as he got out of the car. Defendant's eyes jumped like "a typewritter ribbon" when the officer administered the horizontal gaze nystagmus (HGN) test. Hickman could not demonstrate the walk-and-turn test because defendant kept talking. Defendant was unable to complete the test because he was "unable to stand in the starting position," "tried raising his foot" and "stumbled twice."

Based on the officer's observations, defendant's statements and the failed field sobriety test, Hickman determined defendant was under the influence of alcohol. Defendant was then placed under arrest and read his Miranda[2] rights. When asked if he understood his rights, defendant responded "no," then laughed and said he "understood."

At the police station, Hickman read defendant the SSMVO. When asked to take a breath test, defendant replied, "Tomorrow." Defendant was advised his answer was not acceptable and the law required that he submit samples for testing, and defendant would be charged with a refusal for any answer other than "yes.". Defendant then asked, "What is the legal limit in New Jersey?"

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

Hickman made a second attempt to proceed with the standard protocol for drivers arrested for DUI. Defendant was again advised of his Miranda rights. Hickman asked defendant if he had consumed any alcohol to which he responded, "Recently, I haven't had any. I'm with you." Throughout this encounter, defendant's face was "flushed," and his speech was "mumbled and slurred." Also during this time, defendant went from being polite to "uncooperative[,] . . . downright rude," and "antagonistic." Defendant also "[made] fun of [Hickman]."

Considering defendant's testimony, the municipal judge stated he was driving home and was almost in his driveway when he was stopped by Hickman. Defendant testified he was unable to produce documents from the car because he did not know their location. Defendant contradicted Hickman's testimony, stating he: did not stumble when he exited the vehicle; performed the HGN test "very well and very good," and did not oppose a blood or urine test. Defendant also claimed the terrain was not conducive to permit the walk-and-turn test.

Based on the evidence and that of Hickman's, the municipal judge found defendant guilty of all charged offenses. The judge explained that "[t]he observations made by Sergeant Hickman of the [d]efendant, combined with the

totality of the circumstances here, [was] enough to prove beyond a reasonable doubt that the [d]efendant was operating a motor vehicle under the influence."

Regarding defendant's refusal to take a breath test, the judge stated "anything substantially short of an[] unequivocal assent to an officer's request that the [d]efendant take the breath test constitutes a refusal." The judge further found the officer's testimony that defendant did not agree to take the breath test "the most credible testimony," while defendant's testimony was "evasive, . . . disingenuous, misleading, untrustworthy, insincere and untruthful" and summarily described as "acrimonious, rhetorical," and "not credible at all." Accordingly, the judge concluded "the State met its burden of proof [beyond] a reasonable doubt as to all charges." The judge sentenced defendant on the DUI charge as a first offender, suspending defendant's driving privileges for ninety days, and imposing other mandatory fines and penalties. Similarly, the judge imposed the mandatory fines and penalties on the remaining charges, and stayed the sentence pending defendant's appeal to the Law Division. Defendant timely appealed to the Law Division.

At the trial de novo in the Law Division, defendant challenged the conviction, contending the municipal prosecutor's reference to the failure of a female co-worker to testify on defendant's behalf during final summation

constituted plain error under New Jersey law. Defendant also contested the municipal judge's admission of HGN and DDQ evidence. As such, defendant argued the convictions should be reversed and remanded to a "conflict" municipal court.

Following the de novo trial, on May 14, 2021, Judge Louis S. Sceusi rendered a comprehensive written decision. The judge rejected defendant's arguments and concluded the State met its burden as to each charge. The judge accepted Hickman's testimony after considering the thirty-five pages of the officer's direct testimony and his "short" cross-examination. The judge expressly noted Hickman's "first-hand observations" of defendant's intoxication was "substantial evidence " to establish the State's burden of proof. The judge also determined his findings were made "without considering the HGN results or any information elicited from the [DDQ]."

With regard to defendant's failure to maintain a lane charge, Judge Sceusi found Hickman observed defendant deviate from his lane of travel when his driver's side tires crossed over a double yellow line on two occasions. The judge further concluded Hickman's testimony "could be corroborated by reviewing the MVR which was admitted into evidence by stipulation."

Based on the evidence presented and his credibility determinations, the judge also found comments made by the State in its closing summation about a female witness's failure to testify for defendant "did not suggest to the court that it diminished the State's burden of proof." The judge noted defense counsel failed to object to the prosecutor's comments, which "signifie[d] that the defense counsel did not believe the remarks to be prejudicial." Thus, Judge Sceusi concluded the municipal judge's failure to strike this comment did not warrant reversal or remand.

Judge Sceusi also concluded "the admission of HGN and DDQ evidence" was also harmless error "in view of the substantial evidence of [d]efendant's guilt[] from other observational testimony" presented in the municipal court, "which, by itself, [was] sufficient for the [d]efendant to be found guilty on these charges." Based on the judge's de novo review of the evidence, he concluded "there [was] ample additional observational evidence presented" which satisfied the State's burden beyond a reasonable doubt. Consequently, the judge denied the appeal, found defendant guilty of all charges, and imposed the same sentence as the municipal court.

On appeal, defendant raises the sole argument:

> THE APPELLATE DIVISION SHOULD VACATE DEFENDANT-APPELLANT'S MOTOR VEHICLE

CONVICTIONS AND REMAND THE MATTER BACK TO THE SECOND TRIAL COURT SINCE AN OBJECTIVE REVIEW OF THE TRIAL DE NOVO STRONGLY SUGGESTS THAT IT FAILED TO RECEIVE, REVIEW, AND CONSIDER THE EXHIBITS THAT WERE RECEIVED IN EVIDENCE DURING DEFENDANT-APPELLANT'S TRIAL AT THE FIRST TRIAL COURT.

II.

Our standard of review is limited following a de novo appeal to the Law Division, conducted on the record and developed in the municipal court. State v. Adubato, 420 N.J. Super. 167, 175-76 (App. Div. 2011) (citation omitted); see also R. 3:23-8(a)(2). We consider only "'the action of the Law Division and not that of the municipal court.'" State v. Palma, 219 N.J. 584, 591-92 (2014) (quoting State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001)). We do not "'weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence.'" State v. Locurto, 157 N.J. 463, 472 (1999) (quoting State v. Barone, 147 N.J. 599, 615 (1997)).

Conversely, we review de novo the court's legal conclusions and the legal consequences that flow from established facts. See State v. Goodwin, 224 N.J. 102, 110 (2016). We consider only "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Stas, 212 N.J. 37, 48-49 (2012) (quoting Locurto, 157 N.J. at 471); see also

State v. Robertson, 228 N.J. 138, 148 (2017). However, "[a] trial court's resolution of a discovery issue is entitled to substantial deference and will not be overturned absent an abuse of discretion." State v. Stein, 225 N.J. 582, 593 (2016). Likewise, "[w]e review evidentiary rulings under an abuse of discretion standard." State v. Jackson, 243 N.J. 52, 64 (2020); see also Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (noting that the abuse of discretion standard is established "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis'") (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

Given our standard of review, we are satisfied the record contains ample credible evidence to support Judge Sceusi's finding defendant was guilty of all charged offenses.

In contending Judge Sceusi failed to consider exhibits admitted into evidence, defendant particularly argues the judge "never received, reviewed, or considered the MVR evidence." Defendant contends the "[L]aw [D]ivision did not make a single finding in either the trial de novo itself or its statement of reasons describing anything that was depicted on the [twenty-six] minutes, [thirty-]second MVR." Specifically, defendant argues that, in the statement of

reasons which accompanied the May 14, 2021 order, the judge failed to make a "corresponding reference to the MVR evidence" which defendant asserts contradicted Hickman's testimony that he observed defendant twice crossing the double yellow line; "pull[ing] himself up on the door" and "stumbl[ing]" when he got out of the car; and performing the walk-and-turn test. Defendant further argues the judge made his finding "solely" predicated on Hickman's testimony elicited at the municipal court trial.

In support of his argument, defendant relies on Stein for the proposition that, if the MVR contradicts the officer's testimony, such evidence is relevant in contested DUI matters. We reject defendant's arguments and conclude reliance on Stein is misplaced. In Stein, our Supreme Court held municipal prosecutors are required to provide requested videotapes that may have recorded defendant's appearance, behavior, and motor skills pursuant to Rule 7:7-7(b). 225 N.J. at 596-97. Here, there is no discovery violation concerning the MVR.

Additionally, the record is bereft of evidence that Judge Sceusi did not consider all of the evidence presented in the municipal trial. Likewise, the record does not support defendant's claim that a trial de novo was conducted without the MVR. Contrary to defendant's contentions, Judge Sceusi noted the stipulation of the MVR into evidence which supported Hickman's testimony.

Thus, we find no merit in defendant's argument the judge's written opinion "suggests" the MVR was not received or reviewed.

Next, we note, "[a] driver is 'under the influence' of alcohol, N.J.S.A. 39:4-50, when his or her 'physical coordination or mental faculties are deleteriously affected.'" State v. Nunnally, 420 N.J. Super. 58, 67 (App. Div. 2011) (quoting State v. Emery, 27 N.J. 348, 355 (1958)). "'Intoxication' not only includes obvious manifestations of drunkenness but any degree of impairment that affects a person's ability to operate a motor vehicle." State v. Zeikel, 423 N.J. Super. 34, 48 (App. Div. 2011).

Here, Hickman's testimony provided sufficient credible evidence establishing defendant was under the influence of alcohol, engaged in reckless driving and failed to maintain a lane. Defendant admitted to drinking five beers within three hours and prior to the stop, defendant swerved and crossed the double yellow lines twice. Hickman also noted defendant had the smell of alcohol on his breath, mumbled and slurred his words, was not able to complete the field sobriety tests, swayed as he stood, had difficulty finding his license in the glovebox and giving it to Hickman, and could not get out of the car without pulling up on his car's door. As properly determined by the judge, Hickman's "first[]hand observations" were enough and amply supported his testimony that

defendant was "intoxicated," and the judge's findings defendant was "intoxicated". See State v. Bealor, 187 N.J. 574, 588 (2006); see also State v. Corrado, 184 N.J. Super. 561, 567 (App. Div. 1982). Further, we concur with Judge Sceusi that the officer's testimony credibly established defendant engaged in reckless driving and failed to maintain his lane during the incident.

Having reviewed the record and guided by the governing principles, we are satisfied Judge Sceusi conducted a thorough review of the municipal court record in the trial de novo.

To the extent we have not addressed them, any remaining arguments made by defendant lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2).

Affirmed. The stay of defendant's sentence is vacated and remanded to the Law division to impose defendant's sentence on all charges. We do not retain jurisdiction.