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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-3587-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY DAMICO,

Defendant-Appellant.

Submitted October 31, 2022 – Decided November 30, 2022

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Municipal Appeal No. 6253.

Uri J. Roer, LLC, attorney for appellant (Uri J. Roer, of counsel and on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Ali Y. Ozbek, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Anthony Damico appeals the Law Division's July 7, 2021 order upholding a municipal court conviction for driving while intoxicated (DWI), N.J.S.A. 39:4-50(a). The sole question on appeal is whether defendant “operated” his car while intoxicated within the meaning of the statute. We affirm for the reasons that follow.

I.

On October 13, 2019, at 1:23a.m. Officer Matt Bernardo was on patrol alone when he responded to a call for a welfare check at Maggie's Tavern on Hamburg Turnpike. Officer Bernardo arrived at the scene about three to five minutes after the call and observed a single vehicle, a 2000 Ford Ranger pickup truck, parked over the stall line. The officer observed the truck's brake lights and turn signal were on, the vehicle was running, and the key was in the ignition. Officer Bernardo and Sergeant Voight¹ approached the vehicle and saw defendant sitting in the truck's driver's seat, but he was leaning or slouched towards the passenger side. Officer Bernardo officer observed that the driver's seat in the pickup was not reclined, but rather in an upright driving position².

¹ This is the first and only mention of Sergeant Voight in the record, so it is unclear how or when he arrived on scene.

² The Ford Ranger is a single cab pickup truck. Both defendant and his brother, Vincent Damico, testified the seats do not recline.

Officer Bernardo removed the keys from the ignition and woke the defendant up. Officer Bernardo and defendant stayed at the scene for approximately 30 to 40 minutes. Defendant was subsequently arrested and charged with DWI. He was taken to the police barracks where he was picked up two hours later by his father, John Damico.

A virtual trial took place in municipal court on January 22, February 19, and March 23, 2021. Defendant was represented by counsel, and both parties stipulated the only issue at trial would be whether defendant "operated" the vehicle within the meaning of the statute. The State called Officer Bernardo as its sole witness. Defendant and his brother Vincent Damico testified.

On cross examination, Officer Bernardo testified that it would not be unusual for an individual to sit in their car and warm up on a cold evening in October. He also testified that he could not remember the weather for the night in question.

Vincent testified that his brother, defendant, called him for a ride home because he had been drinking that evening. Vincent agreed to do so and told defendant to call him when he was ready to be picked up. Vincent testified he received a call from defendant between 10 p.m. and 11 p.m., but he was delayed getting to defendant because he picked up two other friends. Vincent arrived at

Maggie's Tavern after 2 a.m., but he did not find defendant or his truck. Vincent called defendant unsuccessfully several times. He ultimately decided to go home after failing to reach defendant.

Defendant testified he arrived at the tavern around 7:45 p.m. He ordered at least two drinks. Defendant then called Vincent at 9:12 p.m. and asked him for a ride at the end of the night because he had been drinking. Vincent agreed. Defendant called Vincent again at 10:57 p.m. to ensure his brother could pick him up before the bar closed at midnight. Vincent explained he would be late, and he advised defendant to wait in his car and not drive home. Defendant testified there was nowhere else to wait for his brother, so he got in his pickup. He turned the heat on because he was cold. After falling asleep waiting for his brother, at 1:32 a.m. defendant was awakened by the police. Defendant falsely told police he hadn't been drinking that night because he was on probation and was afraid that he would get in trouble.

At trial defendant testified he was intoxicated when he left the bar but stated he had no intention of driving at that time. On cross examination, defendant admitted he did not tell the police he was waiting for a ride from his brother.

The municipal court judge found defendant not credible, focusing on defendant's failure to tell the police his brother was coming to pick him up. In addition, the judge found defendant's timeline of events inconsistent since defendant and Vincent did not communicate for hours after their last phone call at 10:57 p.m., and Vincent did not arrive at the tavern until after 2 a.m.

After trial, the municipal court found defendant guilty of violating N.J.S.A. 39:4-50. The municipal court sentenced defendant to an eight-year loss of driving privileges, installation of an ignition interlock device, 12 hours at the Intoxicated Driver Resource Center, various fines and penalties, and 180 days in jail.

Defendant appealed his conviction to the Law Division. After oral argument, the Law Division adopted the municipal court's findings and found defendant guilty of driving while intoxicated. The Law Division imposed the same sentence.

On appeal, defendant raises the following points in his brief:

POINT I

THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT OPERATED A MOTOR VEHICLE WHILE UNDER THE INFLUENCE IN VIOLATION OF AND REQUIRED BY N.J.S.A. 39:4-50.

A. The State failed to present sufficient evidence to establish beyond a reasonable doubt that the defendant intended operate his vehicle while intoxicated.

POINT II

BY FINDING THE DEFENDANT GUILTY OF A DUI THE COURTS ARE ACTUALLY DISCOURAGING INTOXICATED INDIVIDUALS FROM BEING RESPONSIBLE AND SLEEPING OFF THEIR INTOXICATION AND INSTEAD ARE ENCOURAGING DRIVERS TO OPERATE THEIR VEHICLES WHILE INTOXICATED.

II.

The Law Division reviews municipal court determinations de novo on the record. R. 3:23-8(a)(2). That court gives no deference to a municipal court's findings of facts or conclusions of law but should generally defer to a municipal court's credibility findings. See State v. Robertson, 228 N.J. 138, 147 (2017).

We review "de novo verdict[s] after a municipal court trial . . . to 'determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering the proofs as a whole." State v. Ebert, 377 N.J. Super. 1, 8 (App. Div. 2005) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). We also give deference to the trial court's factual determinations. Johnson, 42 N.J. at 161.

Moreover, we give greatest deference when the municipal court and Law Division make concurrent factual findings, unless there is a "very obvious and exceptional showing of error." State v. Locurto, 157 N.J. 463, 474 (1999). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

III.

We turn to the sole issue. N.J.S.A. 39:4-50(a) provides that a person "who 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" is guilty of driving while intoxicated. We broadly interpret the term "operates" to include more than driving. See State v. Tischio, 107 N.J. 504, 513 (1987); State v. Mulcahy, 107 N.J. 467, 478-79 (1987). Operation may be established by a variety of circumstances, including "actual observation of the defendant driving while intoxicated," "observation of the defendant in or out of the vehicle under circumstances indicating that the defendant had been driving while intoxicated," or the defendant's admission. Ebert, 377 N.J. Super. at 10-11. Furthermore,

"[o]peration may be proved by any direct or circumstantial evidence – as long as it is competent and meets the requisite standards of proof." State v. George, 257 N.J. Super. 493, 497 (App. Div. 1992) (citing State v. Dancyger, 29 N.J. 76, 84 (1959)).

We previously sustained a DWI conviction against an intoxicated defendant who was found sleeping in his car with the engine running while parked in a convenience store parking lot. State v. Thompson, 462 N.J. Super. 370, 373-75 (App. Div. 2020). Under those circumstances, we concluded "[t]here is no doubt that an intoxicated . . . defendant behind the wheel of a motor vehicle with the engine running is operating the vehicle within the meaning of N.J.S.A. 39:4-50(a), even if the vehicle was not observed in motion; it is 'the possibility of motion' that is relevant." Id. at 375 (quoting State v. Stiene, 203 N.J. Super. 275, 279 (App. Div. 1985)).

The record contains ample credible evidence to support finding beyond a reasonable doubt that defendant had demonstrated an intent to drive. Officers found defendant in his pickup late at night with the engine running. The truck's turn signal was on, and the brake lights activated. The officer saw defendant's foot on the brake pedal when he looked into the truck upon his arrival.

Although defendant testified that he called his brother for a ride and did not intend on driving, the court found his testimony not credible. Although no one observed defendant drive, the condition the pickup was found in, coupled with defendant's failure to tell police he was waiting for a ride, provided ample evidence of the possibility of motion. Thompson, 462 N.J. Super. at 375.

We reject defendant's contention that he is entitled to relief under State v. Daly, 64 N.J. 122 (1973). In Daly, the Court found that the State failed to prove that the defendant intended to move the motor vehicle where he had been found sleeping in the parking lot of the tavern. Id. at 124-25. The defendant credibly testified that he got into his car after leaving the tavern in order to sleep, reclined the seat, and turned on the motor to keep warm. Id. at 124. The Court held that operation could not be inferred beyond a reasonable doubt as the defendant had not demonstrated an intent to drive. Id. at 125.

Here, defendant was found not credible, and he was found slumped over in his seat with his foot on the brake and the turn signal on. These facts, along with the rest of the record, distinguish this matter from Daly. Considering the principles set forth above, we are satisfied the Law Division found defendant guilty based on sufficient, credible evidence in the record.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION