SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0716-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MALICK THIOUBOU,

Defendant-Appellant.

Submitted March 20, 2023 – Decided April 20, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Municipal Appeal No. 21-06-0087.

Malick Thioubou, appellant pro se.

Raymond S. Santiago, Monmouth County Prosecutor, attorney for respondent (Alecia Woodard, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Malick Thioubou appeals from the September 17, 2021 Law Division order finding him guilty, following a de novo review, of refusing to submit to a breathalyzer, N.J.S.A. 39:4-50.4(a); failure to maintain travel on a marked lane, N.J.S.A. 39:4-88; and disorderly person obstructing administration of law, N.J.S.A. 2C:29-1(a). Based on our review of the record and applicable legal principles, we affirm.

I.

On May 16, 2017, at 1:50 a.m., Officer Robert Hagerman of the Neptune Police Department observed defendant operating his vehicle while exiting a parking lot on Route 71 and Main Avenue in Neptune Township. Officer Hagerman noticed defendant's vehicle had tinted windows and proceeded to follow him. Thereafter, he observed defendant's vehicle drift into the right lane of travel and then back to the center. Officer Hagerman initiated a motor vehicle stop, approached defendant's vehicle, and requested his driver's license, registration, and insurance card. During this interaction, Officer Hagerman detected an odor of alcohol emanating from defendant's vehicle and further observed defendant's face was flushed and that his eyes were bloodshot and watery. Officer Hagerman directed defendant to step out of his vehicle, but he initially refused. After approximately thirty minutes, along with additional

officers arriving at the scene, defendant got out of his vehicle and was arrested for obstruction. He was then transported to police headquarters for the administration of field sobriety testing (FST). Officer Hagerman, who is certified in the administration of FST, administered the tests, which defendant failed.

Officer Hagerman also requested defendant to submit to an Alcotest, but he refused. Officer Hagerman subsequently read the Attorney General standard statement for motor vehicle operators to defendant as required pursuant to N.J.S.A. 39:4-50.2(e). Defendant ultimately refused to submit to the test, even after being read the additional paragraph in the standard statement.

Defendant was subsequently charged with driving while intoxicated (DWI), N.J.S.A. 39:4-50; refusal to provide samples of breath, N.J.S.A. 39:4-50.2; reckless driving, N.J.S.A. 39:4-96; failure to maintain lanes, N.J.S.A. 39:4-88(b); improper tinted windows, N.J.S.A. 39:3-75; and fourth-degree obstruction of administration of law, N.J.S.A. 2C:29-1(a).

Defendant was initially scheduled for trial on March 18, 2019. He failed to appear, and the municipal court conducted a trial in absentia. Defendant was found guilty of DWI, refusal to provide breath samples, failure to maintain travel

on a marked lane, and obstruction.[1] Defendant appealed the conviction, and with the State's consent, the Superior Court vacated the conviction and remanded the matter for a retrial by order dated October 7, 2019.

The matter was ultimately assigned to a different municipal court judge. However, the newly assigned judge had a conflict, and the case had to be reassigned. A third municipal court judge began the trial on February 12, 2020. Defendant sought to dismiss the charges, alleging a denial of a speedy trial and a violation the Superior Court's order dated October 7, 2019, which required defendant to be tried on or before November 15, 2019. While the motion was not properly served on the State, the municipal court considered the motion on its merits and denied it, noting the delay was occasioned by the necessity of assigning a new judge to the case because of a conflict. Moreover, there were additional delays associated with the COVID-19 pandemic in completing the trial.[2]

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[1] The Law Division court noted, "[a]lthough not at all clear from the municipal judge's decision in the transcript, court documents indicate defendant was found not guilty of reckless driving, school property DWI, and the tinted window violation."

[2] The trial started on February 12, 2020, continued on November 9, 2020, and ultimately concluded on March 15, 2021.

Officer Hagerman was the only witness to testify. The municipal court ultimately found Officer Hagerman's testimony credible as to why he stopped defendant's vehicle. Moreover, the court determined there was a reasonable basis for suspecting defendant of violating the DWI statute based on the officer's initial observations, coupled with defendant's subsequent failure of the FST. The court ultimately convicted defendant of the following charges: refusal to provide breath samples, obstruction, and failure to maintain travel on a marked lane.[3]

Defendant subsequently filed an appeal. The Law Division conducted a trial de novo on August 21, 2021, and September 1, 2021. Judge Michael A. Guadagno issued a thorough and comprehensive opinion, discussed more fully below, finding defendant guilty of refusal to submit to a breathalyzer, failure to maintain travel on a marked lane, and disorderly person obstructing administration of law.

Defendant raises the following issues on appeal:

> POINT I
>
> There is insufficient evidence [the officer] had articulable and reasonable suspicion to stop defendant's

[3] Defendant was also found guilty of the tinted window violation. The Law Division dismissed that charge, noting the municipal court judge at retrial did not recognize the tinted windows charge had been dismissed at the first trial.

vehicle. [The officer's] observation of a suspected violation of [N.J.S.A.] 39:3-75 was a mistake of fact and law.

POINT II

There is insufficient evidence [the officer] had articulable and reasonable suspicion to stop defendant's vehicle. [The officer's] investigatory traffic stop of defendant's vehicle was an unlawful and unconstitutional seizure under the [Fourth A]mendment of the U.S[.] Constitution and Article 1, ¶ 7 of the New Jersey Constitution due to lack of sufficient articulable and reasonable suspicion.

POINT III

Subsequent [to] the unlawful and unconstitutional seizure of [d]efendant's vehicle, any alleged probable cause was insufficient to broaden the scope of the traffic stop beyond a brief and cursory investigation into a de facto arrest and unconstitutional seizure of [d]efendant's person via ordering [d]efendant out of his vehicle, subsequently resulting in [d]efendant erroneously being charged with [N.J.S.A.] 2C:29-1[(]a[)]. The exclusionary rule is applicable.

POINT IV

Defendant's conviction of [N.J.S.A.] 39:4-50.2 (and amended [N.J.S.A.] 39:4-50.4(a)) should be vacated because there was insufficient probable cause to subject [defendant] to the [b]reathalyzer test.

POINT V

Defendant contends the municipal trial judge did err and abused his discretion in his dismissal of

> [defendant's] motion to dismiss these matters pursuant to . . . Rule 3:25-4(g) and . . . Rule 7:8-5.
>
> POINT VI
>
> Defendant contends the trial judge did err and abuse his discretion in deeming the March 18[, 2018] proceedings transcript inadmissible as evidence.
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> POINT VII (Not Raised Below)
>
> Relying on the arguments herein, [d]efendant proffers that the . . . Law Division . . . abused it[]s discretion and did err in its opinion in finding [d]efendant guilty and re-imposing the [m]unicipal court sentence.

II.

When a defendant appeals from a municipal court conviction, the Law Division judge reviews the matter de novo on the record. R. 3:23-8(a)(2). The Law Division judge must make independent "findings of fact and conclusions of law but defers to the municipal court's credibility findings." State v. Robertson, 228 N.J. 138, 147 (2017).

Our review of a de novo conviction in the Law Division following a municipal court appeal is "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). Unlike the Law Division, we do not independently assess the evidence. Id. at 471-72. The "standard of review of a de novo verdict after a municipal court trial is 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)). The rule of deference is more compelling where, as here, the municipal and Law Division judges made concurrent findings. Locurto, 157 N.J. at 474. "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." Ibid. (citing Midler v. Heinowitz, 10 N.J. 123, 128-29 (1952)). However, our review of a trial court's legal determination is plenary. See State v. Kuropchak, 221 N.J. 368, 383 (2015).

III.

As to defendant's claim Officer Hagerman lacked a proper basis to stop his car based on the tinted windows charge, Judge Guadagno agreed the State failed to produce sufficient evidence the tinting on defendant's windows caused an "unsafe distortion" pursuant to N.J.S.A. 39:3-75[4] to warrant a conviction.

[4] N.J.S.A. 39:3-75, in pertinent part, provides:

> The term "safety glass" shall be construed as meaning glass so treated or combined with other

However, the court noted the companion statute, N.J.S.A. 39:3-74,[5] has been construed to provide a reasonable basis for a law enforcement officer to conduct a traffic stop where there is a reasonable articulable suspicion the windshield or front dash windows of a vehicle are illegally tinted. State v. Cohen, 347 N.J.

> materials as to reduce, in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from exterior sources or by glass when the glass is cracked or broken. The term "safety glazing material" shall be construed as meaning "safety glass" . . . . The term "approved safety glazing material" shall be construed as meaning safety glazing material of a type approved by the director. . . .
>
> No person shall drive any motor vehicle . . . unless such vehicle is equipped with approved safety glazing material . . . .
>
> . . . .
>
> No person shall drive any motor vehicle equipped with safety glazing material which causes undue or unsafe distortion of visibility . . . .

[5] N.J.S.A. 39:3-74, in pertinent part, provides:

> No person shall drive any motor vehicle with any sign, poster, sticker or other non-transparent material upon the front windshield . . . or front side windows of such vehicle other than a certificate or other article required to be so displayed by statute or by regulations of the commissioner.

Super. 375, 380 (App. Div. 2002). Significantly, however, Judge Guadagno noted the tinted windows were not the basis for the stop. Specifically, he noted, "[a]lthough Officer Hagerman first noticed defendant's car because of the tinted windows, Officer Hagerman did not initiate the traffic stop until he observed defendant swerving out of his lane." The court relied on State v. Regis for the proposition that the failure to maintain a driver's lane is a discrete violation of N.J.S.A. 39:4-88(b). 208 N.J. 439, 442 (2011). Moreover, a traffic stop is lawful when based upon reasonable and articulable suspicion that a traffic offense has been committed. State v. Amelio, 197 N.J. 207, 211 (2008).

Judge Guadagno further rejected defendant's argument there was no justification to order him out of the car and arrest him for obstruction pursuant to N.J.S.A. 2C:29-1.[6] The court noted Officer Hagerman detected the odor of alcohol emanating from defendant's vehicle and further observed his bloodshot

[6] N.J.S.A. 2C:29-1 provides in pertinent part:

> a. A person commits an offense if he purposely obstructs, impairs[,] or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.

and watery eyes. The court further observed Officer Hagerman was "lawfully performing an official function" when he requested defendant to get out of his vehicle. Furthermore, Judge Guadagno determined defendant was required to comply with the request, and his refusal to do so constituted a violation of N.J.S.A. 2C:29-1. See State v. Crawley, 187 N.J. 440, 460 (2006).

Judge Guadagno was also unpersuaded by defendant's argument there was an insufficient basis to subject him to a breathalyzer test. The court referenced the municipal court judge's finding Officer Hagerman's testimony was credible regarding the reasons for the initial stop and the suspicion of DWI based on his observations of the odor of alcohol emanating from defendant's car, coupled with defendant's appearance—bloodshot, watery eyes, and a flushed face. The court noted despite defendant's cross-examination of Officer Hagerman, there was no basis to challenge the municipal court's credibility findings, which Judge Guadagno ultimately adopted. He further noted Officer Hagerman was justified in asking defendant to step out of the vehicle, based on his observations pursuant to State v. Smith, 134 N.J. 599, 611 (1994). The court noted:

> Even though the initial stop was for a motor vehicle violation, Officer Hagerman was 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 suspicions unrelated to the traffic offense.'" State v. Dickey, 152 N.J. 468, 479-80 (1998).

The court noted Officer Hagerman's initial observations were reinforced by defendant's performance on the FST. In short, Judge Guadagno stated the totality of the events "established probable cause for Officer Hagerman to believe that defendant had been driving while intoxicated and justified his request that defendant provide a breath sample."

Concerning defendant's argument that the municipal court judge erred in not granting the motion to dismiss because the retrial did not proceed until 128 days after the remand order, Judge Guadagno noted there are four factors to consider in evaluating claims of a denial of a right to a speedy trial. Relying on State v. Cahill, 213 N.J. 253, 258 (2013), he noted that the court must consider the length of delay, reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The judge further noted that the Cahill Court instructed that a delay greater than one year would trigger an analysis of other factors. 213 N.J. at 266. Judge Guadagno explained:

> The 128-day delay between the retrial order and the start of the retrial is well short of this deadline. Moreover, the reasons for the delay including two municipal court reassignments and the overall disruptions caused by the pandemic are compelling. Finally, defendant has shown no prejudice as a result of the delay.

Lastly, Judge Guadagno rejected defendant's argument the municipal court improperly failed to introduce the transcripts from the first municipal court trial into evidence. The court noted defendant was given an opportunity to cross-examine Officer Hagerman based on any alleged inconsistencies between his testimony in the two proceedings. Moreover, the court noted, "[t]he fact that the transcript was not admitted into evidence did not prejudice defendant."

We affirm substantially for the reasons set forth in Judge Guadagno's opinion. We add the following comments.

We are mindful of our Supreme Court's recent decision in State v. Smith, 251 N.J. 244 (2022), subsequent to Judge Guadagno's opinion in this matter. There, the Court determined that Trenton detectives improperly conducted a motor vehicle stop based on window tinting to the defendant's rear window. Id. at 252. The Court determined N.J.S.A. 39:3-75 does not apply to aftermarket tinted window films, as the plain language of the statute indicates it is "concerned solely with the quality and maintenance of . . . safety glazing material . . . ." Id. at 261. The Court further determined that tinting on a rear windshield does not constitute a violation of N.J.S.A. 39:3-74 based on the plain language of the statute, which only applies to front windshield and front side window tinting. Id. at 260. In addressing the argument that the statute was

unconstitutionally vague, the Court noted, "[w]e hold that the term 'non-transparent' used in N.J.S.A. 39:3-74 is not impermissibly vague and means that reasonable suspicion of a tinted windows violation arises when a vehicle's front windshield or front side windows are so darkly tinted that police cannot clearly see people or articles within the car." Id. at 265.

Smith is not applicable here. First, Officer Hagerman observed defendant had "front tinted windows," as opposed to the detectives in Smith, whose only basis for the motor vehicle stop was the defendant's rear tinted window. Id. at 252. Second, although the record was not fully developed before the municipal court as to whether defendant's front windows were "so darkly tinted that police [could not] clearly see people or articles within the car," there was a separate basis for the traffic stop—defendant failing to maintain the lane of travel. Id. at 265. The officer did not pull defendant over until he saw him swerve. We agree this was an independent and proper basis to justify the stop in this case.

We are also unpersuaded by defendant's arguments there was insufficient probable cause to subject him to a breathalyzer test. Defendant's swerving vehicle, the odor of alcohol emanating from his car, his bloodshot and watery eyes, along with his performance of the FST, provided the officer with probable

cause to believe defendant had been driving while intoxicated and thereby justifying his request for a breath sample.

Finally, defendant has provided no controlling authority for his argument in favor of the wholesale admission of the initial municipal court transcript into evidence at the second trial. Initially, we observe testimony elicited at a prior trial in the same case is considered hearsay. N.J.R.E. 801(c)(1); State v. McInerney, 450 N.J. Super. 509, 518-519 (App. Div. 2017). Although Officer Hagerman's prior testimony may have been admissible if he was unavailable as a witness under N.J.R.E. 804(b)(1), he was available for the second proceeding. The municipal court judge properly permitted defendant to cross-examine Officer Hagerman based on any prior inconsistent statements in the transcripts in accordance with N.J.R.E. 803(a)(1). Accordingly, Judge Guadagno properly determined there was no error.[7]

[7] Defendant additionally contends there are "material facts still in dispute." Defendant had an opportunity to go to trial where the municipal court made credibility findings that were subsequently adopted by the Law Division. The courts made specific findings which are supported by the record. We discern no basis to disturb those findings.

To the extent that we have not otherwise addressed defendant's arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION