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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1348-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AKIL SECI,

Defendant-Appellant.

Submitted January 19, 2023 – Decided January 24, 2023

Before Judges Haas and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Municipal Appeal No. 21-13.

Camili & Capo, PA, attorneys for appellant (Krenar Camili, of counsel and on the brief; Christopher W. Hsieh, on the brief).

Mark Musella, Bergen County Prosecutor, attorney for respondent (Edward F. Ray, Assistant Prosecutor, on the brief).

PER CURIAM

Following a trial de novo in the Law Division, defendant Akil Seci appeals from his convictions for two motor vehicle violations. Because the trial court did not scrupulously honor defendant's right to present an alibi defense, we reverse and remand for a new trial.

On November 23, 2019, the State served three motor vehicle summonses upon defendant by mail. The summonses charged defendant with improper passing, contrary to N.J.S.A. 39:4-85; failing to operate in a marked lane, contrary to N.J.S.A. 39:4-88; and careless driving, contrary to N.J.S.A. 39:4-97. At a proceeding in the municipal court on January 27, 2021, defendant orally advised the municipal court judge and the State that he wished to contest the charges at a trial because he was not driving the vehicle in question at the time of the alleged violations.¹

The municipal court judge conducted a trial on June 23, 2021.² At the outset, the judge asked defendant if he was waiving his right to be represented

¹ The record indicates that defendant appeared several times in the municipal court in response to the charges. However, the parties have only provided us with a copy of the June 23, 2021 trial transcript from the municipal court, and the December 21, 2021 Law Division transcript.

² The municipal court judge conducted the trial using Zoom.

by an attorney, and prepared for trial. Defendant replied, "I'm prepared for trial."

After that brief inquiry, the State called Officer Michael Pellegrino as its only witness. Pellegrino testified that at 4:40 p.m. on November 22, 2019, he was in his personal vehicle returning home from work. According to Pellegrino, traffic was at a "dead stop" at the "fly-over" lane where Route 298 North and Interstate 287 South merged. As he was stopped, Pellegrino looked in his side mirror and saw a white Ford Raptor truck travelling quickly up the right shoulder of the road, outside the fog line that marked the lanes of travel. Pellegrino claimed the truck did not have tinted windows. As the truck passed him, Pellegrino saw a "middle-aged white male" driving it. Pellegrino wrote down the truck's license number, but did not pursue the vehicle.

The next day, Pellegrino went to work and ran the truck's license plate. He found that the truck belonged to a company called Seci Construction Incorporated, and that it was associated with defendant's driver's license. Pellegrino was able to view defendant's driver's license photograph and testified

it matched the person he saw driving the truck the previous day.³ Pellegrino then issued the three traffic violation summonses to defendant by mail.

Defendant did not cross-examine Pellegrino. Instead, he told the judge that he had proof he was in the hospital on November 22, 2019 at the time the violations allegedly occurred. Defendant stated:

I was not in Franklin Lakes at 4:40 p.m. I was in a hospital. I just got a ride home. I did a surgery on November 22nd at 5:19 p.m. I have a picture of Hackensack Hospital, which did a very big surgery, and thank God I was just able to find that picture. I can prove that . . . I was not in the car, . . . my hair was long to my neck, so today I have no hair whatsoever. I have tinted windows. I have a Raptor SUV with limo tinted windows, and this guy saying all these things, that he seen me, all of this, something just doesn't add up here, Your Honor, and I'm willing to prove everything that I need, the surgery from Hackensack Hospital on November 21st and 22nd, and I have that picture. I have - - it shows a Raptor with tinted windows and anything else I can prove that I wasn't in the vehicle at that time.

At that point, the State objected to defendant's attempt to raise an alibi defense. Although defendant had told both the court and the State at the January 27, 2021 proceeding about his claim that he was not driving the truck at the time of the alleged violations, the judge stated this was the first time defendant

³ Pellegrino also identified defendant as the driver by viewing him on the video feed during the municipal court trial.

claimed he was not on the highway that day. The judge excluded defendant's testimony concerning his alibi, stating that defendant failed to comply with the requirement that a defendant "furnish the prosecuting attorney with a signed statement of alibi, specifying the specific place or places at which defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish the alibi." R. 7:7-3(1); see also R. 3:12-2(a).

After the judge barred defendant from testifying concerning his hospital stay, or presenting photographic or documentary evidence concerning it or the condition of his truck's windows, the judge found defendant guilty of all three traffic offenses. Defendant retained an attorney and filed an appeal to the Law Division. The Law Division conducted a trial de novo on December 21, 2021.

Before the Law Division, defendant argued the municipal court improperly prevented him from presenting evidence concerning his alibi defense. Defendant's attorney explained that because the Law Division proceeding was based on the existing record, he did not attempt to assemble defendant's documentary evidence for submission at that time. Defendant's attorney asked that the court remand the matter for a new trial to enable

defendant to testify concerning his alibi and present his written and photographic proofs.⁴

After oral argument, the judge told defendant to look in his cell phone for photographs of his hospital stay. Defendant was able to locate two photographs where he was lying in a hospital bed and showed them to the court via Zoom. The photographs were taken on November 19, 2019, rather than on the day of the offense. After noting this, the judge remarked, "We don't have the hospital bill. I don't have the hospital records. He didn't acquire them. And I understand why [defense counsel] would not acquire them now, . . . because that's not the record below." The judge then stated, "I have enough to decide this[,]" and reserved decision.

On December 22, 2021, the Law Division judge issued a written decision finding defendant guilty of improper passing and failing to operate in a marked lane, and not guilty of careless driving. In a footnote, the judge stated that the municipal court judge erred by prohibiting defendant from presenting his alibi evidence at trial. The judge stated that he "allow[ed] . . . defendant to

⁴ Defendant also asserted that Pellegrino's identification of defendant as the driver of the truck was faulty because he only viewed defendant's driver's license photograph instead of examining a photo array assembled by a neutral police officer.

supplement the record and show this court the photographs." As noted above, however, the judge did not permit defendant to testify, describe the photographs, or provide any written records concerning his hospital stay.

Nevertheless, the judge found that defendant's claim that he was in the hospital was not credible because the only two photographs he found on his phone were taken three days before the incident near Interstate 287. This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

THE LAW DIVISION JUDGE VIOLATED [DEFENDANT'S] RIGHTS TO TESTIFY ON HIS OWN BEHALF AND TO PRESENT A COMPLETE DEFENSE BY FINDING HIM GUILTY WITHOUT ALLOWING HIM TO TESTIFY REGARDING ALIBI, CONTRARY TO STATE V. BRADSHAW[, 195 N.J. 493 (2008)].

POINT TWO

A NEW TRIAL IS REQUIRED BECAUSE THE MUNICIPAL JUDGE FAILED TO DETERMINE WHETHER [DEFENDANT] KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL AT TRIAL. (NOT RAISED BELOW).

POINT THREE

THE IDENTIFICATION WAS HIGHLY UNRELIABLE AND SHOULD HAVE BEEN

SUPPRESSED, AS IT WAS TAINTED BY AN INHERENTLY SUGGESTIVE ONE-PHOTO SHOWUP MADE MORE THAN TWO HOURS AFTER THE EVENT, IN VIOLATION OF STATE V. HENDERSON[, 208 N.J. 208 (2011)].

We address only defendant's first claim of error, as this decision makes the others moot. For the reasons that follow, we conclude that the Law Division incorrectly prohibited defendant from presenting a complete alibi defense and, therefore, we reverse and remand for a new trial.

On appeal from a municipal court, the Law Division's review is de novo. R. 3:23-8(a)(2). The Law Division makes independent findings of fact and conclusions of law but defers to the municipal court's credibility findings where applicable. State v. Robertson, 228 N.J. 138, 147 (2017).

On a subsequent appeal from the Law Division to this court, our review of the Law Division's factual findings is limited to whether the conclusions "could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 162 (1964). Unlike the Law Division, we do not independently assess the evidence. State v. Locurto, 157 N.J. 463, 471 (1999). "Therefore, appellate review of the factual and credibility findings of the municipal court and the Law Division 'is exceedingly narrow.'" State v. Reece, 222 N.J. 154, 167 (2015) (quoting Locurto, 157 N.J. at 470).

However, the Law Division'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 Manalapan, 140 N.J. 366, 378 (1995). "[W]here issues on appeal turn on purely legal determinations, [this court's] review is plenary." State v. Monaco, 444 N.J. Super. 539, 549 (App. Div. 2016).

In municipal court proceedings, Rule 7:7-3(b) states that when a defendant fails to provide the State with the signed statement of alibi and other information required by Rule 7:7-3(a), "the court may refuse to permit the party in default to present witnesses at trial as to defendant's presence at or absence from the scene of the alleged offense or make any other order or grant any adjournment or continuance as may be required in the interest of justice." This same directive applies to Law Division proceedings under Rule 3:12-2(b). Our Supreme Court has interpreted this "rule to mean that only in the rarest circumstances should the 'interest of justice standard' result in a prohibition of a defendant's own alibi testimony as an appropriate sanction." Bradshaw, 195 N.J. at 507.

In Bradshaw, a defendant, who was on trial for sexual assault, notified the prosecution for the first time during trial that he intended to testify that he was elsewhere at the time of the assault. Id. at 498. The trial judge precluded the

defendant from testifying about his claimed alibi because of the late notice he provided to the State concerning it. Id. at 498-99.

In its opinion, the Court established the following four-factor balancing test for determining whether witness preclusion is the appropriate sanction where a defendant has failed to furnish notice of an alibi defense:

[I]n reaching a fair determination for the appropriate sanction for the breach of the alibi rule, the trial court should consider: (1) the prejudice to the State; (2) the prejudice to the defendant; (3) whether other less severe sanctions are available to preserve the policy of the rule, such as a continuance or a mistrial to permit the State to investigate the alibi; and (4) whether the defendant's failure to give notice was willful and intended to gain a tactical advantage.

[Id. at 507-08.]

The Court further stated that "[a]bsent a finding that the factors on balance favor preclusion, the interest of justice standard requires a less severe sanction" than the preclusion of the alibi evidence. Id. at 508.

Applying these factors, it is clear that the Law Division judge mistakenly prevented defendant from presenting his own testimony and all of his documentary evidence on the question of whether he had a viable alibi defense. The State did not identify any prejudice it would suffer if the matter were remanded to the municipal court. Defendant notified the State almost five

months before the June 23, 2021 municipal court trial that he was claiming he was not the driver of the truck. Yet, the State did not demand that he furnish any further information about this claim. See R. 7:7-3(a); R. 3:12-2(a). The entire trial took less than thirty minutes, and the court could have provided the State with a continuance to enable it to evaluate any of defendant's documentary evidence.

On the other hand, defendant was greatly prejudiced by the preclusion of his evidence. Defendant's alibi claim was his primary defense to the traffic violations. Yet, the municipal court judge prevented him from providing any alibi evidence at trial, and the Law Division judge barred defendant from testifying and from assembling and presenting all the documentary evidence his defense counsel asserted could be available.

Turning to the third factor, a short continuance of the proceedings would have harmed no one. Finally, nothing in the record supports the State's contention that defendant's failure to give written notice of his alibi claim was willful or designed to give defendant a tactical advantage in the proceedings.

In short, "we are satisfied that this [was] not that rare circumstance when a defendant's violation of the alibi rule should have resulted in the sanction of preclusion" of his testimony and documentary evidence, as occurred in the

municipal court. Bradshaw, 195 N.J. at 509. Although the Law Division judge permitted defendant to present two photographs, he precluded defendant from testifying about them or submitting any additional documentary proofs. As the Supreme Court suggested in Bradshaw, only the "full scope of defendant's testimony" will allow the court to "fairly evaluate the evidence and determine the credibility of the witnesses." Id. at 509-10.

The Law Division therefore mistakenly exercised its discretion when it denied defendant the opportunity to present his alibi defense through a remand to the municipal court. Accordingly, we reverse the Law Division's December 22, 2021 decision, and remand to the municipal court for a new trial on the two remaining alleged traffic violations.

Reversed 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