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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1790-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAFAEL B. DURAN,

Defendant-Appellant.

Argued February 27, 2023 – Decided March 9, 2023

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Municipal Appeal No. 6264.

Vache E. Bahadurian argued the cause for appellant.

Timothy Kerrigan, Senior Assistant Prosecutor, argued the cause for respondent (Camelia M. Valdes, Passaic County Prosecutor, attorney; Timothy Kerrigan, of counsel and on the brief).

PER CURIAM

Defendant Rafael B. Duran appeals from a February 17, 2021 order entered by the Law Division denying his municipal court appeal. We affirm.

This matter was tried in the Clifton Municipal Court, which heard testimony from Clifton Police Officer Angelo Milordo. He testified that on November 8, 2020, at 12:53 a.m., he and another officer were dispatched to a bar and restaurant for a welfare check on a vehicle that was occupied and running in the restaurant's parking lot. The restaurant was in a strip mall adjacent to a roadway. When Officer Milordo arrived, there were only two cars in the parking lot. The second car belonged to the 9-1-1 caller, who stayed on scene to explain why they called and then left.

Officer Milordo observed the first vehicle was running because it had its lights on and exhaust was coming from its tailpipe. He discovered defendant asleep in the driver's seat. He confirmed defendant was alive because his chest moved evidencing breathing. As a result, both officers started banging on the windows. Defendant awoke after a few minutes. Officer Milordo requested defendant roll down his windows and observed defendant was slow-moving, lethargic, and had bloodshot, watery eyes. Defendant denied he was drinking alcohol, but Officer Milordo detected a faint odor of alcohol on his breath.

Defendant stated he was traveling home from his parents' house and had stopped at the restaurant to have some drinks. He claimed to be sleeping. His home was approximately two miles away and not within walking distance, and defendant never claimed he intended to walk home.

After defendant produced his credentials, Officer Milordo asked him to exit the vehicle to perform sobriety tests. The officer observed defendant was slow moving and lethargic while exiting the vehicle, and once outside the car he swayed back and forth on the pavement. Defendant told the officers he loved them. Officer Milordo administered the heel-to-toe and one-leg-stand field sobriety tests. Defendant partially executed the former test and failed to complete the latter because he continued swaying. Officer Milordo terminated the second test and arrested defendant for driving while intoxicated (DWI), N.J.S.A. 39:4-50(a). At the police station defendant denied he was injured, under the care of a doctor, or took prescriptions.

After the State rested, the defense moved to dismiss, challenging Officer Milordo's identification testimony, arguing he was unable to identify defendant in court. Defendant asserted the officer was prodded by the prosecutor and needed to refer to his report to refresh his recollection to such a degree his testimony was unreliable. He also argued police lacked reasonable suspicion

for the stop because there was no evidence of an emergency or public safety issue requiring police to remove defendant from the car while he was sleeping. He noted the State did not admit the 9-1-1 call into evidence and the dispatch lacked details.

Defendant argued police executed an investigatory stop by blocking his car and asking defendant for his credentials rather than inquiring about his welfare. He asserted police lacked probable cause to arrest him because the officer's testimony regarding the field sobriety tests was inadequate proof of intoxication. Defendant claimed his slow movement, watery eyes, and lethargy were due to him being in a deep sleep, as evidenced by the efforts to wake him. There was no evidence of intent to operate the vehicle because Officer Milordo testified defendant told him he was sleeping because he was tired. Moreover, defendant's car was lawfully parked in a parking space.

The municipal court judge agreed the officer's identification was "not the most positive . . . [but] was sufficient for the purposes" of proving "defendant was the person behind the wheel of the vehicle on the night in question." The judge found defendant's denial of alcohol consumption was a "critical statement" because the officer detected alcohol on his breath after defendant stated he was drinking. The judge found the testimony regarding the field sobriety tests "less

than satisfactory, in that . . . [the officer] was unable to clearly articulate the nature of the instructions that he gave." The judge blamed this on the "inordinate passage of time . . . between the . . . events and the . . . testimony" caused by the pandemic. As a result, the judge did not consider the field sobriety tests, but did credit the officer's testimony regarding defendant's swaying and inability to stand after he exited the vehicle, in addition to the odor of alcohol on his breath.

The municipal court judge referenced a picture of the restaurant and noted it was reasonable for police to park behind defendant's vehicle because the parking spaces were "pitched . . . from the building toward the street." Therefore, it was reasonable for police to position their vehicle behind defendant's for safety reasons.

The judge concluded Officer Milordo's "less than perfect" testimony did not negate his credible testimony the totality of the circumstances established reasonable suspicion for the stop and probable cause for the arrest. The judge denied defendant's motion, defendant entered a conditional guilty plea, and was sentenced accordingly.

On appeal to the Law Division, defendant reiterated his challenges to Officer Milordo's testimony and the credibility findings. He also challenged the

constitutionality of the stop for the same reasons articulated in the municipal court.

The Law Division judge made oral findings restating the facts as we have recounted them. Although the judge deferred to the municipal judge's credibility findings "because he had the ability to see and hear the officer testify," he "[i]ndependently, . . . also [found] Officer Milordo credible . . . [because h]is testimony was knowledgeable. He had some difficulty with questions. He attributed his difficult[y] to being tired and apologized to the [c]ourt."

As an example of the officer's credibility, the Law Division judge cited his difficulty identifying defendant in court. The judge found the fact the officer "could have easily said that [defendant] is the person sitting next to his attorney" but did not, bolstered his credibility because "[thirteen] months had passed from the arrest date . . . and the suppression motion" He rejected defendant's argument there was an identification issue, noting the record established "[t]here is no likelihood of misidentification in this case."

The judge found the stop was lawful. He stated:

The 9-1-1 call provided justification for Officer Milordo to approach [defendant's] vehicle and wake him up. The call from a concerned citizen is viewed more credible than an anonymous informant because such a person is motivated by factors that are consistent with law enforcement goals. . . . Police can trace the

identity of a 9-1-1 caller, and that enhances his reliability. Furthermore, the 9-1-1 caller waited at the scene for the police to arrive.

Therefore, "[i]t was reasonable for Officer Milordo to approach the vehicle, wake up [defendant], and ask him questions." The judge rejected defendant's argument the welfare check was a pretext to conduct an investigatory stop as "without merit."

The Law Division judge also rejected defendant's argument there was no probable cause for arrest. He concluded the officer's observations of defendant's conduct, the alcohol emanating from his breath, and his assertion he was not drinking, but had stopped for drinks before heading home caused "the caretaking function of the officers [to] evolve[] into an investig[at]ory stop." These observations, in addition to defendant's inability to perform the field sobriety tests, provided "ample probable cause to arrest" defendant for DWI.

The judge rejected defendant's assertion he lacked intent to operate the vehicle. He concluded there was an intent to operate because defendant "was asleep in his motor vehicle, sitting in the driver's seat. No one else was in the vehicle. The engine was running, the lights were on, and exhaust was coming out." Further, defendant's admission that he stopped at the restaurant "for some drinks and then he was going home . . . [was] an indication of his intent to

operate his motor vehicle. It is reasonable to conclude that he was going to drive home."

The judge entered the February 17, 2022 order denying the suppression motion. The order returned the matter to the municipal court for execution of the judgment.

On appeal, defendant raises the following arguments:

I. THE LAW DIVISION ERRED IN RULING THE STATE'S IN-COURT IDENTIFICATION OF THE DEFENDANT WAS PROPER AND RELIABLE.

II. THE LAW DIVISION ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

a. The Law Division erred in ruling the stop and investigatory detention of the [d]efendant were lawful and supported by sufficient credible evidence.

b. The Law Division erred in ruling the arrest of the [d]efendant was lawful and supported by sufficient credible evidence.

1. The Law Division erred in ruling the State presented sufficient credible evidence that the [d]efendant operated a vehicle.

2. The Law Division erred in ruling the State presented sufficient credible evidence that the [d]efendant was under the influence of alcohol.

Following a de novo appeal to the Law Division, conducted on the record developed in the municipal court, our standard of review is limited. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005); 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. Joas, 34 N.J. 179, 184 (1961)). The Law Division judge must make independent findings of fact and conclusions of law based on the evidentiary record of the municipal court with deference to the municipal court judge's ability to assess the witnesses' credibility. State v. Johnson, 42 N.J. 146, 157 (1964). This is because the municipal court has the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Elders, 192 N.J. 224, 244 (2007) (quoting Johnson, 42 N.J. at 161). In turn, we focus our review on "whether there is 'sufficient credible evidence . . . in the record' to support the trial court's findings." State v. Robertson, 228 N.J. 138, 148 (2017) (alteration in original) (quoting Johnson, 42 N.J. at 162). However, our review of legal determinations is plenary. See State v. Kuropchak, 221 N.J. 368, 383 (2015).

When the only issue on appeal is the trial court's decision on a motion to suppress, our review is similarly circumscribed. State v. Robinson, 200 N.J. 1,

16 (2009). "An appellate court reviewing a motion to suppress evidence . . . must uphold the factual findings underlying the trial court's decision, provided that those findings are 'supported by sufficient credible evidence in the record.'" State v. Boone, 232 N.J. 417, 425-26 (2017) (quoting State v. Scriven, 226 N.J. 20, 40 (2016)). We owe no deference to conclusions of law made by the trial court in suppression decisions, which we instead review de novo. State v. Watts, 223 N.J. 503, 516 (2015).

"Warrantless searches are permissible only if 'justified by one of the "few specifically established and well-delineated exceptions" to the warrant requirement.'" State v. Witt, 223 N.J. 409, 422 (2015) (quoting State v. Frankel, 179 N.J. 586, 598 (2004)). "[T]he State bears the burden of proving by a preponderance of the evidence that [the] warrantless search or seizure" falls within an exception. Elders, 192 N.J. at 246.

"Courts have allowed warrantless searches . . . when police officers have acted not in their law enforcement or criminal investigatory role, but rather in a community[-]caretaking function." State v. Bogan, 200 N.J. 61, 73 (2009). "In performing these tasks, typically, there is not time to acquire a warrant when emergent circumstances arise and an immediate search is required to preserve life or property." State v. Edmonds, 211 N.J. 117, 141 (2012).

"An investigatory stop or detention is constitutional only 'if it is based on "specific and articulable facts which, taken together with rational inferences from those facts," give rise to a reasonable suspicion of criminal activity.'" Elders, 192 N.J. at 247 (quoting State v. Rodriguez, 172 N.J. 117, 126 (2002)). "To determine whether the State has shown a valid investigative detention requires a consideration of the totality of the circumstances." Ibid.

Pursuant to these principles, we affirm substantially for the reasons expressed in the Law Division judge's opinion. We add the following comments.

The State proved by a preponderance of the evidence that defendant was in fact the person Officer Milordo arrested the night of the incident. Defendant presented his credentials to the officer. Moreover, the Law Division judge's finding the officer's identification testimony, while less than perfect was nonetheless honest, is supported by the record.

The Law Division judge did not abuse his discretion in denying the motion to suppress. The totality of the circumstances show police were called not for law enforcement purposes but out of the 9-1-1 caller's concern for the defendant's welfare. The record does not support the notion police blocked the vehicle for investigatory purposes.

Likewise, the Law Division judge neither misapplied his discretion nor made a mistake of law when he concluded the investigatory stop exception applied after Officer Milordo began interacting with defendant. The totality of the circumstances, including defendant's lethargic manner, watery eyes, breath, admission he was stopped at the restaurant for drinks, being seated in the driver's seat of a running car, and swaying once he was outside the vehicle, amply supports the finding of reasonable suspicion.

These facts further supported the probable cause finding. The preponderance of the credible evidence showed defendant was intoxicated, and his statements to police while sitting behind the wheel of a running vehicle were sufficient evidence of a violation of N.J.S.A. 39:4-50(a), warranting his arrest. See State v. Sweeney, 40 N.J. 359, 361 (1963) (holding a trial court can infer intent to operate a vehicle while intoxicated from the evidence, including where a defendant "enters a stationary vehicle . . . in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle").

Affirmed.

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



CLERK OF THE APPELLATE DIVISION