SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3519-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEPHEN J. WARDENSKI,

Defendant-Appellant.

Submitted November 16, 2016 – Decided December 15, 2016

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Union County, Municipal Appeal No. 6212.

Eric M. Mark, attorney for appellant.

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Stephen Wardenski appeals from a conviction after a trial de novo in the Law Division for driving while intoxicated, N.J.S.A. 39:4-50. We affirm.

On December 17, 2013, defendant was charged with driving while intoxicated (DUI), in violation of N.J.S.A. 39:4-50, along with several other motor vehicle violations. On August 7, 2014, a municipal court judge found defendant guilty of DUI. All additional summonses were dismissed pursuant to a finding of guilty under N.J.S.A. 39:4-50, subject to being reopened in the event of a successful appeal.

A de novo hearing was held before a Law Division judge on February 17, 2015. Defendant was found guilty on the DUI charge and sentenced to a ten-year loss of driver's license; 180-days to be served in the Union County jail; and installation of ignition interlock device on his vehicle for thirteen years. Further, defendant was ordered to pay appropriate fines and penalties. Defendant filed a timely notice of appeal.

We discern the following undisputed facts from the trial record. On December 17, 2013, at approximately 2:30 a.m., Officer Mark Gresham of the Rahway Police Department was dispatched to a residence on a report of a suspicious vehicle that was illegally parked. Upon his arrival at the scene, Gresham observed a 1993 Pontiac parked approximately one-and-a-half to two feet away from the curb. The vehicle was running with the keys in the ignition. Defendant was observed sitting in the driver's seat. Additionally,

Gresham observed four bottles of vodka, three of which had broken seals and were half empty.

As Gresham approached defendant he detected the odor of alcohol emanating from defendant and the vehicle. The officer asked defendant where he was coming from. After first responding with an unintelligible answer, defendant replied in slurred speech that he was coming from his "backyard." It was later determined defendant's residence was located approximately one mile from the location of the vehicle.

Gresham requested defendant exit the vehicle. As defendant complied, he stumbled and leaned on the vehicle for support. Corporal Nicolas Robles then arrived at the scene and attempted to administer the horizontal gaze nystagmus (HGN) test.[1] Based upon his training, Robles concluded defendant was unable to maintain his balance to a degree to allow him to perform the test and placed defendant under arrest.

The sole matter in dispute was whether defendant operated the vehicle. Defendant stipulated to the fact that his blood alcohol level content (BAC) was found to be 0.29%, and that the incident occurred within a school zone.

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[1] HGN tests are not admissible at trial as "neither this court nor our Supreme Court has yet endorsed HGN testing." State v. Doriguzzi, 334 N.J. Super. 530, 533 (App. Div. 2000). However, police can use them to ascertain probable cause. Id. at 546.

A trial commenced on August 7, 2014. Defendant testified as to his version of the events. According to defendant, he was staying with a friend who lived in the area. They were watching TV and drinking and both went outside to smoke. While outside, the friend slipped and fell on ice. Defendant took his friend to the vehicle to treat his facial wounds but could not recall whether he had put the keys in the ignition or started the vehicle, but he "probably did" to warm up. He and his friend were occupants of the vehicle for approximately a half-an-hour prior to the officers' arrival on the scene. Upon the officers' arrival, one of the officers tended to his friend that "was in bad shape," and then permitted the friend to return to the residence.

In contravention thereto, Gresham, Robles and Officer Andrew Webb, who arrived at the scene later, testified they did not recall seeing any other individual in the vehicle other than defendant. The three officers testified that given the circumstances, had another individual been present, that individual would not be permitted to leave the scene per protocol.

At the conclusion of the trial, the judge found defendant guilty, holding that the State proved beyond a reasonable doubt that defendant operated the vehicle while intoxicated by establishing the key was in the ignition and the engine was running. The judge determined that the position of the vehicle

coupled with defendant's admission that he was coming from his backyard located a few blocks away supported a finding that defendant operated the vehicle. Additionally, the judge found defendant's claim that he did not intend to operate the vehicle upon the officers' arrival, but rather was helping a hurt friend, was not credible. The judge imposed a ten-year suspension of defendant's driving privileges, a 180-day jail sentence, and applicable fines and penalties associate with his conviction. The judge stayed the sentence pending appeal.

The Law Division judge upon a de novo review also found defendant's version of events not credible. The judge found that defendant both operated the vehicle prior to the arrival of the police and intended to operate the vehicle. As such, the judge found defendant guilty, vacated the stay, and imposed the same sentence as the municipal court judge.

Defendant raises the following points on appeal:

POINT I

> THE JUDGE ACTED AS THE PROSECUTOR BY ASKING IMPROPER QUESTIONS OF WITNESSES OUTSIDE THE BOUNDS OF PERMISSIBLE JUDICIAL QUESTIONING. [(NOT RAISED BELOW.)]

POINT II

> THERE IS INSUFFICIENT EVIDENCE TO PROVE OPERATION OF THE MOTOR VEHICLE BEYOND A REASONABLE DOUBT.

In an appeal from a de novo hearing on the record, we consider only the action of the Law Division and not that of the municipal court. State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001) (citations omitted). Our standard of review of a Law Division judge's decision is limited to determining only whether the findings made by the judge could reasonably have been reached on the sufficient credible evidence present in the record. State v. Locurto, 157 N.J. 463, 472 (1999); State v. Johnson, 42 N.J. 146, 162 (1964).

"That the case may be a close one or that the trial court decided all evidence or inference conflicts in favor of one side has no special effect." Johnson, supra, 42 N.J. at 162. We will reverse only after being "thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction . . . ." Ibid.

A Law Division judge in a trial de novo must make findings of fact based upon the record made in the municipal court. State v. Ross, 189 N.J. Super. 67, 75 (App. Div.), certif. denied, 95 N.J. 197 (1983). The judge's function "is not the appellate function governed by the substantial evidence rule but rather an independent fact-finding function . . . ." Ibid. (citations omitted).

Additionally, we accord great deference to the consistent conclusions of two other courts and "[u]nder the two-court rule, [we] 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." State v. Stas, 212 N.J. 37, 49 n.2 (2012) (citing Locurto, supra, 157 N.J. at 474; State v. Oliver, 320 N.J. Super. 405, 421 (App. Div.), certif. denied, 161 N.J. 332 (1999)).

Here, the Law Division judge made independent findings regarding defendant's operation of the vehicle and his intent to operate the vehicle. The judge also made credibility findings. We defer to those findings. However, our review of legal determinations is plenary. See State v. Handy, 206 N.J. 39, 45 (2011).

Defendant asserts his conviction must be vacated as there was insufficient evidence to prove that he operated the vehicle while intoxicated. We are not persuaded.

We first address the issue of operation. To sustain the conviction, the State must prove beyond a reasonable doubt that defendant operated his automobile while under the influence of intoxicating liquor. State v. Ebert, 377 N.J. Super. 1, 10 (App. Div. 2005); State v. Grant, 196 N.J. Super. 470, 477 (App. Div.

1984).[2] Determining what constitutes operation has been the subject of many judicial decisions, which guide our review and lead to the conclusion legal operation was shown beyond a reasonable doubt.

The term "operates" as used in N.J.S.A. 39:4-50(a) has been broadly interpreted. State v. Tischio, 107 N.J. 504, 513 (1987), appeal dismissed, 484 U.S. 1038, 108 S. Ct. 768, 98 L. Ed. 2d 855 (1988); State v. Mulcahy, 107 N.J. 467, 478 (1987). "Operation 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) (citations omitted). Courts have consistently adopted a practical and broad interpretation of the term "operation" in order to express fully the meaning of the statute. Tischio, supra, 107 N.J. at 513; State v. Morris, 262 N.J. Super. 413, 417 (App. Div. 1993).

The Supreme Court first discussed the scope of "operation" in State v. Sweeney, 40 N.J. 359, 360-361 (1963). In affirming the defendant's conviction, the Court held:

> [A] person "operates" — or for that matter, "drives" — a motor vehicle under the influence of intoxicating liquor, within the meaning of N.J.S.A. 39:4-50 . . . when, in that condition, he enters a stationary vehicle, on

[2] As noted, defendant stipulated to being under the influence.

> a public highway or 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[.]
>
> [Ibid.]

Evidence of "intent to move the vehicle" satisfies the statutory requirement of operation so that actual movement is not required. Ibid.

Here, there was sufficient circumstantial evidence which supported the finding that defendant operated or intended to operate the vehicle. The judge found defendant either drove to the scene or, as evidenced by defendant being in the driver's seat with the keys in the ignition and the engine running, intended to operate the vehicle. In sum, given the record before us and our standard of review, we discern no reason to disturb the Law Division judge's determination.[3]

Defendant's remaining argument is raised for the first time on appeal. This court will not address an issue on appeal that parties have not raised before the trial court absent concerns

[3] From our review of the trial transcript, we find defendant's argument, raised for the first time on appeal, that the municipal court judge acted as prosecutor by questioning police witnesses to lack merit. We agree with the State that the questions were limited to police protocol concerning whether the officers would have allowed an individual to leave the scene as defendant claimed occurred. See State v. Taffaro, 195 N.J. 442, 451 (2008).

involving "the jurisdiction of the trial court" or "matters of great public interest." Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)). Guided by this standard, and in the absence of such concerns, we need not consider defendant's remaining argument.

Affirmed.