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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6044-10T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN R. BENNETT,

Defendant-Appellant.

Argued April 25, 2012 - Decided December 18, 2013

Before Judges Fuentes, Harris and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Municipal Appeal No. 2010-45.

Robert Ramsey argued the cause for appellant (Donini & Ramsey, attorneys; Mr. Ramsey, on the brief).

Jennifer Moran, Assistant Prosecutor, argued the cause for respondent (Joseph L. Bocchini, Jr., Mercer County Prosecutor, attorney; Ms. Moran of counsel and on the brief; John M. Jingoli, Jr., Assistant Prosecutor, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

By leave granted, defendant John R. Bennett appeals from the order of the Law Division reversing the decision of the Princeton Municipal Court to suppress evidence seized by the

police that led to him being charged with driving while intoxicated (DWI), N.J.S.A. 39:4-50, and refusal to provide samples of his breath for the purpose of determining the content of alcohol in his blood, in violation of N.J.S.A. 39:4-50.2.

In this appeal, defendant argues the Law Division erred in relying on the community caretaking doctrine to justify intrusive and constitutionally impermissible law enforcement conduct by the arresting police officer. Defendant also argues the Law Division incorrectly found that the character and duration of the arresting officer's interaction with defendant prior to his arrest were permissible byproducts of a valid investigative detention. The State urges us to affirm the Law Division's decision as a proper application of the community caretaking doctrine to the salient facts of this case. The State also adopts the Law Division's characterization of the conduct of the police officer who interacted with defendant at the scene as permissible investigative techniques.

After reviewing the evidentiary record developed before the municipal court and presented to the Law Division, we reverse. We are satisfied that the actions taken by the police officer at the scene do not fall under the purview of the community caretaking doctrine nor do they constitute constitutionally permissible investigative techniques.

The following facts were stipulated by the parties before the municipal court and the Law Division. These facts were recited by the Law Division judge in his memorandum of decision.

> [Princeton Borough Police Sergeant Steven] Riccitello was at the WAWA convenience store on University Place in Princeton Borough at around 2:49 a.m. on [Sunday] October 3, 2010 [responding to a] report of a gathering of a large crowd of student customers. The WAWA is adjacent to the Princeton University campus.
>
> While Riccitello stood in front of the store, defendant pulled a 2005 Chevrolet Tahoe into the parking space directly in front of the officer. A passenger quickly exited the automobile and entered the store, while defendant remained inside the vehicle. Riccitello's attention "was drawn to the driver . . . as he was groggy and appeared to be falling asleep behind the steering wheel with the engine running." Riccitello then approached the vehicle and opened the door to speak to the driver.

The evidence Riccitello obtained from defendant this point forward is the object of his motion to suppress. Based on this evidence, the municipal court judge initially found the State failed to meet its burden that Sergeant Riccitello was performing a community caretaking act by opening the door of the vehicle because his primary concern was for defendant's safety and wellbeing. The Law Division judge found the stop and subsequent actions by Sergeant Riccitello were proper as an investigatory stop.

The trial judge found Riccitello was justified in opening defendant's car door because there was a reasonable articulable suspicion that defendant had committed "a motor vehicle violation." According to the Law Division, given the hour, 2:49 in the morning on a Sunday, and the location, near a university campus in October, it was

> objectively reasonable to conclude that consumption of alcohol occurs more frequently at night than during the day; and on Saturday night more frequently than, say, a Tuesday night. Moreover, it is reasonable to conclude that a person confronted late in the evening is more likely to have consumed alcohol than a person confronted earlier in the evening.

The Law Division judge also indicated that what he characterized as "common sense observations" have been "confirmed by social science research." (emphasis added). The judge then cited to a final report issued by the University of North Carolina Highway Safety Research Center in October 2000, entitled "Development and Evaluation of a Comprehensive Program to Reduce Drinking and Impaired Driving Among College Students." According to the judge, "[t]he study surveyed over 1700 college students at the University of North Carolina, Chapel Hill, returning to their campus residences between 10 pm and 3 am." The judge noted that among the students matching this profile, "roughly 60 percent had consumed alcohol to measure over .02

percent BAC, and almost 40 percent had a BAC over .08 percent BAC."

Armed with this data, the Law Division found Riccitello noticed that defendant "appeared to be falling asleep behind the wheel with the engine running . . . [and] also appeared to be groggy." From these "two facts," the judge found Riccitello had more than a "'mere hunch' to suspect a person was driving under the influence [of some intoxicant] when the person actually appears to be physically impaired." According to the Law Division judge, "appearing to fall asleep and being groggy is consistent with being under the influence of alcohol."

The Law Division then construed "groggy" as derivative from the word "grog," relying on the New Collegiate Dictionary, G. & C. Merriam Co., (1981), which defines "groggy" as "unsteady on the feet or in action." The judge also returned to social scientific research and studies in the form of an undated report from the National Highway Traffic Safety Administration to support the notion that "when someone looks like he has been drinking, it is reasonable to suspect that he was drinking."

Notwithstanding these findings, the Law Division also found Sergeant Riccitello's conduct was justified under the community caretaking doctrine. The judge found that the same two factors that could have justified Riccitello's suspicion that defendant

was under the influence of alcohol, grogginess and appearing to fall asleep behind the wheel of a running automobile, could have been viewed as indicators of illness or distress.

Against this record and analysis, defendant appeals raising the following arguments.

> POINT I
>
> THE FACTUAL FINDINGS OF THE LAW DIVISION JUDGE WERE BASED UPON PERSONAL OPINIONS AND PURPORTED SCIENTIFIC EVIDENCE THAT WERE COMPLETELY OUTSIDE THE TRIAL RECORD.
>
> POINT II
>
> THE LAW DIVISION'S DETERMINATION THAT THE POLICE ACTION WAS JUSTIFIED UNDER THE COMMUNITY CARETAKING DOCTRINE WAS INCORRECT AS A MATTER OF LAW.

As we noted earlier, we are satisfied that Sergeant Riccitello's conduct in opening defendant's car door without making any attempt to talk to defendant or investigate the matter further to determine whether he had a reasonable basis to proceed was legally improper. Any evidence seized or derived by the State from this unconstitutional violation is suppressed.

We start our analysis by reviewing our Supreme Court's decisions concerning reasonable suspicion and investigatory detention.

> An investigatory stop is valid only if the officer has a <u>particularized suspicion based upon an objective observation that the person stopped has been [engaged] or is</u>

> about to engage in criminal wrongdoing. The articulable reasons or particularized suspicion of criminal activity must be based upon the law enforcement officer's assessment of the totality of circumstances with which he is faced. Such observations are those that, in view of [the] officer's experience and knowledge, taken together with rational inferences drawn from those facts, reasonabl[y] warrant the limited intrusion upon the individual's freedom.
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> [State v. Nishina, 175 N.J. 502, 511 (2003) (quoting State v. Davis, 104 N.J. 490, 504 (1986)) (emphasis added) (internal quotation marks omitted).]

Applying these principles to the undisputed, salient facts in this case, there is no rational basis to conclude that at the time Sergeant Riccitello saw defendant falling asleep behind the steering wheel of his running car, he had a particularized suspicion, based upon an objective observation, that defendant had been driving or was about to drive while under the influence of some unknown intoxicant. As the Court made clear in Nishina, the officer's particularized suspicion must be based on his assessment of the totality of circumstances, in view of the officer's experience and knowledge. Social scientific studies, dictionary definitions, or even a judge's personal "common sense" extrapolations cannot substitute or preempt these standards.

Here, Sergeant Riccitello should have knocked on defendant's car window and engaged in conversation with him to

determine whether he had alcohol on his breath or was otherwise too tired or sleepy to drive safely. Based on the outcome of these preliminary and limited interactions, Riccitello could have asked defendant to produce his driving credentials or even step out of the car to see if he was unsteady on his feet.

Seeing a young man, who may or may not be a student at Princeton, legally drive his vehicle into a parking space outside a convenience store in the early morning hours on a Sunday, and while parked, put his head down and close his eyes, does not give a police officer legal grounds to open the young man's car door. Under the totality of these circumstances, Sergeant Riccitello's conduct was not legally sustainable as a valid investigatory stop.

We reach the same conclusion with respect to the applicability of the community-caretaking doctrine. Once again we start our discussion by reviewing what our Supreme Court has stated with respect to this legal doctrine.

> The community-caretaking doctrine recognizes that police officers provide a "wide range of social services" outside of their traditional law enforcement and criminal investigatory roles. These social-welfare activities include, among other things, protecting the vulnerable from harm and preserving property. 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.

> This narrow exception to the warrant requirement has been applied to such circumstances as allowing the police to conduct a warrantless search of a car to locate a gun that was missing from a police officer, to perform a "welfare check" of a vehicle that was parked in an area known for suicides and whose last authorized driver was listed as a missing person and to set foot in an apartment to ascertain the welfare of a child who was home from school, with no apparent excuse, in a residence that had been the site of an alleged sexual assault earlier that day[.] The community-caretaking functions in these cases were permissible without a warrant because they were "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."
>
> [State v. Edmonds, 211 N.J. 117, 141-142 (2012) (internal citations omitted).]

It is essentially unquestioned that Sergeant Riccitello's conduct in opening defendant's car door was motivated by his belief that defendant may be under the influence of an unknown intoxicant. There is no basis to conclude that his actions were not intended to detect, investigate, or acquire evidence relating to a possible violation of a Title 39 offense. The State cannot invoke the community-caretaking doctrine to convert an unconstitutional investigatory act to acquire inculpatory evidence without probable cause into a benign attempt to verify defendant's health status.

Reversed.

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

CLERK OF THE APPELLATE DIVISION