SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1791-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RYAN PESCHIERI,

Defendant-Appellant.

Submitted October 11, 2022 – Decided November 16, 2022

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey, Ocean County, Municipal Appeal No. 20-0005.

The O'Mara Law Firm, attorneys for appellant (Peter M. O'Mara, of counsel and on the brief).

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Cheryl L. Hammel, Assistant Prosecutor, on the brief).

PER CURIAM

On January 12, 2019, around 2:00 a.m., the Toms River Police Department received a phone call from a male resident that there was a "suspicious" parked car on the resident's street for about thirty minutes with its motor running and brake lights on. Shortly thereafter, Police Officer David Talty driving a marked police car pulled up behind defendant's car, got out and approached the driver's side of defendant's car, which had its motor running and brake lights on as reported. When Talty asked defendant where he was coming from, the officer noticed defendant's eyes were watery, his face was pale, and the smell of alcohol was emanating from his breath. In addition, Talty observed defendant fumbling with his wallet to find his driving credentials. Defendant admitted drinking two or three beers when asked if he had been drinking.

Defendant complied with Talty's request to get out of the car to perform field sobriety tests. After assessing that he failed the tests, Talty arrested defendant for drunk driving. At the police station, Alcotest test results revealed defendant's blood alcohol concentration (BAC) was 0.14 percent, over the legal limit of 0.08 percent set by N.J.S.A. 39:4-50, resulting in defendant being charged with driving while intoxicated (DWI).

Before the municipal court, defendant moved to suppress the Alcotest results contending there was no probable cause to approach defendant's car

which led to his arrest for DWI. The court denied the motion, finding Talty's encounter with defendant was based upon his role as a community caretaker. At the trial's conclusion, the court determined there was probable cause to arrest defendant based on Talty's observation of defendant in the car and his failed sobriety tests. The court also determined the Alcotest was properly administered, with the test results confirming defendant was guilty of DWI, his third such offense.

Defendant appealed to the Law Division, where the court conducted a trial de novo on the record. The Law Division judge affirmed defendant's conviction and sentence, agreeing with the municipal court that there was probable cause for Talty's investigation and encounter with defendant under the community caretaking doctrine leading to his DWI arrest, and that the Alcotest was properly admitted.[1]

In this appeal, defendant argues:

> POINT I
>
> THE ARRESTING OFFICER[']S SEIZURE OF MR. PESCHIERI WARRANTS THE CONSTITUTIONAL PROTECTIONS OF THE FOURTH AMENDMENT.

[1] Defendant's request to stay his license suspension pending appeal was granted by the Law Division judge.

POINT II

THE OFFICER DID NOT HAVE PARTICULARIZED SUSPICIONS THAT DEFENDANT HAD BEEN, OR WAS ABOUT TO ENGAGE IN CRIMINAL WRONGDOING, THEREBY MAKING THIS SEIZURE AND INQUIRY UNCONSTITUTIONAL, AND ALL EVIDENCE OBTAINED THEREAFTER INADMISSIBLE.

POINT III

THE OFFICER'S TESTIMONY DOES NOT PROVIDE FACTS WHICH ARE UNUSUAL ENOUGH FOR TIME AND PLACE TO WARRANT THE CLOSER SCRUTINY OF A COMMUNITY CARETAKING STOP AND INQUIRY.

POINT IV

OFFICER TALTY DID NOT HAVE REASONABLE ARTICULABLE SUSPICION TO JUSTIFY THE INVESTIGATORY STOP OF MR. PESCHIERI.

POINT V

THE ARRESTING OFFICER'S [INVESTIGATIVE] DETENTION AND SUBSEQUENT SEIZURE OF MR. PESCHIERI WARRANTS THE CONSTITUTIONAL PROTECTIONS OF THE [FOURTH] AMENDMENT.

POINT VI

THE OFFICER DID NOT HAVE PARTICULARIZED SUSPICIONS THAT DEFENDANT HAD BEEN, OR WAS ABOUT TO ENGAGE IN CRIMINAL WRONGDOING, THEREBY MAKING THIS

SEIZURE AND INQUIRY UNCONSTITUTIONAL, AND ALL EVIDENCE OBTAINED THEREAFTER INADMISSIBLE.

POINT VII

THE ALCOTEST RESULTS IN THIS MATTER SHOULD HAVE BEEN RULED INADMISSIBLE.

Based upon our consideration of the parties' arguments, review of the record, and the applicable legal principles, we affirm.

I

We first address defendant's contention that Talty's "stop" of his legally parked car violated his Fourth Amendment rights, thereby making evidence of his intoxication inadmissible as fruits of an illegal detention. He argues Talty's blocking his car and insisting he roll down his car window constituted a seizure under the Fourth Amendment without "reasonable, particularized facts to believe criminal activity was afoot." Defendant argues "the seizure was not justified under community caretaking law since the facts presented by [Talty] are not unusual enough to warrant even a slight and temporary intrusion into [his] privacy." We are unpersuaded.

There is no significant factual dispute concerning defendant's encounter with Talty. The judge held:

> That there's been a call to [d]ispatch from a homeowner about a suspicious vehicle in the neighborhood, and it's approximately 2[:00] a.m.
>
> Talty is familiar with the neighborhood and characterized it as an upper[-]class neighborhood. The caller provided the specific address where the vehicle had been parked for about 30 minutes.
>
> Talty arrives at the address identified by the caller. The defendant's vehicle is parked there. It's occupied only by the defendant. The lights were on and the engine is running. There are no other vehicles parked within the immediate vicinity of that address at that time.
>
> Now I think that some of those facts raise the [specter] of community caretaking. [Defense counsel] disagrees. I'm not suggesting I would make those findings, but it certainly raises the [specter] of whether or not an individual, who is in a vehicle between 1:30 and 2[:00] a.m., is having problems, either health or with the operation of the vehicle, and I don't mean from a Title 39 perspective, I mean from the equipment side violation of the motor vehicle. I do think that this rises to the level of field inquiry. I think that Officer Talty had a duty to approach that to inquire of the defendant whether there were any problems and to engage in a limited non constitutionally constrained exchange with . . . defendant.

The judge's factual findings and credibility determinations echoed the municipal court's ruling. Because we discern no exceptional error in those rulings, we defer to them. See State v. Locurto, 157 N.J. 463, 474 (1999) (citing Midler v. Heinowitz, 10 N.J. 123, 128-29 (1952)) ("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.").

In exercising plenary review of the judge's legal conclusions that flow from established facts, State v. Handy, 206 N.J. 39, 45 (2011), we conclude the judge correctly determined Talty's investigation of defendant in his parked car with his motor running and brake lights on in response to a resident's report was a proper exercise of the community caretaking doctrine and, therefore, not a violation of defendant's constitutional rights.

The community-caretaking doctrine, first enunciated by the Supreme Court in Cady v. Dombrowski, 413 U.S. 433 (1973), is an exception to the warrant requirement based on the awareness that police officers "often are called on to perform dual roles." State v. Diloreto, 180 N.J. 264, 276 (2004). "The . . . doctrine recognizes that police officers provide a wide range of social services outside of their traditional law enforcement and criminal investigatory roles." State v. Scriven, 226 N.J. 20, 38 (2016) (internal quotation marks and citations omitted). The doctrine provides an independent justification for intrusions into a citizen's liberty that would otherwise require a showing of probable cause or reasonable and articulable suspicion of criminal behavior. Diloreto, 180 N.J. at 276. Our Supreme Court has found the community-

caretaker role permits officers to "check on the welfare or safety of a citizen who appears in need of help on the roadway without securing a warrant or offending the Constitution." Scriven, 226 N.J. at 38.

The doctrine entails a fact-sensitive, two-part inquiry. First, a court must ask whether the officer has reacted to an objectively reasonable community concern. Id. at 39 (stating officers must have an "objectively reasonable basis" to stop a vehicle to provide aid or check a motorist's welfare). This concern must serve as a distinct motivation for the officer's conduct, divorced from any desire to further a criminal investigation. Ibid. In other words, community caretaking may not serve as a pretext for a warrantless intrusion into a citizen's liberty that does not satisfy another warrant exception. State v. Bogan, 200 N.J. 61, 77 (2009). However, the "divorce" between the two police functions "need only relate to a sound and independent basis for each role, and not to any requirement for exclusivity in terms of time or space." Ibid. (citation omitted). The State is required to prove the officers were acting objectively reasonably. Scriven, 226 N.J. at 38-39.

Second, the court must discern whether the actions taken by the officer pursuant to his community caretaking remained within the limited scope justified by that function. As with all police stops, the officer's conduct must be

"reasonably related in scope to the circumstances which justified the interference in the first place." State v. Dickey, 152 N.J. 468, 476 (1998) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). Moreover, an officer's "community[-]caretaking inquiry must not be 'overbearing or harassing in nature.'" State v. Drummond, 305 N.J. Super. 84, 89 (App. Div. 1997) (quoting State v. Davis, 104 N.J. 490, 503 (1986)).

Defendant's situation, although factually dissimilar on some points, is akin to the threshold question in Drummond,

> whether a reasonably objective police officer would have been justified in "making an inquiry on property and life" when observing a darkened car with no one outside it, parked shortly before midnight next to a car wash facility which appeared to be closed for the night because its lights were off. Even though there may have been coin operated air fresheners and vacuum stands which could be actuated all night, and even if partially illuminated by street lighting, we do not find that it was objectively unreasonable for the police to deem the situation worthy of a community[-]caretaking inquiry.
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> [305 N.J. Super. at 88.]

Our review of the record indicates the Law Division judge correctly determined Talty was performing a community-caretaking role when he encountered defendant. We find it of little import that the neighborhood where defendant's car was parked was described by Talty as "upper class." The

operative facts were that defendant's car was the lone car parked in a residential neighborhood at approximately 2:00 a.m. According to the report conveyed to Talty, the car had been parked there for about thirty minutes with its motor running and brake lights on. When Talty arrived at the scene, the car was situated as reported. This seemed "abnormal" for that time of the early morning, suggesting the driver of the car needed some assistance. Under these circumstances, Talty's inquiry was reasonably appropriate to ensure the car's occupant—defendant—was not in need of aid. There was nothing awry or unconstitutional about Talty's inquiry. Based upon his subsequent observations, Talty had reasonable suspicion to believe defendant was intoxicated, appropriately required him to perform field sobriety tests, and then had probable cause to arrest defendant.

Given our conclusion that Talty's encounter with defendant was permissible under the community-caretaking doctrine, we need not address his contention that Talty did not have a lawful basis to conduct an investigate stop of his parked car under Terry.[2]

[2] In accordance with Terry, a police officer, without a search warrant, has the right "to conduct a brief, investigatory stop" as long the officer "is able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." State v. Morrison, 322 N.J.

II

In his last contention, defendant maintains the Alcotest was not properly performed, therefore, making the test results inadmissible to sustain his DWI conviction. We are again unpersuaded.

Alcotest results have been deemed scientifically reliable and are admissible to prove a per se violation of DWI. State v. Chun, 194 N.J. 54, 66 (2008). As a pre-condition for admissibility of Alcotest results, the State must establish by clear and convincing evidence that: (1) the Alcotest was in working order and had been "inspected according to procedure"; (2) "the operator was certified"; and (3) the operator administered the test "according to official procedure." Id. at 134; see also State v. Ugrovics, 410 N.J. Super. 482, 489-90 (App. Div. 2009) (examining the application of Chun with respect to the twenty-minute waiting period required before collecting another breath sample in administering the Alcotest).

Super. 147, 151-52 (1999). Our Supreme Court recently reiterated that "[d]etermining whether reasonable and articulable suspicion exists for an investigatory stop is a highly fact-intensive inquiry that demands evaluation of 'the totality of circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions.'" State v. Nyema, 249 N.J. 509, 528 (2022) (quoting State v. Privott, 203 N.J. 16, 25-26 (2010)).

Defendant contests a specific component of the third Chun factor. Once the two blank air tests are validated, the operator can obtain a breath sample from the defendant. Chun, 194 N.J. at 80. After the defendant provides a sample, the device performs a third blank air test to purge the defendant's sample from the device, and then locks out for a two-minute period. Id. at 81. No less than two minutes thereafter, a second breath sample is taken from the defendant. Id. at 81. Defendant asserts his Alcotest results are inadmissible because the lock-out time between two necessary tests was less than the required two-minute period thereby contaminating the test sample.

Defendant's contention that Chun's third factor was not followed is purely speculative. He maintains the Alcotest operator's testimony was that his first breath sample

> was taken at 3:12 [a.m.], which could mean that it was taken at 3:12 and 59 seconds. The second sample was at 3:13 a.m. and the [operator] agreed that means that it could have been at 3:13 and one second. [Meaning] that the third sample could have been obtained well before [two] minutes had elapsed since the prior sample . . . . (Emphasis added).

We are satisfied there was sufficient credible evidence the Alcotest operator adhered to Chun. The judge rejected defendant's contention the Alcotest was improperly administered, "based upon the fact . . . the [Chun]

documents were admitted and [municipal court's] finding, . . . the [Alcotest] machine was reliable and that the BAC of [0.14 percent] was also a reliable finding" warranting a DWI conviction. We have no reason to upset this determination. Defendant's argument is speculative and not supported by the record.

To the extent we have not specifically addressed arguments raised by defendant, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.