NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3438-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN SIMMONS,

Defendant-Appellant.

Argued June 6, 2023 – Decided August 1, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Municipal Appeal No. 2022-002.

Salvatore R. Vargo argued the cause for appellant.

Stephen A. Pogany, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens, II, Acting Essex County Prosecutor, attorney; Stephen A. Pogany, on the brief).

PER CURIAM

Following a trial de novo in the Law Division, defendant Kevin Simmons was convicted of driving while intoxicated (DWI), N.J.S.A. 39:4-50; and refusal to submit to a chemical breath test (refusal), N.J.S.A. 39:4-50.4a.[1] He was sentenced to pay appropriate fines, costs, and penalties. Defendant now appeals from the June 3, 2022 order, contending the State did not meet its burden of proving the violations and seemingly challenges the municipal court's credibility findings. Discerning no evidentiary errors or grounds to reject the Law Division's decision, we affirm.

I.

The trial de novo was conducted on a review of the municipal court record. R. 3:28-8(a). The municipal court trial was held on October 18, 2021 and December 22, 2021. The State's case was presented through the testimony of the arresting officer, New Jersey State Police (NJSP) Trooper Israel Dela Rosa-Vargas (Dela Rosa). Defendant elected not to testify but called two witnesses on his behalf: Joseph M. Tafuni, of Pinnacle DWI Consulting Group, who was qualified as an expert in Alcotest machines and field sobriety testing; and defendant's friend, Hazima Robinson.

[1] The municipal court dismissed a third summons, parking in a no-parking zone, N.J.S.A. 39:4-138(g), for lack of prosecution.

Around 1:26 a.m. on March 9, 2020, Dela Rosa was dispatched to milepost 152 along the northbound lanes of the Garden State Parkway (GSP) in response to a reported medical emergency. Upon his arrival, Dela Rosa observed a car on the grass off the shoulder. The driver's side door was open. Defendant was "sleeping and snoring" behind the wheel. When he approached the car, Dela Rosa detected an odor of alcohol emanating from inside the vehicle. He did not recall whether the engine was running, or whether the keys were in the ignition. There were no other occupants in the car.

Dela Rosa awakened defendant and requested his credentials. Defendant was "alert and oriented" but he was mumbling and slurring his speech, rendering him "incoherent." Defendant claimed he was not involved in an accident. He told Dela Rosa he pulled over to the side of the road and was awaiting a ride. Dela Rosa then asked defendant to exit the vehicle and submit to standard field sobriety testing. Because defendant "had difficulty standing and walking," Dela Rosa "assisted [him] out of the vehicle."

Defendant failed the horizontal gaze nystagmus (HGN) test. Dela Rosa explained that before issuing the test, he permitted defendant to sit on the hood of his car because he had difficulty standing. Defendant was unable to follow

Dela Rosa's repeated instructions "to keep his head straight" and could not track an object with his eyes. Defendant's eyes were "bloodshot and watery."

Dela Rosa arrested defendant "for suspicion of DWI" based on: his slurred and incoherent speech; "slow movement of hands"; "failure to follow instructions"; "inability to stand or walk without assistance"; "bloodshot and watery eyes"; the odor of alcohol emanating from the car and defendant's breath; and the "off-the-road" location of defendant's car. Dela Rosa advised defendant of his Miranda[2] rights and drove him to the Bloomfield barracks. While in transit, Dela Rosa noticed an odor of alcohol in his patrol car "that was not previously present."

At the station, defendant was asked to perform the walk-and-turn and one-legged-stand balance tests. In view of "defendant's level of intoxication and [the] unsafe nature of the highway on the weekend," Dela Rosa had not asked defendant to perform these tests on the side of the GSP. Defendant failed both tests.

Dela Rosa again advised defendant of his Miranda rights. Defendant did not respond to each question posed and refused to sign the Miranda form. Dela Rosa then asked defendant additional questions pursuant to the standard operator

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

questionnaire. Defendant responded that he had diabetes, but denied that he was sick, under a doctor's care, or taking medicine, including insulin. Defendant acknowledged that he had consumed "six to eight beers." He refused to answer any other questions but agreed to give a breath sample.

Dela Rosa testified that he personally placed defendant under "continuous and uninterrupted" observation for the requisite twenty minutes before administering the initial Alcotest. Defendant failed to provide a sufficient volume of breath to obtain a reading. Two more tests were attempted, but defendant provided insufficient breath samples each time. Defendant "did not look like he was . . . trying to provide a good sample." After the third test, Dela Rosa concluded defendant refused to provide a sample. Defendant was issued summonses and released when his ride arrived.

A retired NJSP breath test coordinator, Tafuni challenged the reliability of the field sobriety tests and doubted Dela Rosa's testimony that he had observed defendant for twenty minutes prior to conducting the first Alcotest. Tafuni testified that the HGN test was unreliable because Dela Rosa only checked for one indicator, "smooth pursuit," and did not check for resting nystagmus, meaning whether "the eyes [are] moving as you're staring at them." Nor did he check for a third indicator, whether "the eyes [are] able to track

equally." Tafuni opined that the balance tests performed at the station were unreliable because defendant was "more than sixty pounds overweight." He also concluded, based on information set forth in an NJSP database, that Dela Rosa performed a "control solution change" at 2:05 a.m. on the night of the incident and, as such, the trooper could not have observed defendant continuously in the twenty minutes preceding administration of the Alcotest.

Robinson testified that she knew defendant for ten years. About two hours before Dela Rosa was dispatched to the scene, defendant called Robinson and requested a ride home. According to Robinson, defendant said "he was tired . . . and had pulled over." She further testified that defendant was a truck driver and had been driving for "forty-eight, fifty hours."

Following Robinson's testimony, the court questioned Tafuni concerning the timing of the solution change. The State recalled Dela Rosa in rebuttal. Dela Rosa testified that he did not change the solution while observing defendant prior to administering the Alcotest. Defendant then recalled Tafuni who stood by his testimony and stated that "the foundational document" would clarify the issue.

On the second day of trial, the State recalled Dela Rosa. Referencing the "solution change document" moved into evidence as S-21, Dela Rosa said he

initiated the solution change at approximately 1:08 a.m. – before he was dispatched to the scene. Further, once the process is initiated, the machine completes the solution change on its own. Dela Rosa explained that the timestamp from the database reflected the time the solution change was completed.

During oral argument before the municipal court, defendant challenged Dela Rosa's credibility and the trooper's multiple requests to review his report to refresh his recollection. He therefore contended the State failed to prove the DWI and refusal charges. Following argument, the court reserved decision.

On January 24, 2022, the municipal court rendered a thorough oral decision, detailing its factual and credibility findings in view of the governing law, and found defendant guilty of DWI and refusal. Crediting Dela Rosa's testimony, the court found, "based upon the totality of circumstances at the scene on the [GSP]," which included defendant's "demeanor and physical condition," and Dela Rosa's observations, "there was sufficient probable cause to arrest defendant," whose physical condition "was subsequently corroborated by [his] performance on the field sobriety tests at the police station." The court was not persuaded that defendant called Robinson for a ride before the trooper arrived

at the scene. Nor was the court convinced there were any flaws in the administration of the Alcotests.

On the same date, the court sentenced defendant to the minimum fines and penalties for both offenses. Because defendant's driver history abstract reflected a prior DWI conviction, the court sentenced defendant as a second-time offender on the DWI violation. The court stayed imposition of sentence pending receipt of documentation that defendant's prior conviction had been vacated.

In his ensuing appeal to the Law Division, defendant maintained the State failed to prove the DWI and refusal charges. Oral argument was held before Judge Christopher S. Romanyshyn on May 25, 2022. Defendant argued there was insufficient proof that he had operated the car while intoxicated because he: was not observed driving his car; was asleep for an indeterminate time when Dela Rosa arrived at the scene; and had called Robinson to pick him up. Citing Tafuni's testimony, defendant also challenged Dela Rosa's conclusion that defendant refused to submit to the Alcotest. After oral argument, the judge reserved decision.

On June 3, 2022, Judge Romanyshyn issued a comprehensive written opinion, rejecting defendant's contentions. The judge conducted a thorough

review of the evidence presented to the municipal court and made independent factual findings and legal conclusions in view of the controlling law.

Regarding the DWI charge, Judge Romanyshyn found the "direct and circumstantial evidence" adduced in this case "demonstrate[d] both that . . . defendant was under the influence of alcohol and 'operating' a vehicle within the DWI statute." Recognizing Dela Rosa "might not have been able to recall minute details with particularity," the judge found the trooper "provided a sufficiently complete and vivid account of defendant's behavior and performance during the tests and at the scene."

Recounting "the strong circumstantial evidence" that defendant "recently drove the car," the judge rejected his contention that the State failed to prove operation within the meaning of the DWI statute. In doing so, the judge rejected defendant's reliance on State v. Daly, 54 N.J. 122 (1973). The judge elaborated:

> Unlike Daly, where [the] defendant was found asleep in his car outside a tavern, with the engine running, in this case defendant was found on the shoulder of the [GSP], which is a limited access roadway. That circumstance alone, without any admission by defendant, is sufficient to infer operation. As the municipal judge observed, defendant had to get there somehow and there was no evidence of any other operator or passenger. The driver door was open, and . . . defendant was sitting in the driver seat, asleep and snoring.

The judge further found defendant was "the sole occupant of that vehicle," and admitted "he 'pulled over' and had consumed 'a couple of beers.'"

Turning to the refusal charge, Judge Romanyshyn found unavailing defendant's argument that he was not afforded additional attempts to complete the breathalyzer test. The judge reasoned:

> [Defendant] was not entitled to additional attempts after the officer gave him three attempts at the test. Once the officer determined that the defendant was refusing to comply with the test by failing to give an adequate breath sample – both in terms of quantity (all attempts) and duration (second attempt only) – absent other reasons there was enough evidence to charge him with refusal.

Citing our decision in State v. Monaco, 444 N.J. Super. 539, 551 (App. Div. 2016), the judge found: "Defendant asserted no other reason he could not provide adequate breath samples."

Nor was the judge persuaded that Dela Rosa lied about the timing of the solution change. Meticulously citing the trial record, Judge Romanyshyn credited Dela Rosa's testimony, which the judge found was corroborated by S-21.

Regarding defendant's sentence, the judge was satisfied that defendant's prior DWI conviction "was vacated on post-conviction relief." Accordingly, defendant was sentenced as a first-time offender to forfeiture of his driver's

license until an ignition interlock device was installed, twelve hours at an Intoxicated Driver Resource Center, and appropriate fines and penalties. This appeal followed.

Citing the transcript of the municipal court's decision, defendant raises the following points for our consideration:

POINT [I]

THE COURT BELOW IMPROPERLY FOUND THE STATE'S ONLY WITNESS CREDIBLE DESPITE INCONSISTENT AND CONTRADICTORY TESTIMONY.

POINT [II]

THE STATE DID NOT PROVE THE DEFENDANT VIOLATED EITHER N.J.S.A 39:4-50 OR N.J.S.A. 39:4-[5]0.4A BEYOND A REASONABLE DOUBT.

II.

Well-settled principles guide our review. On appeal from a municipal court to the Law Division, the review is de novo on the record. R. 3:23-8(a)(2). The Law Division judge must make independent "findings of fact and conclusions of law but defers to the municipal court's credibility findings." State v. Robertson, 228 N.J. 138, 147 (2017). This deference is especially appropriate when a municipal court's "credibility findings . . . are . . . influenced by matters such as observations of the character and demeanor of witnesses and common

human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999); see also State v. Kuropchak, 221 N.J. 368, 382 (2015). Indeed, the municipal court has the unique opportunity to assess live testimony. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005).

Unlike the Law Division, however, we do not independently assess the evidence. Locurto, 157 N.J. at 471. 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). 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 sufficient credible evidence present in the record." Locurto, 157 N.J. at 472 (quoting State v. Barone, 147 N.J. 599, 615 (1997)).

The rule of deference is more compelling where, as here, the municipal and Law Division judges made concurrent findings. Id. at 474. We accord great deference to the consistent conclusions of two other courts. State v. Stas, 212 N.J. 37, 49 n.2 (2012). "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." Locurto, 157 N.J. at 474.

Having considered defendant's contentions in view of the applicable law, and our deferential standards of review, we conclude they lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(2). We affirm substantially for the reasons set forth by Judge Romanyshyn in his well-reasoned decision. We add only the following remarks.

As a preliminary matter, it appears defendant challenges the municipal court's credibility findings, which are not before us on this appeal. See Oliveri, 336 N.J. Super. at 251. To the extent defendant challenges the Law Division judge's findings, we are not persuaded. Because Judge Romanyshyn's factual and credibility findings were supported by "sufficient credible evidence present in the record," we discern no reason to disturb his cogent decision. See Locurto, 157 N.J. at 472 (quoting Barone, 147 N.J. at 615).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.
CLERK OF THE APPELLATE DIVISION