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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3522-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BARBARA E. DOYLE,

Defendant-Appellant.

Submitted: December 9, 2009 – Decided: March 12, 2010

Before Judges Payne and C.L. Miniman.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Municipal Appeal No. 33-08-C-T13.

John Menzel, attorney for appellant.

Wayne J. Forrest, Somerset County Prosecutor, attorney for respondent (Anthony J. Parenti, Jr., Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Barbara Doyle appeals from her conviction of refusing to submit to a breath test, contrary to N.J.S.A. 39:4-50.2, and the sentence imposed of a seven-month suspension of defendant's driver's license and twelve hours attendance at the Intoxicated Driver Resource Center (IDRC). We now affirm in all respects.

I.

On October 31, 2006, defendant was observed driving her vehicle erratically at approximately 12:20 a.m. Officers Christopher Kennedy and Michael McMahon of the Hillsborough Police Department responded to a report of the erratic driving and, after stopping defendant's vehicle, administered five field sobriety tests. Based on the tests, McMahon determined defendant was driving while intoxicated, placed her under arrest, and brought her to police headquarters. Defendant was issued a citation for driving while intoxicated.

Upon arriving at police headquarters, defendant, after being read an eleven-paragraph statement by McMahon, assented to a breath test on the Alcotest® 7110 MKIII-C device. The Alcotest® is a breath-testing device used to assist in determining the blood-alcohol concentration (BAC) of a person suspected of driving while intoxicated. State v. Chun, 194 N.J. 54, 64, 74-75, cert. denied, ___ U.S. ___, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008). The readings generated by the device from the breath samples taken are reported on the Alcohol Influence Report (AIR) during administration of the test by a certified Alcotest® operator. Id. at 79. The Alcotest®, however, is not operator-dependent; it performs its analysis according to a sequence

through a computerized program that gives visual prompts to the operator. Ibid.

Prior to administration of the test, the operator must wait twenty minutes to avoid inflated readings attributable to the effects of mouth alcohol. Ibid. During those twenty minutes, the Alcotest® prohibits testing and the operator must observe the individual to ensure no alcohol has entered the person's mouth. Ibid. Afterwards, the testing process begins with the operator typing identifying information into the machine. Id. at 80. The machine then starts and automatically samples the room air to check for the presence of chemical interferents (the blank air test). Ibid. Assuming there are none, the machine conducts a control test. Ibid. If the control test is valid, which it was in this case, a second blank air test is performed and then the operator may administer the test. Ibid.

The device first prompts the operator to collect a breath sample. Ibid. The operator then attaches a mouthpiece, removes electronic devices from the testing area, and reads this instruction to the test subject: "I want you to take a deep breath and blow into the mouthpiece with one long, continuous breath. Continue to blow until I tell you to stop. Do you understand these instructions?" Id. at 80-81. The test subject then provides a breath sample. Id. at 81. After a proper

breath sample is taken, the Alcotest® notifies the operator via an LED display, performs a third blank air test to purge the first sample, and locks out for a two-minute period in which it prohibits another test. Ibid. After the two-minute lock-out period, a second sample is taken. Ibid. If either sample is outside the minimum requirements for a valid sample, additional tests up to a maximum of eleven may be administered until two valid samples are obtained. Ibid.

The Alcotest® gives the operator three minutes to conduct each test. Ibid. If the three minutes expire without a sample, the device allows the operator to terminate the test, report a refusal, or perform an additional test. Ibid. If all eleven tests fail to produce two valid samples, the device permits the operator only to terminate the test or report a refusal. Ibid.

An acceptable, valid sample is one that meets four minimum criteria: "(1) minimum volume of 1.5 liters; (2) minimum blowing time of 4.5 seconds; (3) minimum flow rate of 2.5 liters per minute; and (4) that the [infrared] measurement reading achieves a plateau (i.e., the breath alcohol does not differ by more than one percent in 0.25 seconds)." Id. at 97. If any of the four criteria is not met, the device will return an error message, report how much air was submitted on the AIR, and make no calculations. Id. at 82-83. If two results are acceptable, the AIR

calculates BAC values for the two samples and a report is generated. Id. at 83.

A breath sample that falls short of the required 1.5-liter volume requirement is unacceptable and the Alcotest® will return an error message of "minimum volume not achieved." Id. at 99. The Alcotest® will return other messages in the event of an invalid sample, such as "blowing not allowed," which indicates a test where the subject blows, stops, and blows again. Special Master's Findings & Conclusions Submitted to the Supreme Court 136 (Feb. 13, 2007) ("Master's Findings"), adopted as modified by Chun, supra, 194 N.J. at 149. If two valid samples are not obtained, the operator has the option of terminating the test and issuing a summons for refusing to submit to a breath test pursuant to N.J.S.A. 39:4-50.2. Chun, supra, 194 N.J. at 99. However, "[c]harging an arrestee with refusal remains largely within the officer's discretion." Ibid.

Prior to administering each test, McMahon advised defendant that "she would have to take a deep breath and blow into the mouthpiece with one long continuous breath in order for the test to [be] properly administered." In starting the first test, McMahon testified defendant took a small breath, blew slowly into the machine, stopped, and appeared to attempt to inhale and start again. Defendant blew 1.9 liters in 8.4 seconds but the

machine returned a message of "Blowing Not Allowed." McMahon advised defendant to blow one long continuous breath and she could not inhale, stop, and/or start again.

On the second test, defendant blew 1.8 liters in 11.6 seconds but the machine also returned a message of "Blowing Not Allowed." McMahon advised defendant that if she did not properly perform the test, she would essentially be refusing to take the test.

McMahon began to prepare the third test, but defendant became argumentative, stood up, and asked about the location of her vehicle. By the time defendant sat down, the time had expired for the third test, with a message of "Ready to Blow Expired" being returned.

The fourth test yielded a valid breath sample based on 1.5 liters in 8.6 seconds, defendant having provided one long continuous breath. McMahon then advised defendant of such and that she would have to complete the test a second time in a similar fashion to have another proper reading. McMahon did not know the result of the accepted reading until the test was complete or a refusal was indicated.

The fifth test returned a result of "Minimum Volume Not Achieved" because defendant blew only 0.5 liters for 3.0 seconds. According to McMahon, defendant "barely blew into the

machine and stopped essentially." McMahon advised defendant he was going to give her a sixth opportunity to take the test.

On the sixth test, defendant appeared to McMahon as though she was conducting herself in a fashion similar to the first and second tests. Defendant blew 1.6 liters over 6.3 seconds, but the machine again returned a result of "Blowing Not Allowed." McMahon testified, "She'd blow into the machine slowly and stopping as if to inhale and then starting to blow again, [which] is not a straight, long, continuous breath."

On the seventh and final test, defendant blew 1.9 liters over 8.4 seconds, but the machine again returned a message of "Blowing Not Allowed." McMahon stated that defendant again started to blow into the machine, stopped, blew again, and inhaled. After this test, McMahon charged defendant with refusing to submit to a breath test. McMahon could have made four more attempts to obtain a valid second sample, but elected not to do so.

Defendant recalled McMahon telling her to "take a deep breath and then blow into the mouth piece with one long solid breath." She testified that she did as instructed for each of the tests. According to defendant, McMahon developed a "harsh tone" after the second test, became "more and more agitated," seemed "exacerbated," and told her she "was doing it purposely."

Defendant stated that she was not under the influence of alcohol that night and she did not refuse to submit breath samples.

Upon questioning by the court, McMahon explained the message "Blowing Not Allowed" was an indication that the test was not being performed properly where one stops and inhales or blows into the machine again. The message also indicates the breath was not consistent. McMahon stated that flow rate is a third factor impacting the validity of the test, in addition to minimum volume and duration requirements. Flow rate is not indicated on the AIR.

A trial on the charges was held in Hillsborough Municipal Court on November 2 and 9, 2007. At the conclusion of all of the evidence, the municipal judge placed an oral opinion on the record. He found the testifying officers to be "extremely credible." He first ruled that defendant was not guilty of driving while intoxicated. He next addressed the charge of refusing to submit to a breath test, stating that McMahon was "trying to extract at least two results of the blood alcohol content." The judge determined that defendant was informed of how to perform the test, failed to act accordingly, and was not cooperative with McMahon in giving a breath reading. He found that McMahon could have attempted more tests, but "he did more than he should have." Finally, the judge cited defendant's

failure to achieve even the minimum volume on test five as supporting his conclusion that she was not cooperative. The judge found defendant guilty beyond a reasonable doubt of refusing to submit to a breath test. He imposed fines totaling $439, a seven-month suspension of defendant's driver's license, and twelve hours attendance at the IDRC. Execution of the sentence was stayed pending the Supreme Court's decision in Chun.

On August 25, 2008, a hearing was held on defendant's motion for reconsideration in light of the decision in Chun. After hearing the parties' arguments and reviewing the AIR, the municipal judge refused to reconsider his decision and denied defendant's motion. He continued the stay of the license suspension only.

On appeal to the Law Division, the judge on January 16, 2009, affirmed the conviction in a trial de novo, finding defendant guilty of refusal beyond a reasonable doubt. After hearing the parties' arguments and recounting the facts and testimony, the judge stated that defendant's "actions speak louder than her words about her willingness to comply." He was "satisfied, given [defendant's] conduct versus her assent, that this was really a refusal. Although there was a verbal assent, there was every physical indication that she was not going to comply, so that indicates willful conduct by the defendant not to comply,

despite the fact she knew how to comply." Thus, the judge determined that defendant failed to comply despite her capacity and affirmed the conviction. He stayed execution of the license suspension only. A judgment of conviction was entered on January 21, 2009, and this appeal followed.

Defendant presents the following issues for our consideration:

> POINT ONE — IN THIS CASE OF FIRST IMPRESSION, THE COURT BELOW ERRED IN CONVICTING DEFENDANT, SINCE NO DEFENDANT HAS EVER BEEN CONVICTED BEYOND A REASONABLE DOUBT OF BREATH TEST REFUSAL WHEN THE OBJECTIVE EVIDENCE ESTABLISHED THAT DEFENDANT SUBMITTED BREATH SAMPLES THAT MET MINIMUM VOLUME AND DURATION REQUIREMENTS.
>
> A. Subjective Evidence Failed to Establish That Defendant Willfully Refused to Submit Breach Samples.
>
> B. Objective Evidence Established That Defendant Submitted Breath Samples That Met Minimum Volume and Duration Requirements.

II.

Municipal court decisions are first appealed to the Law Division. R. 3:23-1; State v. Golin, 363 N.J. Super. 474, 481 (App. Div. 2003); State v. Buchan, 119 N.J. Super. 297, 298 (App. Div. 1972). The Law Division reviews the record de novo and makes its own findings of fact. State v. Kotsev, 396 N.J. Super. 58, 60 (Law Div. 2005), aff'd, 396 N.J. Super. 389 (App.

Div.), certif. denied, 193 N.J. 276 (2007). The Law Division defers to the municipal court's opportunity to see and hear witnesses, develop a feel of the case, and determine witness credibility. State v. Locurto, 157 N.J. 463, 470-71 (1999); State v. Johnson, 42 N.J. 146, 161 (1964); State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000).

Our review of municipal court convictions is "exceedingly narrow." Locurto, supra, 157 N.J. at 470. The "standard of review of a de novo verdict after a municipal court trial is to 'determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering the proofs as a whole." State v. Ebert, 377 N.J. Super. 1, 8 (App. Div. 2005) (quoting Johnson, supra, 42 N.J. at 162). Deference is given to the municipal judge's credibility findings that are "often influenced by matters such as observations of the character and demeanor of witnesses and common human experience[s] that are not transmitted by the record." Locurto, supra, 157 N.J. at 474 (citations omitted). Furthermore, absent an obvious and exceptional showing of error, we will not disturb the lower court findings when the municipal court and Law Division have entered concurrent judgments on purely factual issues. Ebert, supra, 377 N.J. Super. at 8 (citing Locurto, supra, 157 N.J. at 474). The trial court's

factual findings are binding on appeal unless the court is "thoroughly satisfied" that the lower court's finding is clearly mistaken and so unwarranted that the interests of justice demand intervention and correction. Johnson, supra, 42 N.J. at 162 (citations omitted). In such a case, we "appraise the record as if [we] were deciding the matter at inception and make [our] own findings and conclusions." Ibid. Nonetheless, "a trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Defendant urges that this is the first case to consider whether the State proved a refusal to submit beyond a reasonable doubt, the higher burden of proof imposed by State v. Cummings, 184 N.J. 84 (2005), as prior cases have been decided by a preponderance of the evidence. She contends the State failed to meet this burden because defendant met the minimum volume and duration requirements. She asserts that she did not engage in a "pattern of belligerence" such that her actions constituted a "refusal." Defendant secondarily argues that the objective evidence of the AIR supports the conclusion that she did nothing to willfully frustrate the attempts to give a breath sample. According to defendant, the absence of a willful refusal on her

part equates to the existence of reasonable doubt. Defendant concludes that a review of the trial record "clearly establishes" that the objective evidence creates a reasonable doubt that requires reversal of her conviction.

The State points out that we must defer to the credibility findings of the lower courts. Accordingly, the State argues that, despite defendant's verbal assent, she "methodically refused to provide proper samples," as evidenced by the AIR. The State asserts that defendant failed to comply with all the criteria for an acceptable breath sample because even though she met the minimum volume and duration requirements, defendant failed to meet the minimum flow rate requirement. It urges the Alcotest® results and McMahon's testimony prove beyond a reasonable doubt that defendant refused to give a proper breath sample.

Under New Jersey's Implied Consent Law, N.J.S.A. 39:4-50.2, "[a]ny person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood[.]" Failure of a person to act in accordance with N.J.S.A. 39:4-50.2 can result in prosecution for refusing to submit to a breath test. State v. Widmaier, 157

N.J. 475, 488-89 (1999). The purpose the statute is to encourage motorists suspected of driving under the influence to submit to breath tests. Id. at 487 (citing State v. Wright, 107 N.J. 488, 499 (1987)).

In a case charging a motorist with refusal, the municipal court must determine whether: (1) "'the arresting officer had probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle . . . while . . . under the influence of intoxicating liquors'" or other controlled dangerous substances; (2) "'the person was placed under arrest'"; and (3) the person "'refused to submit to the test upon request of the officer.'" State v. Marquez, 408 N.J. Super. 273, 280 (App. Div.) (quoting N.J.S.A. 39:4-50.4a(a)), certif. granted, 200 N.J. 476 (2009). The State must prove these elements beyond a reasonable doubt. Cummings, supra, 184 N.J. at 88. Only the third element is at issue here.

The Supreme Court has recognized that the relationship between the Legislature's intolerance of drunk driving and the advent of the Alcotest®, as compared to the breathalyzer, may give it reason to re-examine earlier case law. Chun, supra, 194 N.J. at 74. However, in interpreting the refusal statute in the context of an Alcotest® test, we have previously relied on cases in which the Alcotest® device was not used. Marquez, supra, 408

N.J. Super. at 279-83 (citing cases involving refusal to submit to a breathalyzer test in affirming conviction of individual for refusal to submit to an Alcotest® test). We are satisfied that pre-Chun case law still provides guidance on what actions constitute refusal to submit to a breath test.

In Widmaier, supra, 157 N.J. at 484, after being arrested for driving while intoxicated, the defendant was asked to submit to a breath test. The defendant agreed, but asked for his attorney and did not take the breathalyzer test. Id. at 485. The defendant was subsequently charged with refusal. Ibid. In examining whether the defendant's statements constituted refusal, the Court first pointed out that police need to administer tests within a reasonable time after arrest to obtain an accurate reading given the evanescent nature of the evidence. Id. at 487. In light of this consideration and the public policy of encouraging drivers to submit to tests, the Court held that "anything substantially short of an unconditional, unequivocal assent to an officer's request that the arrested motorist take the breathalyzer test constitutes refusal to do so." Id. at 488, 497 (citations omitted). The Court further held that "a defendant's subjective intent is irrelevant in determining whether the defendant's responses to the officer

constitute a refusal to take the test. . . . [A] motorist has no right to delay a breathalyzer test." Id. at 498.

In Marquez, supra, 408 N.J. Super. at 277, the defendant contended that he could not be convicted of refusal to submit to an Alcotest® because he could not comprehend the English-language standard statement explaining the test. Relying on Widmaier, we held, "The elements of a refusal offense do not include proof that the driver actually comprehended the police officer's instruction." Id. at 280. We explained this was so because "some motorists might illicitly feign such lack of comprehension to evade liability for a refusal." Id. at 281.

The Law Division previously interpreted and applied Widmaier in State v. Geller, 348 N.J. Super. 359 (Law Div. 2001). There, the defendant was arrested for driving while intoxicated. Id. at 361. He stated that he would take a breathalyzer test, but subsequently provided only one sample after six opportunities. Id. at 361-62. The defendant was charged with refusal and other violations. Id. at 362. In affirming the conviction in a trial de novo, the Law Division opined that an initial affirmative response does not automatically preclude an officer from charging an individual with refusal where the circumstances warrant. Id. at 365. Such circumstances include "any words or actions which indicate that

the agreement to the test was no more than a sham and a charade." Ibid. The court also stated that individuals may not engage in impermissible delay tactics. Ibid. (citing State v. Pandoli, 109 N.J. Super. 1, 4 (App. Div. 1970)).

Had defendant had the benefit of our July 1, 2009, decision in Marquez and the Supreme Court's October 13, 2009, grant of certification, we anticipate he would have argued that the grant of certification does not auger well for the continued vitality of Widmaier in the context of a refusal to take an Alcotest®. It is more likely that the Court may be concerned about the application of Widmaier where the Spanish-speaking defendant could not comprehend the English-language explanation of how to perform the test. As a result, we conclude that Widmaier still governs our decision here.

We turn to defendant's arguments that the subjective evidence failed to establish a willful refusal and the objective evidence demonstrated that defendant submitted breath samples meeting the minimum requirements for volume and duration. The objective evidence clearly demonstrates that defendant was capable of providing a valid breath sample, as she did in test four and clearly failed to do in test five. This occurred a mere two minutes after defendant gave the valid breath sample. Furthermore, despite defendant's ability to give a valid sample,

she failed to blow continuously five times, including twice after she gave the valid sample, because each of these times the machine recorded an error message of "Blowing Not Allowed," meaning that she blew, stopped, and blew again. Master's Findings, supra, at 136. Defendant also did not give a breath sample within the allotted timeframe for the third test as the machine returned a message of "Ready to Blow Expired." More is required than merely meeting the minimum volume and duration requirements. The flow rate must be sufficient to generate a valid sample and defendant did not achieve the minimum flow rate.

The testimony of McMahon corroborates this objective evidence. McMahon's testimony is consistent with the AIR evidence, and particularly the results of tests one, two, six, and seven, in that during those four tests he witnessed defendant blow, stop, and blow again. Before each test, McMahon advised defendant on the proper method of completing the test. McMahon also warned defendant multiple times about the consequences of failing to provide a proper sample. Despite the repeated instructions and warnings, defendant failed to provide a valid breath sample. Such failure in light of McMahon's directives supports the finding that defendant refused to give a breath sample. When considering these objective and subjective

proofs as a whole, we conclude that the findings made could reasonably have been reached on sufficient credible evidence present in the record. Ebert, supra, 377 N.J. Super. at 8.

Defendant urges that we should premise a "refusal to submit" only upon a showing of willfulness. Citing Geller, supra, 348 N.J. Super. at 363, defendant further argues that a refusal conviction must be predicated on a finding of a "pattern of belligerence" and "defendant's defiant and overtly hostile attitude." We disagree. This argument is an attempt to import a mens rea requirement into the statute. While a "pattern of belligerence" and a "defiant and overtly hostile attitude" were sufficient in Geller, supra, 348 N.J. Super. at 362-63, to convict the defendant of refusal, case law is clear that such actions are not prerequisites for a refusal conviction. Indeed, "anything substantially short of an unconditional, unequivocal assent" to a request to give a breath sample constitutes refusal. Widmaier, supra, 157 N.J. at 488, 497 (emphasis added). Moreover, a defendant's subjective intent is irrelevant. Id. at 498. Here, any willfulness or lack thereof on the part of defendant is simply irrelevant——it is her actions that are relevant, and her actions unequivocally show that she knew how to give a breath sample yet failed to do so on six occasions. Just as in Geller, supra, 348 N.J. Super. at 365,

defendant's actions of noncompliance speak louder than her words of assent.

The circumstances of defendant's conduct also lead us to conclude beyond a reasonable doubt that she refused to take the test. Where one's actions indicate that an individual's assent to taking a breath test was nothing more than a "sham and a charade," a defendant may properly be found to have refused. Ibid. Although defendant initially assented to McMahon's request for a breath sample, her actions were undoubtedly inconsistent with her assent.

Finally, contrary to defendant's contentions, the fact that she met the minimum volume and duration requirements for a majority of the tests does not preclude a finding of guilt beyond a reasonable doubt. This is so because the Alcotest® error messages of "Blowing Not Allowed" were attributable to defendant's conduct, as explained by McMahon. Indeed, defendant raises no argument creating a reasonable doubt regarding her failure to satisfy the flow rate and plateau criteria. Defendant's actions show beyond a reasonable doubt that, despite her verbal assent, she refused to submit to a breath test.

Affirmed.