

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2339-06T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN F. MIZE,

Defendant-Appellant.

Agued October 22, 2007 - Decided November 20, 2007

Before Judges Weissbard, S. L. Reisner and
Gilroy

On appeal from the Superior Court of New
Jersey, Law Division, Sussex County, Docket
No. 37-07-06.

Greggory M. Marootian argued the cause for
appellant.

Robin M. Lawrie, Assistant Sussex County
Prosecutor, argued the cause for respondent
(David J. Weaver, Sussex County Prosecutor,
attorneys; Ms. Lawrie, of counsel and on the
brief).

PER CURIAM

Defendant John F. Mize appeals from his conviction for
driving while intoxicated (DWI), contrary to N.J.S.A. 39:4-

50(a), after a trial de novo in the Law Division. Because it was his third conviction, defendant was sentenced to a ten-year suspension of driving privileges; \$1,364 in fines, costs and penalties; and to 180 days in the Sussex County Jail. Defendant was granted leave to make application to serve ninety days of his jail sentence in an in-patient alcoholic rehabilitation program. The primary question presented on appeal requires us to again address the issue of what constitutes "operation" of a motor vehicle under the statute. Because we determine that the facts do not support a finding beyond a reasonable doubt that defendant had operated the motor vehicle to the location where it had been found, or that defendant had intended to move the motor vehicle prospectively, we reverse.

On November 22, 2004, defendant was issued three traffic summonses: DWI; refusal to submit to a breathalyzer test, contrary to N.J.S.A. 39:4-50.2;¹ and failure to notify the New Jersey Motor Vehicle Commission of a change of address, N.J.S.A. 39:3-36.²

¹ Although the refusal summons referenced N.J.S.A. 39:4-50.2, the correct statutory reference for charging an individual with refusing to submit to a breathalyzer test is N.J.S.A. 39:4-50.4a. See State v. Cummings, 184 N.J. 84, 90 n.1 (2005).

² Defendant was also charged with aggravated assault and resisting arrest. Those charges were resolved in the Law Division and are immaterial to this appeal.

Defendant filed a motion to suppress evidence in the municipal court, challenging the probable cause for his arrest. Because the issue on the motion depended on the same facts required for a conviction, defendant consented to the municipal court simultaneously hearing evidence on the motion and on the trial of the charges. Patrolman Kuzicki, the only witness to testify at the proceeding, testified as follows.

At approximately 11:20 p.m. on November 21, 2004, the Vernon Township Police Department received several telephone calls from citizens complaining about the operation of a red pickup truck. Patrolmen Kuzicki and Reed were dispatched to locate the vehicle. While on patrol, Kuzicki observed a red pickup truck parked approximately twenty-five yards into the driveway of a private residence at 30 Juniper Road.

Following Reed's arrival at the scene, both patrolmen exited their motor vehicles and commenced walking toward the pickup truck. Upon observation, Kuzicki observed defendant "slumped over the steering wheel, with his head on the steering wheel"; the vehicle's interior dome light on; and keys in the ignition but the engine not "running."

After the two officers approached the vehicle, Kuzicki knocked on the door of the residence, intending to inquire whether any resident knew defendant was parked in their

driveway. Although intoxicated, the male homeowner, a friend of defendant, answered the door. Kuzicki engaged the homeowner in a brief conversation, but did not testify as to the nature or substance of the conversation.

After talking to the homeowner, Kuzicki returned to defendant's vehicle where he and Reed knocked on the windows and woke defendant. Upon awakening, defendant became belligerent, used profanity, and struck Reed in the chest while exiting the vehicle. Kuzicki opined that defendant was intoxicated, describing him as having slurred speech, an odor of alcoholic beverage on his breath, and bloodshot, watery eyes. After defendant was arrested, he was transported to police headquarters where he refused to submit to a breathalyzer test. Although Kuzicki assumed that defendant had operated the motor vehicle to where it had been found, on cross-examination he candidly admitted that he was unaware as to "how the motor vehicle even got to its location."

During the proceeding, no evidence was adduced as to whether either officer had checked the hood of the motor vehicle at any time in order to determine whether it was warm, or had inquired whether the homeowner had operated the motor vehicle that night. Nor were there any statements from defendant from which one could infer that he had operated the motor vehicle to

where it had been found or that he had intended to move the motor vehicle.

During the proceeding, the judge granted defendant's motion, striking Kuzicki's testimony concerning the telephone communications between the police dispatcher and the citizens, as well as the police dispatcher's statements to the two patrolmen, determining that the testimony was hearsay. However, the judge did admit the testimony, not "to prove the truth of the matter[s] asserted," but for the limited purpose of establishing why Kuzicki was in the area of Juniper Road when he observed the pickup truck in the driveway.

The municipal court judge acquitted defendant of refusing to submit to a breathalyzer test, concluding that there was an absence of proof that defendant had operated the motor vehicle on a roadway as required by the statute. N.J.S.A. 39:4-50.4a. The judge, however, found defendant guilty of DWI, inferring from the evidence that defendant had intended to move the motor vehicle. On appeal de novo challenging the DWI conviction, the Law Division judge found defendant guilty of DWI, determining that the evidence proved beyond a reasonable doubt defendant had operated the motor vehicle to where it had been found by the police officers, not that defendant had intended to move the vehicle.

On appeal, defendant argues:

POINT I.

THE STATE DID NOT PROVE BY COMPETENT EVIDENCE BEYOND A REASONABLE DOUBT, THAT MIZE OPERATED THE TRUCK.

POINT II.

ASSUMING THE STATE PROVED OPERATION (WHICH THEY CLEARLY DID NOT), THEY DID NOT SHOW A NEXUS BETWEEN THE INTOXICATION AND THE TIME OF OPERATION OF THE CAR, AN ELEMENT OF THE OFFENSE OF DWI.

POINT III.

THE STATE DID NOT PROVE THAT MR. MIZE WAS UNDER THE INFLUENCE BEYOND A REASONABLE DOUBT.

An appellate court's scope of review of a trial court's determination is limited. We are obligated to "review the record in the light of the contention, but not initially from the point of view of how [we] would decide the matter if [we] were the court of first instance." State v. Johnson, 42 N.J. 146, 161 (1964). Factual findings of the trial judge are generally given deference, especially when they "are substantially influenced by [the judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Ibid.; accord State v. Locurto, 157 N.J. 463, 470-71 (1999). When the appellate court is satisfied that the findings of the trial court could

reasonably have been reached on sufficient, credible evidence present in the record, "its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." Johnson, supra, 42 N.J. at 162. "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." Ibid.

We have considered defendant's argument under Point III in light of the record. We are satisfied that the argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). There is sufficient evidence in the record to support the trial judge's conclusion that defendant was intoxicated. Intoxication may be proven by evidence of a defendant's physical condition. State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, 180 N.J. 45 (2004). A police officer is permitted to give his or her lay opinion as to whether a defendant is under the influence of alcohol. State v. Irelan, 375 N.J. Super. 100, 106-07 (App. Div. 2005).

We now turn to defendant's arguments in Points I and II. In doing so, we acknowledge "[t]he primary purpose behind New Jersey's drunk-driving statutes is to curb the senseless havoc and destruction caused by intoxicated drivers." State v. Tischio, 107 N.J. 504, 512 (1987). We also acknowledge that the

case involves "law enforcement efforts designed to curb one of the chief instrumentalities of human catastrophe, the drunk driver." State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984). However, although DWI is not a crime entitling a defendant to a jury trial, State v. Hamm, 121 N.J. 109, 116 (1990), N.J.S.A. 39:4-50(a) subjects an individual to grave penalties. Here, defendant is subject to: 1) 180 days of incarceration; 2) a ten-year suspension of driving privileges; and 3) a minimum fine of \$1,000 and other penalties. Because DWI is quasi-criminal in nature, State v. Howard, 383 N.J. Super. 538, 548 (App. Div. 2006), the "State is obligated to prove each element of the charge beyond reasonable doubt." Ibid.; see also State v. Emery, 27 N.J. 348, 353 (1958). It is against these principles that we must determine whether the State's proofs fall within the outer limits of "operation," as that term is used in the DWI statute, as previously construed by case law.

N.J.S.A. 39:4-50(a) prohibits "a person who operates a motor vehicle while under the influence of intoxication" (emphasis added). Although N.J.S.A. 39:4-50(a) does not define "operating," the term as used in the DWI statute, has been construed in a broader sense than one normally would attribute to the term "driving." State v. Mulcahy, 107 N.J. 467, 478

(1987) (recognizing the "distinction between the concept of 'operating' a motor vehicle for the purposes of defining a moving violation and 'operating' for purposes of defining the essence of the under-the-influence offense"); see also State v. Morris, 262 N.J. Super. 413, 417 (App. Div. 1993). "Operation may be proved by any direct or circumstantial evidence - as long as it is competent and meets requisite standards of proof." State v. George, 257 N.J. Super. 493, 497 (App. Div. 1992).

Case law instructs us that there are three general methods of proving "operation" of a motor vehicle under the DWI statute. First, operation may be proven by observation of the defendant driving the vehicle. State v. Ebert, 377 N.J. Super. 1, 10 (App. Div. 2005). The second method is by a defendant's admission. Id. at 11. The third is by circumstantial evidence. Ibid. The first two methods of proving operation are not applicable to this case. Accordingly, we review those cases falling under the third method.

The third method not only includes circumstances giving rise to the inference that the motor vehicle had been operated to the place where found, but also circumstances that give rise to the inference that defendant intended to move the vehicle. State v. Sweeney, 40 N.J. 359 (1963); Ebert, supra, 377 N.J. Super. at 11. However, in each of the cases, where operation

has been determined based on circumstantial evidence, courts have found facts supporting the inference of operation in addition to those here.

Courts have inferred operation when the defendant's presence was coupled with an admission of the defendant or evidence of recent movement or control of the motor vehicle by the defendant. See State v. Chapman, 43 N.J. 300, 301 (1964) (defendant "was found intoxicated at the wheel of the vehicle, standing with the motor off at a position other than a normal one for parking"); Ebert, supra, 377 N.J. Super. at 11 (defendant possessed the motor vehicle key, and had stated to the arresting officer that she had gone into the restaurant to make a phone call and when she came out her car was missing, when the vehicle was found parked on the opposite side of the restaurant); State v. Dickens, 130 N.J. Super. 73, 78 (App. Div. 1974) (defendant was found asleep in his motor vehicle "on the shoulder of a superhighway, which could only have been reached by operation of the automobile to the point where it was found," and defendant "admitted that he was driving his car to take someone home to Piscataway when he did not feel well and stopped by the side of the road"); State v. Witter, 33 N.J. Super. 1, 5 (App. Div. 1954) (defendant found behind the steering wheel of his car, with the motor running and lights on while attempting

to dislodge the motor vehicle from a log); State v. Damoorqian, 53 N.J. Super. 108, 114 (Law Div. 1958) (defendant found behind the wheel of a motor vehicle parked on the grassy section of the shoulder of the New Jersey Turnpike with the engine running, radio playing, and in possession of a toll ticket required before entering the limited access highway).

We have also determined operation when the defendant's presence was coupled with circumstantial evidence inferring an intent to move the motor vehicle. See Mulcahy, supra, 107 N.J. at 479 (defendant entered a car, placed himself behind the driver's wheel, and attempted to place the key into the ignition); Sweeney, supra, 40 N.J. at 361 (defendant entered a stationary motor vehicle on the roadway, turned on the ignition, and started and maintained the motor in operation); Morris, supra, 262 N.J. Super. at 419 (defendant entered a motor vehicle, placed the starter key in the ignition and attempted to turn the motor vehicle over in order to start the car, but was prevented by the arresting police officer who grabbed the key before defendant could turn the ignition key beyond the accessory position); State v. Stiene, 203 N.J. Super. 275, 277-79 (App. Div.) (defendant controlled the steering of a motor vehicle while it was being pushed by his mother using a second motor vehicle), certif. denied, 102 N.J. 375 (1985). Compare

State v. Daly, 64 N.J. 122, 125 (1973) (holding that the State failed to prove an intent to move the motor vehicle where the defendant was found sitting in a car parked in the parking lot of a tavern, with the motor running solely for the purpose of keeping warm).

Here, contrary to the aforementioned cases, defendant's motor vehicle was found lawfully and properly parked in a private driveway owned by a friend, twenty-five yards off the public roadway. There is no evidence from which one could infer that the motor vehicle had been recently operated to the place where it had been found, e.g., a warm engine hood, or testimony from any of the private citizens who had observed the motor vehicle allegedly operated shortly before it had been found by the police officers, or testimony from the homeowner. Because most of the State's case was based on hearsay, there is not even legally competent evidence that defendant's truck was the same vehicle that was the subject of the citizen complaints. Nor is there any evidence to prove an intent to move the motor vehicle. The headlights of the motor vehicle were off. There was no evidence indicating when the key had been inserted into the ignition or by whom it had been inserted. Nor was there any evidence, either by observation or by admission, that defendant had attempted to start the motor vehicle.

The State argues that operation may be reasonably inferred solely because the car was found with the key in the ignition and defendant asleep or passed out behind the steering wheel of the motor vehicle. We disagree. The same facts equally give rise to the inference that defendant's friend had operated the motor vehicle, since it was found in the driveway of his residence; or that defendant had visited his friend for a period of time, leaving his key in the ignition before entering the home, and then returning to sleep in his own vehicle when his friend went to bed. Accordingly, we are satisfied that the facts do not prove defendant's operation of the motor vehicle beyond a reasonable doubt.

Reversed.

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


CLERK OF THE APPELLATE DIVISION