

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1346-10T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LORRAINE M. SELECKY,

Defendant-Appellant.

Submitted November 29, 2011 - Decided January 11, 2012

Before Judges Payne and Reisner.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Municipal Appeal
Docket No. 5941.

Joel I. Rachmiel, attorney for appellant.

Theodore J. Romankow, Union County
Prosecutor, attorney for respondent (David
A. Zeitzoff, Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant, Lorraine M. Selecky, appeals from a Law Division order following a trial de novo on the record below, finding defendant guilty of parking in a handicapped parking spot, in violation of N.J.S.A. 39:4-138o, and imposing a fine of \$250 and

\$6 in court costs. On appeal, she raises the following arguments:

Point I

The Municipal Court Judge's Grant of Special Inferences to the State and The Testimony of Officer Cantrell Violates Fundamental Fairness Standards Thereby Rendering His Credibility Findings Unworthy of Any Deference.

Point II

The State Has Not Proved the Charge of Unlawfully Parking in a Space Reserved For the Physically Handicapped Beyond a Reasonable Doubt.

We reverse and remand for a new trial before a different municipal court judge.

The record discloses that on September 19, 2009, at approximately 9:40 p.m., defendant drove with her thirteen-year-old daughter to a 7-Eleven store in Roselle Park to rent a video from an automated Redbox video vending machine located outside the store. As they approached the Redbox, defendant and the daughter were engaged in an intense argument. Once there, they encountered off-duty police officer James Cantrell, who was renting a video with his children. At this point, a heated argument occurred between defendant and Cantrell, either because defendant thought Cantrell's children were taking too long in making their choice or because Cantrell interjected himself in

defendant's mother-daughter dispute. In any case, the exchange escalated to the point that defendant threatened to call the police, but she did not do so, nor did Cantrell disclose that he was a police officer. Two days later, defendant received in the mail a summons, issued by Cantrell, for parking in the handicapped parking spot located next to the Redbox vending machine.

Defendant, appearing pro se, contested the ticket in municipal court. At the trial held in the matter, Cantrell testified that he had observed defendant parking illegally and that he notified dispatch of the violation. However, he did not personally raise the subject of defendant's allegedly illegal conduct with her at the time.

On cross-examination, defendant asked Cantrell why, if she had parked in a handicapped spot, Cantrell did not ask her to move her vehicle. Her question was as follows:

Officer, since you took an oath that it is your honor to[,] you know[,] protect the public and dispatch anything that you see [as] wrongdoing, why would you not have approached me at that time if you in fact say this is what I did, parked in the handicapped spot right next to this red box, having seen I made this violation, why would you not interject and say to me, Ma'am, why are you parking there, you don't have the handicapped sticker?

When directed to rephrase her question, defendant asked:

Let's say I'm parked in the handicap spot such as Officer Cantrell is saying here that I'm parked there, and you see me coming out of the car and I approach the red box, why would you not stop me then and say, Ma'am, you shouldn't park there, move your car. Why would you not do that if that were the case as you're suggesting?

Cantrell responded that defendant was deemed to know the law, so there was no need on his part to inform her of her violation. In the circumstances presented, he could nonetheless do so, or he could issue a summons. He chose the latter course.

In trial testimony given after the State had rested, defendant admitted to a "horrible verbal altercation" with Cantrell. She denied parking in a handicapped spot, but was unable to offer corroboration of her position, because the 7-Eleven did not conduct video surveillance of that area. Defendant attempted to introduce hearsay corroboration by her daughter that defendant had parked properly. However, that testimony was ruled inadmissible.

Defendant concluded her testimony by offering a photograph of the parking area in front of the 7-Eleven and testifying that she had parked in the spot next to the handicapped one. However, on rebuttal, Cantrell testified that defendant was incorrect; that he had parked in the indicated spot and that defendant had parked in the one reserved for handicapped persons.

In reaching his decision on the matter, the municipal judge observed that, in this case, he was required to determine that "somebody's facts are right and somebody's facts are wrong." He then held: "Based upon the inferences that are to be given to the State and to the police, I find Officer Cantrell's testimony to be credible." The judge continued by stating:

The one thing that I did find interesting to your [defendant's] detriment is when you asked the officer, I guess it was a hypothetical, but you asked him, well even if a person had parked in that spot, would you not interject with the person and ask him to simply pull – basically pull out of that spot rather than issue them a summons.

My – it made me think a little bit what would trigger that question and it made me think possibly, possibly that you were in that spot and that you were hurt or offended by the fact that a simple courtesy would have been to say hey, why don't you back out of the handicapped spot.

I don't know if that happened or not. But it made me have a thought process of why you would ask that particular question.

Following some additional musings on the import of defendant's question, the judge determined to accept Cantrell's testimony regarding the episode, and he ruled that the State had met its burden of proving a statutory violation.

Defendant retained counsel and appealed to the Law Division. On appeal, counsel argued that no deference should be

given to the municipal judge's credibility finding, which was based upon his erroneous conclusion that deference had to be accorded to the State and its police witness. The Law Division judge agreed and, on that basis, determined that he could not give the deference in this case ordinarily accorded to judicial findings of credibility. Additionally, counsel objected to the fact that the municipal judge had interpreted defendant's hypothetical question as an admission that she had parked in the handicapped spot. The Law Division judge responded that he did not think it was proper for the municipal judge to have done so, and that questions were not evidence. As a final matter, counsel argued that, upon ruling inadmissible defendant's testimony regarding her daughter's corroboration of her account of where she parked, the judge should have offered defendant, who was appearing pro se, a continuance to permit her to produce the daughter. However, the judge refused to consider that argument in the absence of a motion to supplement the record.

Following argument, the Law Division judge ruled in the State's favor, deferring to the municipal judge's determination that Officer Cantrell's testimony was straightforward and credible. With respect to defendant, the judge found that, because she would be required to pay a fine if found guilty, she had a motivation for claiming that she had parked legally – a

finding that the judge utilized to bolster his credibility determination. Additionally, the judge stated:

I want to specifically note that I did not consider the judge's rulings on deference. I did not consider the judge's comments that Ms. Selecky's cross-examination should be considered as evidence or in any way an admission on her part. I made this finding based strictly on the testimony in front of me.

In making his credibility determination, the judge rejected defendant's argument that Officer Cantrell had a motive to claim that defendant had acted illegally, arising from the admittedly hostile confrontation between him and defendant.

Following issuance of an order stating that defendant's appeal was "denied," defense counsel moved for an order granting defendant a new trial or permitting defendant to supplement the record with the testimony of her daughter. In a written opinion denying counsel's motion, the judge addressed an argument by counsel, set forth in a certification accompanying the motion, that neither judge had made a credibility finding with respect to defendant. The judge stated:

On the merits of defendant's claim, I, along with [the municipal court judge] did, in fact, take into account her testimony. Both courts took note of the surprising hypothetical that defendant posed when she asked Officer Cantrell why, in lieu of issuing a ticket, he would not have just asked an individual parked in a handicapped spot if they would simply move from the

spot. [The municipal court judge] found the hypothetical suspect, as if she "were hurt or offended by the fact that a simple courtesy would have been to say hey, why don't you back out of the handicapped spot." I adopted [the judge's] concerns.

. . . I properly took the testimony of both the defendant and Officer Cantrell into account in coming to the determination that the State properly met its burden in proving that defendant illegally parked the vehicle in a handicapped spot.

Additionally, the judge denied counsel's request to supplement the record, determining that the motion seeking such relief was untimely, and that none of the conditions for supplementation set forth in Rule 3:23-8 had been demonstrated.

Defendant has appealed. Following our review of the proceedings in the Law Division, we have determined that reversal and retrial before a different municipal judge is mandated. In reaching that conclusion, we concur with the ruling of the Law Division judge that the municipal court judge based his credibility determination on an improperly recognized inference in favor of testimony provided by Officer Cantrell in support of the State's case against defendant. No such inference in favor of the State or its law enforcement witnesses exists.

Nonetheless, we are unwilling to accept the credibility determination of the Law Division judge, made without

consideration of the inference drawn at the municipal level. In this regard, we are particularly concerned by statements by the judge in his opinion denying defendant's motion for a new trial or supplementation of the record, indicating that in determining credibility he, like the municipal judge, considered defendant's hypothetical questions as an admission that she, in fact, had parked illegally. We know of no precedent that would permit a hypothetical question posed by a pro se party during cross-examination of a witness at trial to be considered as substantive evidence in the proceeding. Indeed, for it to be so construed would present an unlawful trap to a defendant, untutored in the law, representing his or herself in a legal proceeding. Moreover, evidence has been defined as:

Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.

[1 Wigmore on Evidence § 1 at 8 (Tillers Revision 1983).]

Defendant's hypothetical question cannot be considered a "fact" as that concept has been defined. Moreover, we do not regard defendant's hypothetical question either "suspect" or

"surprising." Rather, it constituted an entirely logical inquiry designed to test the officer's credibility.

We thus conclude that, because a basis for the judge's credibility determination was plainly improper, the determination thus reached was sufficiently lacking in foundation as to warrant judicial intervention and correction. State v. Johnson, 43 N.J. 146, 162 (1964). Retrial is therefore required.

Given the well-recognized importance of a municipal judge's evaluation of witness credibility, and out of concern that the evidentiary mistakes occurring in that regard in the initial municipal trial in this case would infect future proceedings if held before the same municipal judge, we direct that a different judge be assigned to the retrial of this matter.

Reversed and remanded for retrial.

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



CLERK OF THE APPELLATE DIVISION