SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2699-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

PETER J. DITO,

Defendant-Respondent.

Argued November 14, 2017 – Decided January 11, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Municipal Appeal No. 16-40.

Annmarie Cozzi, Senior Assistant Prosecutor, argued the cause for appellant (Gurbir S. Grewal, Bergen County Prosecutor, attorney; Annmarie Cozzi and Elizabeth R. Rebein, Assistant Prosecutor, of counsel and on the briefs).

E. Gregory M. Cannarozzi argued the cause for respondent (Law Office of E. Gregory M. Cannarozzi, attorney; E. Gregory M. Cannarozzi and Jordan D. Yuelys, of counsel and on the brief).

PER CURIAM

The State of New Jersey appeals from an order entered by the Law Division on January 23, 2017, which dismissed a summons charging defendant Peter J. Dito with refusing to submit to a breath test to measure the alcohol level of his blood because the summons cited N.J.S.A. 39:4-50.2 rather than N.J.S.A. 39:4-50.4a. We reverse.

On December 13, 2015, an officer of the Oradell Police Department (OPD) issued to defendant Summons No. 0244-E15-002005 for driving while intoxicated (DWI), contrary to N.J.S.A. 39:4-50, and Summons No. 0244-E15-002007 for refusing to submit to a breath test, contrary to N.J.S.A. 39:4-50.2. Defendant moved to dismiss the refusal charge on the ground that the summons referenced N.J.S.A. 39:4-50.2 rather than N.J.S.A. 39:4-50.4a.

On April 21, 2016, the municipal court judge denied defendant's motion. Defendant then pled guilty to both charges, reserving the right to appeal the court's denial of his motion to dismiss the refusal charge. Defendant provided a factual basis for the pleas. He admitted that on December 13, 2015, at approximately 7:36 p.m., he operated a vehicle while under the influence of alcohol, after drinking wine with his dinner.

Defendant stated that he was stopped by an officer of the OPD, who asked him to perform certain physical tests, after which the officer placed him under arrest for DWI. The officer

transported defendant to Oradell's police headquarters. There, the officer read the Attorney General's standard statement for motor vehicle operators, pursuant to N.J.S.A. 39:4-50.2(e), which informed defendant that the law required him to submit samples of his breath "for the purpose of testing to determine alcohol content." The statement indicated that if defendant refused to provide the breath samples, "you will be issued a separate summons for the refusal" and the "court may find you guilty of both refusal and [DWI]."

The statement also informed defendant of the penalties that the court could impose if he is found guilty of refusal, which include a license revocation for up to twenty years, a fine of up to $2000, installation of an ignition interlock, and referral to an Intoxicated Driver Resource Center (IDRC). In addition, the statement indicated that defendant did not have a right to have an attorney, physician, or other person present for the purpose of taking the breath test.

Defendant told the municipal court judge that the officer asked him to provide breath samples and he refused. After defendant stated that he wanted a lawyer, the officer then read an additional paragraph from the Attorney General's standard statement:

> Your answer is not acceptable. The law requires that you submit samples of your breath for breath testing. If you do not

> answer, or answer with anything other than "yes," I will charge you with refusal. Now, I ask you again, will you submit to breath testing?

Defendant responded, "No, I need advice" and "I don't know what to do."

The municipal court judge accepted defendant's plea and sentenced defendant on both charges. For the refusal charged in Summons No. 0244-E15-002007, the judge sentenced defendant to a $306 fine, $33 in court costs, a $100 Drunk Driving Enforcement Fund surcharge, twelve hours in an IDRC, and a seven-month license suspension. For the DWI charged in Summons No. 0244-E15-002005, the judge sentenced defendant to a fine of $256, $33 in court costs, a $50 fee for the Violent Crimes Compensation Board, a $125 DWI surcharge, a $75 Safe Neighborhood Fund assessment, a $100 Drunk Driving Enforcement Fund surcharge, twelve hours in an IDRC, and a three-month license suspension, to run concurrent with the license suspension imposed for the refusal.

Thereafter, defendant filed an appeal to the Law Division and argued that the municipal court judge erred by denying his motion to dismiss the refusal charge. The Law Division judge considered the appeal, and on January 9, 2017, placed an oral decision on the record.

The judge found that defendant's summons for refusal to submit the breath test had incorrectly cited N.J.S.A. 39:4-50.2. The judge stated that because the summons should have cited N.J.S.A. 39:4-50.4a. The judge concluded that the error was fatal because it failed to inform defendant of the nature of the charge against him.

The judge entered an order dated January 23, 2017, which dismissed Summons No. 0244-E15-002007, and re-affirmed the sentence that the municipal court judge had imposed on Summons No. 0244-E15-002005. The State's appeal followed.

On appeal, the State argues that the Law Division judge erred by dismissing the summons because it cited N.J.S.A. 39:4-50.2, rather than N.J.S.A. 39:4-50.4a. The State contends the summons provided defendant with adequate notice of the charge and the penalties he faced if found guilty of refusal.

In response, defendant argues that the Law Division judge correctly decided to dismiss the refusal charge. He argues that because the summons cited N.J.S.A. 39:4-50.2 rather than N.J.S.A. 39:4-50.4a, he was deprived of his constitutional right to due process. Defendant contends he was not properly apprised of the penalties for refusal or given the opportunity to defend himself.

When reviewing a decision on a municipal appeal to the Law Division, we defer to the trial court's fact finding if "the

findings made could reasonably have been reached on sufficient credible evidence present in the record." State v. Kuropchak, 221 N.J. 368, 382-83 (2015) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). However, we owe no deference to the trial court's decision on an issue of law "and the consequences that flow from established facts[,]" which we review de novo. State v. Hubbard, 222 N.J. 249, 263 (2015).

We begin our consideration of the appeal with the language of the relevant statutes. N.J.S.A. 39:4-50.2 provides in pertinent part that:

> [a]ny person who operates a motor vehicle on any public road, street or highway . . . 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; provided, however, that the taking of samples is made . . . at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of [N.J.S.A.] 39:4-50 . . . . No chemical test . . . may be made or taken forcibly against physical resistance thereto by the defendant. The police officer shall, however, inform the person arrested of the consequences of refusing to submit to such test in accordance with section 2 [N.J.S.A. 39:4-50.4a] of this amendatory and supplementary act. A standard statement, prepared by the chief administrator, shall be read by the police officer to the person under arrest.

In addition, N.J.S.A. 39:4-50.4a provides that "the municipal court shall revoke the right to operate a motor vehicle of any operator who, after being arrested for [DWI] . . . refuse[d] to submit to a [chemical test] provided for in section 2 of . . . [N.J.S.A. 39:4-50.2] when requested to do so." In determining whether a person is guilty of refusal,

> [t]he municipal court shall determine . . . whether 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 the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-inducing drug or marijuana; whether the person was placed under arrest . . . and whether he refused to submit to the test upon request of the officer; and if these elements of the violation are not established, no violation shall issue.
>
> [Ibid.]

In State v. Marquez, the Court stated that "[t]o identify all of the elements of a refusal offense, we must look at the plain language of both statutes because although they appear in different sections, they are plainly interrelated." 202 N.J. 485, 501 (2010). The Court stated that because N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a "cross-reference one another internally" and "rely on each other substantively[,]" the statutes "must therefore be read together." Id. at 502. The Court noted that:

> [a] careful reading of the two statutes reveals four essential elements to sustain a refusal conviction: (1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test.
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> [Id. at 503 (citing N.J.S.A. 39:4-50.2(e), 39:4-50.4a(a); State v. Wright, 107 N.J. 488, 490 (1987)).]

The Marquez Court held that reading the standard statement is a necessary element of a refusal conviction, and rejected the contention that the procedural safeguards of N.J.S.A. 39:4-50.2 are not a substantive element of the refusal offense. Id. at 506. The Court stated that "[t]he fact that motorists are deemed to have implied their consent, pursuant to [N.J.S.A. 39:4-50.2], does not alter that conclusion." Ibid. The Court held that N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a "impose an obligation on officers to inform drivers of the consequences of refusal." Ibid.

We note that in State v. Cummings, the Court held that a conviction of refusal requires proof beyond a reasonable doubt. 184 N.J. 84, 89 (2005). In Cummings, the Court observed that N.J.S.A. 39:4-50.4a is the "exact statutory provision applicable to breathalyzer refusal cases," and that "care should be taken to

list . . . N.J.S.A. 39:4-50.4a in the summons charging refusal." Id. at 90 n.1.

The Cummings Court did not, however, hold that dismissal is required when the summons cites N.J.S.A. 39:4-50.2 rather than N.J.S.A. 39:4-50.4a. Ibid. (finding "no prejudice resulting from it"). Indeed, such a conclusion would be inconsistent with the Court's later decision in Marquez, where the Court held that the elements of the refusal offense are drawn from both N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a. Marquez, 202 N.J. at 502.

Thus, in this case, the trial court erred by finding that the summons issued was fatally flawed because it failed to cite N.J.S.A. 39:4-50.4a. Since the elements of refusal are found in both N.J.S.A. 39:4-50.2 and N.J.S.A. 39:4-50.4a, the citation of only the former statute does not require dismissal of the summons. Dismissal of the charges under these circumstances would exalt form over substance, an approach our courts have "properly rejected." State v. Fisher, 180 N.J. 462, 472 (2004).

Furthermore, the trial court erred by finding that defendant was prejudiced and denied due process because he was charged under N.J.S.A. 39:4-50.2 rather than N.J.S.A. 39:4-50.4a. Here, the record shows that the officer read defendant the Attorney General's standard statement, thereby informing defendant that if he failed to submit to the breath test, he would be charged with refusal.

The standard statement further informed defendant of the penalties that the court could impose if he is found guilty of refusal. Moreover, after defendant indicated he wanted to speak with an attorney, the officer read defendant the additional paragraph from the standard statement, which indicated that his answer was not acceptable.

Therefore, defendant was fully informed of the charge and the penalties that could be imposed if he refused to provide the breath samples. Defendant's claim that he could not defend himself against the charge has absolutely no support in the record and does not warrant further comment. R. 2:11-3(e)(2).

Reversed and remanded for entry of a judgment reinstating defendant's conviction and sentence on Summons No. 0244-E15-002007. We vacate any stay of the sentence previously imposed. We do not retain jurisdiction.