

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3865-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JEFFREY L. GERBER,

Defendant-Appellant.

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Submitted May 23, 2016 – Decided July 11, 2016

Before Judges Lihotz and Fasciale.

On appeal from Superior Court of New Jersey,  
Law Division, Cumberland County, Municipal  
Appeal No. 15-14.

Stephen Lukach, III, attorney for appellant.

Jennifer Webb-McRae, Cumberland County  
Prosecutor, attorney for respondent (Matthew  
M. Bingham, Assistant Prosecutor, of counsel  
and on the brief).

PER CURIAM

Plaintiff Jeffrey L. Gerber appeals from a March 19, 2015 Law Division order, after a trial de novo pursuant to Rule 3:23, finding he was operating a motor vehicle while under the influence of alcohol. The effect of the Law Division order was to convict defendant of driving while intoxicated (DWI), N.J.S.A. 39:4-50, and leave unaltered the penalties and license

suspension period originally imposed by the municipal court. On appeal, defendant argues:

THE LAW DIVISION ERRED IN FINDING OPERATION  
WAS PROVEN BEYOND A REASONABLE DOUBT ON DE  
NOVO APPEAL. THUS, DEFENDANT MUST BE  
ACQUITTED OF DWI.

We disagree and affirm.

The facts are not disputed. Defendant was observed slumped over the steering wheel of his car, with his eyes closed and the car engine running, at 1:45 a.m. on April 6, 2014, located in the back parking lot of a tavern. Police were alerted. Responding Patrolman Nelson Ferrer testified defendant "appeared passed out" and did not move when the police initially tapped on the driver's side window. The third time the officer knocked on the window, defendant jumped and grabbed the steering wheel. Officer Ferrer "yelled," instructing defendant to turn the engine off and he complied. None of the State's witnesses saw defendant enter or move the vehicle.

Officer Ferrer observed defendant's eyes were red, his speech was slurred and his statements incoherent. The smell of alcohol emanated from the car. In response to Officer Ferrer's questions, defendant denied drinking. He explained he dropped someone off, was tired and fell asleep. He later admitted he had two drinks between 6:30 and 11 p.m.

Defendant's coworker testified. He stated defendant and he went to the tavern after their shift. They ordered food and he drank a beer. He saw defendant drink only one beer. The coworker left defendant in the tavern at 9 p.m. He reported defendant sent him a text message to pick him up at the tavern lot in the morning.

Defendant also testified on his own behalf. He acknowledged he had two beers with dinner, which he did not finish until 11:30. He left the bar as it closed. Recognizing he did not feel like himself, defendant texted his co-worker and sat in his car. He turned on the engine to stay warm.

The dispute before the Law Division was whether the State proved beyond a reasonable doubt the element of operation necessary to sustain a conviction for DWI. Defendant argued although the car engine was running, no evidence showed his intent to drive or move the vehicle. See State v. Daly, 64 N.J. 122, 125 (1973) ("[I]n addition to starting the engine, evidence of intent to drive or move the vehicle at the time must appear.").

Distinguishing the facts at hand from those presented in Daly, the Law Division judge found defendant left the bar at 1:45 to 1:51 a.m. and "lost consciousness very shortly after he entered [his] motor vehicle and started the engine." Unlike

Daly, defendant was not in a reclined position, indicative of sleeping, but "slumped forward over the steering wheel indicating that he had lost consciousness almost immediately." The judge independently evaluated the testimony presented before the municipal court and determined the defense witnesses were not credible. Noting the contradictions in witness testimony, the judge specifically found "defendant had been drinking for a significant period of time at the bar," and rejected his contention he started the engine to stay warm and sent his coworker a text message. Further, the judge reasoned "the rapidity with which [defendant] lost consciousness after starting the engine demonstrated that it was his intent to operate the motor vehicle. He was, however, intoxicated to the point that he could no longer remain conscious."

On appeal, defendant attacks the sufficiency of the circumstantial evidence to establish operation. He suggests the judge made different credibility findings than the municipal court and drew differing inferences from established facts, demonstrating reasonable doubt. Defendant urges the only explanation was he started the car to keep warm while he slept. We disagree.

We uphold the factual findings underlying a trial judge's decision as long as "those findings are supported by sufficient

credible evidence in the record." State v. Rockford, 213 N.J. 424, 440 (2013) (quoting State v. Robinson, 200 N.J. 1, 15 (2009)). "Thus, appellate courts should reverse only when the trial court's determination is 'so clearly mistaken that the interests of justice demand intervention and correction.'" State v. Gamble, 218 N.J. 412, 425 (2014) (quoting State v. Elders, 192 N.J. 224, 244 (2007)).

Here, there is no dispute defendant controlled the vehicle. See N.J.S.A. 39:1-1 (defining "operator" as "a person who is in actual physical control of a vehicle"). His argument hinges on the intent to drive.

"[A] person 'operates' . . . a motor vehicle . . . when . . . he enters a stationary vehicle . . . in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle . . . ." State v. Sweeney, 40 N.J. 359, 360-61 (1963). Operation has been found even though actual driving is not observed. State v. Wright, 107 N.J. 488, 492 n.2 (1987); State v. Mulcahy, 107 N.J. 467, 476-78 (1987).

The trial judge identified the contradictions between defendant's original admissions as testified to by Officer Ferrer, and his trial testimony regarding the amount he drank,

the time he was in his vehicle, and his claimed text to his coworker. The judge also highlighted defendant's assertion he reclined in his car to sleep, yet three State witnesses directly refuted this claim reporting they all saw defendant slumped over the steering wheel. The totality of the evidence led the judge to reject defendant's testimony as not credible and find Officer Ferrer's testimony credible. We defer to these supported findings.

Defendant urges we should not punish the responsible decision to sleep when an individual decides not to drive after drinking. Without debating the reasonableness of this proposition, we conclude, as did the Law Division judge, the facts do not support defendant's decision was to sleep. Rather, he entered his car after drinking over a period of several hours, entered the driver's seat, started the engine, and passed out. These facts evince an intent to drive, satisfying the element of operation beyond a reasonable doubt. Accordingly, his decision to operate his vehicle at a time when he was intoxicated sufficiently establishes the offense of DWI.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION