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OPINIONS

PREPARED BY THE COURT
Hon. Angela F. Borkowski, J.S.C.

STATE OF NEW JERSEY,
Plaintiff.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: CRIMINAL PART
: HUNTERDON COUNTY

v.

: Municipal Appeal No. 2-A-2021

ALBERT FRENCH,
Appellant.

: **DECISION**

Dana Wefer, Esq., for Albert French, (hereinafter "appellant").

Christina Ludwig, Esq., Assistant Prosecutor for the State of New Jersey.

FACTUAL AND PROCEDURAL HISTORY

On March 25, 2021, the appellant appeared before the Honorable Eric M. Perkins, J.M.C., in Municipal Court on charges of Violating Executive Order 107; Disorderly Conduct; and Walking With Traffic.

The State's first witness was Patrolman William Masacchio, of the Clinton Township Police Department. (T1 7:22-24)¹. He testified that on April 7, 2020, he was working a day shift on patrol. (T1 11:17-21)². He testified that at approximately 4:24 in the afternoon, he had just completed a business check at the Fountain Motel. (T1 12:10-22). At the time, due to the COVID-19 pandemic, Governor Murphy had issued an order "which was essentially lockdown to keep people only confined to certain essential activities whether it be going to work or emergencies." (T1 13:15-14:5). Patrolman Masacchio testified that after the business check, he observed a pedestrian walking westbound in the eastbound lanes and carrying a posterboard. (T1 17:24-18:5). He testified that at the time, his instructions were to contact the prosecutor's office for screening if he saw an individual engaged in activity which he believed to be in violation of the executive order. (T1 10-15). He testified that he took notice of the pedestrian because he was a pedestrian on a highway, and because of the state of emergency. (T1 20:2-5). At some point, the individual crossed the highway, and Patrolman Masacchio ultimately contacted the prosecutor's office to speak to the prosecutor assigned to assist with screening suspected violations of the executive order. (T1 20:7-22:7). He then observed the individual turn and face the highway before grabbing his genitals through his clothing and shaking them up and down while several vehicles passed by. (T1 23:5-25). After that, the individual made a gesture extending his middle finger toward passing cars. (T1 24:9-10). Following his conversation with the prosecutor's office, Patrolman Masacchio decided that it would be appropriate to take the

¹ T1 refers to the transcript dated March 25, 2021, and beginning with the testimony of Patrolman William Masacchio.

T2 refers to the transcript dated March 25, 2021, and beginning with the testimony of Sergeant Jeffrey Glennon.

V1 refers to the motor vehicle recording taken on April 7, 2020.

V2 refers to the motor vehicle recording taken on April 7, 2020, beginning immediately after the conclusion of V1.

V3 refers to the motor vehicle recording taken on April 7, 2020, that records simultaneous to V2 with a wider screen range.

V4 refers to the motor vehicle recording taken on April 7, 2020, that records simultaneous to V1 and V2 in which the camera is aimed at the ceiling of the video.

V5 refers to the motor vehicle recording taken on May 6, 2020.

² Although the transcript refers to "April 7th, 2002," context makes it clear that the question intended to refer to a date in 2020.

individual into custody on charges of violating the executive order as well as multiple disorderly persons charges. (T1 25:3-24). He testified that before doing so, he requested assistance from another officer. (T1 26:8-10). He testified that he approached the individual and found him to be irate and emotional. (T1 26:22-23). He realized that he recognized the individual as the appellant. (T1 27:22-28:7). He told the appellant that he was going to detain him, and the appellant responded that he was essential, which Patrolman Masacchio understood to mean that the appellant was an essential worker; he did not believe that the appellant was operating in a professional capacity at that time. (T1 29:1-17). Patrolman Masacchio testified that his supervisor arrived on the scene, and the appellant began to walk away from the two officers. (T1 30:3-16). They decided that since they had identified the appellant, they would not take him into custody, but instead would send any charges to him by mail. (T1 31:1-22). Patrolman Masacchio confirmed that there was video footage of this incident, beginning during his conversation with the prosecutor. (T1 32:18-33:7). At that time, the video was played for the court. (T1 34:1-35:9). In the video, it was confirmed that the appellant had driven a vehicle, although he was on foot at the time of the interaction. (T1 35:14-19). Patrolman Masacchio testified that after the events captured on video, he did not see the appellant again. (T136:44-17). He further testified that on the video, the appellant could be heard stating that he was not an essential employee. (T1 36:18-37:4). He testified that at one point, the appellant crossed the road without walking in a crosswalk, and that when the appellant had shaken his genitals at the motorists, he had also shaken it at the officers. (T1 37:24-38:3).

On cross examination, Patrolman Masacchio testified that during his career, he has interacted with people who were more upset than the appellant, and he clarified that he stopped the appellant due to his suspected violation of the executive order, his jaywalking, and his disorderly conduct. (T1 40:11-41:11). He confirmed that there were certain exceptions to the executive order, including exceptions for going to work, responding to emergencies, and getting food, as well as engaging in certain political activities. (T1 42:1-5). He testified that the appellant was holding a sign, and that he did not ask the appellant whether he was protesting, or on his way to or from work. (T1 42:15-20). He stated that he had not personally interacted with the appellant before, but was aware of him due to his prior interactions with law enforcement. (T1 43:16-21). He confirmed that some protesters do carry signs, and some do use profane language on those signs. (T1 44:20-45:1). The appellant's sign appeared to contain the word "phuck." (T1 18-21).

He confirmed that he noticed the sign before seeing the appellant grab his genitals, and stated that the appellant was walking outside the guardrail on the shoulder of the road before crossing the road to the center median. (T1 36:10-47:3). He stated that although the word “median” is not used in the statute under which the appellant was charged, “median” is synonymous with “medial barrier.” (T1 50:19-51:2). He asserted that although there was not a physical medial barrier in this case, there was a grass median, and the appellant’s conduct was still unlawful. (T1 51:18-52:2). He testified that the length of time that the appellant grabbed his genitals was approximately three to five seconds, and stated that he had multiple reasons for initiating an encounter with the appellant. (T1 55:1-20). He stated that at no time did the appellant tell him that he had a job, although he admitted that the appellant had asked whether the officer was saying that he was not an essential worker. (T1 57:21-58:2). He confirmed that there was no doubt in his mind as to what the appellant was doing when he grabbed his genitals. (T1 60:3). He stated that although there are several businesses in the area of this incident, he did not know what businesses were open at the time, due to the lockdown. (T1 60:13-20).

Neither the State nor the defense called any further witnesses, and the defense proceeded to summation of its case.

In summation, the appellant argued that under the executive order, there were legitimate reasons why a person might be outside, including being an essential worker, getting food, or engaging in political activity, and Patrolman Masacchio made no attempt to discern whether the appellant fell within one of these categories. (T1 63:7-19). He stated that Patrolman Masacchio believed that the appellant’s signs were offensive, but without the signs being in evidence the court could not determine whether they were offensive, and he stated that Patrolman Masacchio had stopped the appellant because he had grabbed his genitals, but made no attempt to determine whether that brief motion might have been because the appellant suffered from a rash or other medical condition. (T1 63:20-64:4). He argued that this created reasonable doubt. (T1 64:5-7). He further argued that it was not improper for a pedestrian to cross the road to the median, because the statute in question clearly referred to a “medial barrier,” and could have used the word “median” if that was what it meant. (T1 64:8-14). He argued that the disorderly conduct charge was improper, because the statute in question referred to “littering, dumping, destruction or playground property and so on,” and because the charge arose out of the officer’s original stop for a violation of the executive order; a stop which was unfounded. (T1 64:15-65:2).

The State argued that at the time of the charged offenses, thousands of people were dying. (T1 65:6-22). Law enforcement had been directed to arrest people who were outside of their residences without a valid reason, and that no reason listed in the order would explain or justify the appellant's conduct. (T1 65:24-66:6). The State argued that the evidence presented was uncontested, and the court cannot speculate as to whether the appellant was employed. (T1 66:6-8). The State argued that the appellant was eager to talk with the police, but never said that he was an essential worker. (T1 66:11-22). The State argued that based on that comment, the court cannot speculate as to why the appellant was on the side of the road. (T1 66:20-67:4). The appellant ultimately walked away from the officers, indicating that he was walking, and was not there for a legitimate purpose. (T1 67:11-15). The State argued that the statute is clear as to what constitutes disorderly conduct, a person is guilty if that person "with purpose to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof, he engages in fighting or threatening or in violent or tumultuous behavior, creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor." (T1 68:5-13). The State reiterated that this occurred at a time when the executive order was being strictly enforced, and the appellant's activities were self-evidently non-essential. (T1 68:14-69:17). The State argued that not only was there no legitimate purpose for the appellant's conduct, but his conduct created a risk to others because it meant that the officers, high-risk first responders, had to take the additional risk of interacting with him. (T1 70:3-18). The State argued that even after being told multiple times that he was being detained, the appellant walked away. (T1 70:19-71:6). The State argued that a median can be considered a barrier, because it divides two things, and therefore the jaywalking charge was proper, but acknowledged that the State was more concerned with the other alleged offenses. (T1 72:1-16). There was little information about the sign because the appellant took the sign with him when he left, and the officer was unable to see it, but that shaking a sign at traffic and grabbing one's genitals is nevertheless disorderly conduct. (T1 72:17-25). The State argued that the appellant had argued that the initial stop for a violation of the executive order was unlawful, and therefore everything stemming from that stop should be suppressed. (T1 73:6-18). However, the State argued, the appellant was the one who walked by the officer's car, and that by the time the officer approached the appellant, he had received authorization from a prosecutor and had proof of a violation beyond a reasonable doubt. (T1 73:11-74:6). The initial encounter was not illegal.

(T1 74:1-6). The State argued that based on the testimony and video evidence, the appellant was guilty beyond a reasonable doubt. (T1 74:9-14).

The court found that it was beyond dispute that the incident occurred within the jurisdiction of the court, and it was agreed upon that the appellant was the individual in question. (T1 74:15-23). The court found that it was uncontroverted that the event occurred on April 7, 2020, during the early days of the pandemic, when the executive order was in effect. (T1 75:4-16). The appellant was observed walking on the shoulder of the road and then crossing over to the median, while carrying a sign. (T1 75:17-19). He was not in a residential area. (T1 75:20-22). When stopped, he became combative, and engaged in conduct that the court considered “quite unusual.” (T1 75:25-76:3). The court found that the officers attempted to deescalate the situation, and therefore did not take the appellant into custody. (T1 76:11-19). The court found that the State had met its burden of showing that the appellant violated the executive order – he was on the side of a highway in a public place carrying a sign, and regardless of whether or not the sign was political, he should not have been there under the terms of the executive order. (T1 76:20-77:5). The court observed that historically, during times of epidemic otherwise unconstitutional restrictions on the rights of the citizenry have been permitted, and therefore under the circumstances the State proved the appellant’s guilt beyond a reasonable doubt. (T1 77:6-19). The appellant was sentenced to a fine of \$500 and \$33 court costs. (T1 78:7-8). On the charge of disorderly conduct, the court found that the State had met its burden. (T1 78:9-11). The appellant had grabbed his genitals while in view of the public, which could have shocked a driver and caused an accident. (T1 78:11-19). The court concluded that there had been no evidence introduced suggesting that the appellant might have grabbed his genitals due to a physiological condition. (T1 78:20-79:1). The appellant was sentenced to a \$250 fine, \$33 court costs, \$50 VCCO, and \$75 SNFA. (T1 79:1-3). The court found that the two complaints of disorderly conduct alleged by the State were part of one incident, and the counts were merged. (T1 79:3-10). The State had additionally alleged two municipal Disorderly Persons charges, which were likewise merged and dismissed. (T1 79:11-17). Regarding the remaining charge, the court accepted the appellant’s argument that when there is no barrier, pedestrians should be allowed to cross a median. (T1 79:24-80:2). On that charge, the appellant was found not guilty. (T1 80:2-5).

In the afternoon, the court addressed the remaining charges against the appellant which had not been resolved by the morning’s trial. The State’s first witness was Sergeant Jeffrey Glennon

of the Clinton Police Department. (T2 5:6-12). He testified that on May 6, 2020, he received a report of an individual walking in the roadway. (T2 8:6-8). He responded, and observed an individual walking and holding a sign. (T2 8:19-20; 9:7-12). Sergeant Glennon testified that he was familiar with the individual, who he identified as the appellant, from prior police interactions. (T2 11:2-18). He attempted to communicate with the appellant, who “immediately” began yelling that he was an essential worker and pointing at his sweatshirt, which had been issued by Rita’s. (T2 11:19-12:1). At that time, Sergeant Glennon activated his body microphone. (T2 12:5-6). He stated that the appellant continued to indicate that he was an essential employee, and pointed to the Rita’s Ice logo on his sweatshirt. (T2 12:15-25). Sergeant Glennon asked the appellant what was going on, and testified that the appellant continued to yell. (T2 13:4-7). He testified that at that time, the appellant was holding a sign warning people to slow down due to police activity ahead, and containing a misspelling of a profanity. (T2 13:21-24). He stated that the appellant refused to stop his activity, and became agitated. (T2 14:2-6). The appellant stated that he had a right to protest, and was an essential employee. (T2 14:11-12). The appellant told Sergeant Glennon that he did not want to be a part of the sergeant’s investigation anymore, and demanded that he be freed from detention. (T2 14:12-15). Sergeant Glennon stated that during this encounter, two additional officers, Lieutenant Thomas DeRosa and Patrolman Carr, arrived on the scene. (T2 14:18-19). At that point, a video of the encounter from Sergeant Glennon’s dashboard camera was played. (T2 15:22). After the video was played, Sergeant Glennon testified that at the time of the May 6, 2020, encounter he was aware that the appellant had previously been charged with violating an executive order, and was aware that after a previous incident between the appellant and the police, the appellant had requested an ambulance. (T2 16:4-17:8). He testified that he was aware from radio communication that after the incident, the appellant went to a diner and requested an ambulance for anxiety, among other reasons. (T2 17:19-25). After observing the appellant’s “erratic” behavior, Sergeant Glennon became concerned for the appellant’s mental health. (T2 22:6-16). He spoke with Lieutenant DeRosa about how to address the situation, and they attempted to contact the Hunterdon County Prosecutor’s Office. (T2 23:6-24:7). Lieutenant DeRosa asked the appellant if he was working, and the appellant confirmed that he was. (T2 24:8-13). Lieutenant DeRosa told the applicant that he could go, and the appellant walked away backwards while raising his middle finger toward the officers. (T2 24:17). Sergeant Glennon stated that after the appellant began leaving, he remained at the scene typing notes, and eventually the appellant left the scene.

(T2 25:21-26:21). At the suggestion of the Prosecutor's Office, Sergeant Glennon contacted Rita's Ice, and confirmed that the appellant had worked at Rita's Ice that day and had left at approximately 4:00. (T2 27:6-22). Rita's Ice is located approximately a mile to three quarters of a mile from the location where the officers encountered the appellant. (T2 28:1-2). Sergeant Glennon observed the appellant at approximately 4:21 p.m. after being contacted by Lieutenant DeRosa. (T2 29:15-21). He stated that the appellant had been the target of an earlier stop approximately a quarter mile or less up the road, and therefore he could confirm that at the time of that stop, the appellant was not at work. (T2 30:15-31:8). Sergeant Glennon further testified that after making a rude finger gesture, the appellant had turned around and began walking in the same direction as traffic, despite the law requiring that people walk facing traffic. (T2 32:6-17). Finally, he stated that the officers had briefly detained the appellant on the side of the road because due to the pandemic, there was a restriction on people out in public, and so they needed to determine what was happening with the appellant. (T2 32:18-33:3). On cross examination, he confirmed that the earlier stop had occurred between the locations of Rita's Ice and of the second encounter. (T2 33:14-24). He stated that he saw the appellant walking, and admitted that he did not know the purpose of the appellant's sign, and could not recall whether the appellant had ever raised the sign above his head. (T2 34:3-36:7). He confirmed that he was told that the appellant's shift had ended at 4:00, but did not himself see the appellant leave work, and did not see anybody get in or out of the appellant's car that day, until the appellant got into the car. (T2 36:8-24). He stated that he had received training in dealing with mental health issues, and was concerned that the appellant might present a danger to the public, but did not want to further escalate the situation by "getting in a fight" on the roadside. (T2 37:4-18). He stated that after observing the appellant, he did not see a weapon on him, although he did not perform a pat down. (T2 37:22-25). He confirmed that he had been to Rita's Ice before, but did not know whether employees were typically attired like the appellant, or whether employees typically wore clothing with the name "Rita's" on it. (T2 38:11). He testified that the appellant was alone, and walking along the shoulder of the road before crossing the road. (T2 39:10-22). After walking backward and extending his middle finger, the appellant turned around, crossed the road, and went to the parking lot, where he got into a vehicle. (T2 40:2-22). He sat in the parking lot, and eventually drove away. (T2 41:2-7).

In response to the court's query, the officer testified that he was unable to recall whether any of the businesses in the area where the appellant parked his car were open, or recall precisely what the businesses were. (T2 41:11-24).

On redirect, the witness testified that he had only seen the appellant approach his vehicle, the appellant was not holding anything other than the sign, and the appellant had told him that he had just left work. (T2 41:25-42:16). The

In summation, the appellant argued that the May 6, 2020, incident was similar to the April incident addressed in the morning, with a few differences. (T2 44:1-2). He argued that the executive order allowed for people to walk outside while maintaining social distance, and essential employees were allowed to go to work. (T2 44:2-7). The appellant argued that based on Sergeant Glennon's report, he had been at work that day. (T2 44:7-9). He argued that he may have been delayed in leaving work for a legitimate reason, and that he may have parked his car in that lot in order to take a package to UPS. (T2 44:12-18). He argued that he had recently interacted with police, who had pointed in the direction that he then continued to walk; he was not walking for miles backwards and in the wrong direction on the highway. (T2 44:19-45:2). He argued that based on the facts, there was too much ambiguity to determine beyond a reasonable doubt that the appellant had violated the executive order. (T2 45:3-10).

In response, the State argued that the court cannot speculate, but must focus on the uncontroverted evidence. (T2 45:13-21). The State argued that the court could take judicial notice of the fact that the appellant had been charged after engaging in similar activity approximately a month previously, which should have put him on notice that there was no legitimate purpose for his activities. (T2 46:4-11). The State argued that under the circumstances, considering the severity of the virus in early May, even if the sign had been political, the "political purpose" exception was meant to refer to something like voting, not carrying a sign on the highway, and the exception for essential employees was only for them to go to and from work. (T2 46:12-24). The State argued that it was not credible to believe that the appellant got in his vehicle, drove to a parking lot, and then walked to work, instead, it was more likely that he saw police activity in the area, parked his car, and began carrying his sign. (T2 47:8-15). The State urged the court to consider the competing interests, and argued that even though the executive order infringed on constitutional rights, there was an interest in protecting public health, and courts have historically upheld this type of restriction. (T2 47:19-48:1). The State argued that it was clear what happened – the appellant was

driving home from work, but decided instead to stop and protest in a disorderly manner. (T2 48:11-21). The State argued that there was no legitimate purpose for the appellant to park his vehicle, get out, cross the street, walk in the street, make an obscene finger gesture, scream at the officers, and behave in an irrational and irate manner. (T2 49:6-15). The State argued that it had proven its case beyond a reasonable doubt, and that the appellant's actions in this case were particularly concerning – they occurred on a busy highway, and the sign stated “phuck;” this could have distracted motorists and led to an accident. (T2 49:16-50:3). The State argued that the appellant's actions put the officers at risk by forcing them to interact with him. (T2 50:4-12). The State argued that there is a reason why people are supposed to walk in the opposite direction of traffic, and when the appellant turned around, he committed a traffic violation. (T2 50:13-51:4).

The court found that it was beyond dispute that the incident occurred in Clinton Township on May 6, 2020, and that the person involved in the dispute was the appellant. The court found that the May 6 incident occurred less than a month after the previous offense, while the executive order was still in effect. (T2 51:6-52:1). There were exceptions to the executive order for performing essential work or visiting an essential business, getting food and drink, seeking medical assistance, visiting family or other appropriate individuals, or engaging in outdoor recreation while appropriately socially distanced. (T2 52:4-9). The court found that when Sergeant Glennon approached him, the appellant became angry and aggressive, and was non-responsive when asked reasonable questions about his purpose in being outside. (T2 52:10-18). The court found that law enforcement's responsibility was enhanced by the pandemic, and Sergeant Glennon and the supporting officers exercised restraint and did not allow the situation to escalate and become dangerous. (T2 52:19-53:3). The court found that in this case, the appellant had argued that he was returning to work, and was walking along the side of the road back to his car. (T2 53:4-11). The State had argued that the court should not suppose such things, and under the circumstances the court did not do so. (T2 53:11-13). The court found that the executive order allowed people to go to and from work, or go to commercial establishments, but the appellant did not make a response. (T2 53:14-17). The court found that Sergeant Glennon would have had no way of knowing whether the appellant was going to seek medical treatment or food, instead, he was walking along the road in a way that violated the law. (T2 53:18-22). The appellant was agitated, and could have been about to run out into traffic. (T2 53:23-25). The court found that it would have been irresponsible of the officer not to have approached the appellant to determine if he was a danger to himself or

others. (T2 54:2-9). Therefore, the court found that the State had met its burden of proving the appellant guilty of violating the executive order, and the appellant was found guilty. (T2 54:10-14). Regarding the appellant's obscene finger gesture, the court found that given free speech concerns, the behavior did not rise to the level of an offense, and the appellant was found not guilty. (T2 15-20). Regarding the second count, the appellant was found guilty, as the court found that it was part of the same event as the third count. (T2 55:1-6). The court dismissed the remaining disorderly conduct charge, after finding that the municipal ordinance did not apply under the circumstances given the appellant's criminal conduct. (T2 55:7-13). Regarding the traffic violation, the court found that although at one point the appellant was walking backwards, he clearly should have been on the other side of the roadway, and when he turned around, he was in violation of the relevant statute. (T2 55:22-25). The appellant was convicted, and sentenced to a \$37 fine and \$33 in court costs. Finally, the court reserved sentencing on the remaining charge in order to allow for a more thorough review of the appellant's background. (T2 56:4-15). On April 28, 2021 the municipal judge imposed sentence. The appellant was sentenced on the Violation of Executive Order 107 to a \$500 fine, \$33 court costs and a 14 day suspended sentence and one year probation. The judge also clarified that the fine for Walking with Traffic should have been \$103, not \$37. The appellant has appealed his convictions.

APPELLANT'S ARGUMENT

I. The Appellant Argues that his Conduct was Not a Violation of Executive Order 107.

The appellant argues that under Executive Order 107, all New Jersey residents were required to remain in their homes or places of residence, with nine exceptions. He argues that these exceptions were to (1) obtain goods or services from essential retail businesses, (2) obtain takeout food, (3) seek medical attention or essential social services, (4) visit family or other people with whom the resident had a close personal relationship, (5) report to or perform a job, (6) walk, run, operate a wheelchair, or engage in other outdoor activities while following social distancing practices, (7) engage in an educational, religious, or political purpose, (8) leave the residence due to a reasonable fear for health or safety, and (9) leave the residence at the direction of law enforcement or another government agency.

The appellant argues that on both of the days in question, he was engaged in at least one and likely three of these exceptions. He argues that he was walking alone, and that both of the officers who stopped him testified that at the time they did so, he was walking on the side of the highway, which is indisputably legal. He argues that there is no question that under the executive order, he was allowed to be outside walking, and that one of the officers testified that he was alone and wearing a mask, demonstrating that he was practicing best social distancing practices. Therefore, he was not violating the executive order, because he was engaged in an expressly permitted activity.

The appellant argues that both officers testified that when they stopped him, he was carrying a sign, and one of the officers testified that he saw the letters “p-h-u-c-k” on the sign. He argues that this corroborates the other officer’s testimony that he was carrying signs reading “-p-h-u-c-k #Thin Blue,” and “Slow Down Police Ahead.” He argues that this is both protected political activity under the First Amendment, and an activity protected under Executive Order 107, as he was engaged in a political protest. In support of this argument, he asserts that he told one of the officers at the time that he was protesting.

The appellant argues that according to the testimony of both officers, he either explicitly stated to them that he was engaged in an essential activity, or implied that he was commuting from his job at the time. He argues that one of the officers confirmed that he had left Rita’s Ice 20 minutes before their encounter. The appellant argues that all of the evidence in this case shows that he was engaged in walking, political activity, and commuting from his job at the time he was stopped by the police, all of which are expressly allowed under Executive Order 107.

II. The Appellant Argues that the Court Impermissibly Shifted the Burden of Proof to the Appellant to Demonstrate that he was Engaged in Activity Permitted Under the Executive Order.

The appellant argues that even if the evidence did not show that he was engaged in permissible activity, the State did not demonstrate that he was not engaging in permissible activity. He argues that the State bears the burden of proving all elements of the charged offense beyond a reasonable doubt, and therefore it was the State’s responsibility to prove that he was engaged in activity not allowed under the Executive Order. He argues that holding otherwise would

impermissibly shift the burden of proof to the appellant to show that he was engaged in permitted activity, and he argues that the municipal court engaged in such burden shifting. In support of this argument, he cites to Judge Perkins' comments that he "should not have been there under the Executive Order. And there's no good reason cited for him being there. That, in and of itself, in the Court's mind, is enough to establish a violation of the Executive Order." He argues that this burden shifting violated his right to due process by requiring him to prove that he was out of the house for a permissible activity.

III. The Appellant Argues that the State did Not Provide Sufficient Evidence to Prove a Violation of Executive Order 107.

The appellant argues that the State did not prove its case beyond a reasonable doubt. He argues that both officers testified that he told them he was an essential employee, and that there is video evidence of him making this statement. He argues that both officers further testified that he was holding signs as a form of speech, and that this is also confirmed by video evidence.

He argues that the testimony of the officers alone was sufficient to create reasonable doubt so great that no reasonable finder of fact could have found him guilty. He argues that most importantly, he was walking while engaged in social distancing, which is expressly permitted under Executive Order 107.

IV. The Appellant Argues that Touching his Groin Area is Not Disorderly Conduct as a Matter of Law.

The appellant argues that he was convicted of Disorderly Conduct for allegedly touching and shaking his groin area. He argues that N.J.S.A. 2C:33-2A(2) states in relevant part that "a person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he [... creates] a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor."

The appellant argues that the State was required to prove beyond a reasonable doubt that he caused a "hazardous or physically dangerous condition" in order to "cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," while having no legitimate purpose for his conduct. He argues that the State did not provide sufficient evidence to

prove mens rea, to prove that he created a hazardous or physically dangerous condition, or to prove that his actions did not have a legitimate purpose. He argues that the State proved none of the required elements of the offense, and certainly did not prove them beyond a reasonable doubt as required by law.

The appellant argues that the State made no effort to prove his purpose or his mens rea, and that Judge Perkins did not make any factual findings of same. He argues that no facts were introduced into evidence showing his mens rea when touching his own groin, and the State provided insufficient evidence to prove that he did so to create public annoyance, alarm, or the risk thereof. Rather, he argues, the evidence shows that he touched his groin for between three and five seconds, and did not repeat the conduct. He further argues that the act of touching his own groin over his clothes is insufficient to show that he created a hazardous or physically dangerous situation. He argues that the record does not show how the officer concluded that he was touching his genitals, rather than touching his clothing, that this action was not captured on video, and no other evidence was presented. He argues that there is no evidence that anybody else witnessed this alleged conduct, and no evidence that the alleged conduct created a hazard or a dangerous condition. He argues that the alleged conduct falls into the category of “unexceptional” behavior that is not covered by the statute. In support of his argument, he cites State v. Stampone, in which a defendant was charged with disorderly conduct after engaging in a verbal altercation with a police officer and then slamming a car door, nearly hitting the officer’s legs. He argues that in that case, the court stated that

“the actions of the defendant and his testy exchange with [the officer] had no capacity to cause public inconvenience, public annoyance or public alarm. There was no indication that passers-by were noticing any of this or congregating or, indeed, that such persons were even present. Nor was there anything inherent in defendant’s conduct as to make it likely that his colloquy with [the officer] would cause public inconvenience, annoyance or alarm. And, of course, there was really no evidence that defendant acted with a purpose to cause public reactions.”

341 N.J. Super. 247, 255 (App. Div. 2001).

The appellant argues that the same lack of evidence is present in this case. He argues that there is no evidence that anybody saw him commit the alleged conduct, and there is no evidence of a hazardous or physically dangerous condition.

The appellant argues that the State failed to show that his actions had no legitimate purpose. He argues that in State v. Sabatino, the appellate division considered the Model Penal Code in order to determine what constitutes a “legitimate purpose.” 2012 WL 5039974 at *4 (App. Div. Oct. 29, 2012). He argues that according to the commentary on the MPC, the phrase “no legitimate purpose” is “intended to exclude activities that serve purposes other than making dangerous mischief.” Ibid. Therefore, he argues that unlawful activity that creates a dangerous physical condition or hazard would not constitute disorderly conduct, even if it were distasteful or unlawful, if it served a legitimate purpose of the actor. He further argues that in Sabatino, the court found that in drafting the relevant statute, the New Jersey Criminal Law Revision Commission was clear that acts could be “both unlawful and legitimate,” and that “not all discomforting activities are criminal.” Final Report of the New Jersey Criminal Law Revision Commission, commentary to 2C:33-2 at 295 (as quoted in Sabatino, 2012 WL at *4).

The appellant argues that in this case, he could have touched his groin due to an itch, or as a communicative gesture intended to convey displeasure. He argues that even if the court finds his actions distasteful, either of these reasons would have been legitimate. He argues that the State bore the burden of proving that there was no legitimate purpose for his conduct, and it was unable to do so.

The appellant argues that there is insufficient evidence to support a conviction in this case, because the State has not demonstrated every element of Disorderly Conduct, and therefore his conviction should be vacated with prejudice.

V. The Appellant Argues that the State Presented Insufficient Evidence to Demonstrate that he Walked the Wrong Way on the Highway.

The appellant argues that there is video of his interaction with Sergeant Glennon, and that in that footage, he is clearly walking backwards and facing traffic throughout the interaction. He argues that at trial, Sergeant Glennon testified that the appellant was walking backwards when he made a rude hand gesture, but that once he reached the jug handle, he turned around and began walking improperly. (2T 32:8-12). He argues that Sergeant Glennon testified that when he was walking backwards, he was facing traffic and walking in the proper direction, but that when he

turned around, he was walking with traffic rather than facing it. (2T 32:14-17). He argues that the video does not show him walking in the wrong direction, and that based on the video, it is clear that Sergeant Glennon's view would have been obstructed at the point in question. He argues that the video shows him continuing to walk backward, and that there is no video evidence that he turned around. Therefore, he argues, the State did not provide sufficient evidence to prove that he walked the wrong way in traffic.

STATE'S RESPONSE

The State argues that on appeal, the governing standard is de novo review, and the court is required to examine the record, make its own findings of fact and conclusions of law, and independently determine the guilt or innocence of the appellant. Rule 3:23-8(a); State v. States, 44 N.J. 285, 293 (1965). However, while the court must make independent findings of fact, it must do so based on the evidentiary record from the municipal proceeding. State v. Loce, 267 N.J. Super. 102, 104 (Law Div. 1991). Furthermore, the court is to "defer to trial courts' credibility findings that are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). Consequently, the court must "determine the case completely anew on the record made in the municipal court, giving due, although not necessarily controlling, regard to the opportunity of the magistrate to judge the credibility of the witnesses." State v. Johnson, 42 N.J. 146, 161 (1964). The State bears the burden of proving the appellant's guilt beyond a reasonable doubt. State v. Grant, 196 N.J. Super. 470, 477 (App. Div. 1984).

I. The State Argues that the Municipal Court did Not Err in Determining that the State Proved its Case Beyond a Reasonable Doubt, nor did the Municipal Court Erroneously Place the Burden of Proof Upon the Appellant.

The State argues that the appellant has argued that the municipal court erred in convicting him because his actions were within the scope of those permitted under Executive Order 107, as he was walking, participating in political activity, and was returning from work.

The State argues that the executive order was issued on March 21, 2020, shortly after the governor had first declared a public health emergency. The State argues that in the order, the Governor noted the spread of COVID-19 in New Jersey due to person-to-person contact. The State argues that the pertinent part of the order reads that

All New Jersey residents shall remain home of at their place of residence unless they are 1) obtaining goods or services from essential retail businesses...; 2) obtaining takeout food or beverages from restaurants, other dining establishments, or food courts...; 3) seeking medical attention, essential social services, or assistance from law enforcement or emergency services; 4) visiting family or other individuals with whom the resident has a close personal relationship, such as those for whom the individual is a caretaker or romantic partner; 5) reporting to, or performing, their job; 6) walking, running, operating a wheelchair, or engaging in outdoor activities with immediate family members, caretakers, household members, or romantic partners while following best social distancing practices with other individuals, including staying six feet apart; 7) leaving the home for an educational, religious, or political reason; 8) leaving because of a reasonable fear for his or her health or safety; or 9) leaving at the direction of law enforcement or other government agency.

The State argues that the executive order continues to state that “[w]hen in public, individuals must practice social distancing and stay six feet apart whenever practicable, excluding immediate family members, caretakers, household members, or romantic partners.”

The State argues that in this case, the record shows that the municipal court judge made findings of fact, and applied those findings to the plain language of the order. It argues that after receiving the testimony of the officers, as well as the video recordings of the appellant’s interactions with law enforcement, the judge concluded that the State had proved beyond a reasonable doubt that the appellant violated the order.

The State argues that in making his decision, the judge stated that the order was issued in order to curb the spread of a communicable disease by restricting the movement of individuals. The appellant was observed walking on the road carrying a sign. He was not in a specifically commercial area. When stopped by law enforcement, he became combative and acted unusual. He cited constitutional cases, argued that he was privileged to be about, and indicated that he was

“essential.” The State argues that the judge observed that the officers wisely deescalated the situation.

The State argues that the judge determined that the State had met its burden, because the appellant was out in a public place with a sign, and that whether or not that sign was political, there was no good reason for the appellant to be in that place at that time. The judge stated that under the circumstances, whether the appellant was on a golf course like others who were cited for violating the order or whether he was on the side of a highway, he violated the order.

The State argues that regarding the violation of Executive Order 107 that occurred on May 6, 2020, the judge stated that there was a colorable argument that the appellant was returning from work, as law enforcement encountered him on a highway approximately half an hour after his shift at work had supposedly ended. However, the judge also stated that while the appellant could have been walking back to the car, he was “not supposed to suppose such things” and would not do so. He stated that the appellant did not respond to law enforcement that he was coming home from work or going to a commercial establishment, and that law enforcement would have had no way of knowing whether the appellant was engaged in a legitimate purpose. The appellant was walking along the highway in the wrong direction, and appeared agitated. The judge stated that the officer would have been derelict if he had not approached the appellant, and found that the State had met its burden of proving that the appellant had violated the executive order as charged.

The State argues that in this case, the municipal court heard the evidence and found that the officers were credible. It argues that these findings are entitled to deference, and that there is no need to disturb them.

The State argues that the appellant has argued that the State did not prove his guilt beyond a reasonable doubt, and impermissibly shifted the burden of proof to him. The State argues that this argument lacks merit, as the officers testified, the court reviewed the footage of the encounters, and the appellant asserted his right not to testify. The State argues that it is clear from the record that the judge heard the testimony presented, considered the evidence presented, and found that the State had met its burden beyond a reasonable doubt.

II. The State Argues that it Proved Beyond a Reasonable Doubt that the Appellant Committed the Offense of Disorderly Conduct.

The State argues that the appellant has argued that his conviction should be vacated because the State did not prove his mens rea at the time of the offense. The State argues that the appellant has relied on State v. Stampone to argue that his conduct, namely grabbing his genitals while standing along the edge of a highway in public view, is unexceptional and non-criminalized behavior.

The State argues that under N.J.S.A. 2C:33-2(a)(2), “a person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he...[c]reates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.” The State argues that the municipal judge determined that the State had met its burden, finding that when the appellant grabbed his genitals while standing along the side of the highway in view of traffic, it was “clearly” a violation of the statute. The judge stated that a driver could have been shocked, and this could have resulted in a traffic accident. The judge stated that while the appellant may have touched his groin due to a physiological condition, in the absence of the establishment of that fact, he accepted the State’s testimony on its face.

The State argues that there can be no doubt that the appellant’s actions violated the statute. It argues that the appellant’s conduct is wholly dissimilar to that in State v. Stampone, in which the appellant slammed a door and refused to provide his name to police. 341 N.J. Super. at 249-50, 254-55. The State further argues that Stampone is also clear that the State need only present evidence that the appellant acted either purposely or recklessly, and that the appellant does not need to actually cause public inconvenience, annoyance or alarm, as long as the appellant purposely or recklessly create the potential of same. Id. at 255.

The State argues that in this case, the facts support a finding that the appellant did recklessly create a risk of public inconvenience, annoyance or alarm. The State argues that the appellant had no legitimate purpose for grabbing his groin and shaking his genitals. The State argues that doing so on the shoulder of the highway in view of motorists recklessly created a dangerous condition, particularly given the officer testimony that there were vehicles driving on the highway at that time.

III. The State Argues that it Proved the Pedestrian Violation Beyond a Reasonable Doubt.³

The State argues that the appellant has claimed that the record does not support his conviction for Crossing Outside of a Crosswalk. The State argues that the relevant provisions of this law are that “[n]o pedestrian shall leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield or stop,” and that “[e]very pedestrian upon a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.” N.J.S.A. 39:36(a)(2); N.J.S.A. 39:36(a)(4). The State argues that in this case, there is credible evidence to support the appellant’s conviction. The State argues that the municipal judge reviewed the trial record, and properly determined that the appellant committed a violation of the law.

OPINION

Applicable Law

Pursuant to R. 3:23-1, a judgement of conviction in a criminal action in municipal court may be reviewed by the superior court by appeal. The standard of review governing municipal appeals is de novo. R. 3:23-8(a) provides that the Superior Court will review the decision from the lower municipal court based on the record below and make its own independent findings of fact and conclusions of law and, in applicable cases, determine independently the appellant’s guilt or innocence. See, State v. States, 44 N.J. 285, 293 (1965). Although the reviewing court is obligated to make independent findings of fact, such review is limited to the evidentiary record created below. State v. Loce, 267 N.J. Super. 102, 104 (Law Div. 1991), modified and aff’d, 267 N.J. Super. 10 (App. Div. 1993), certify. den. 137 N.J. 563 (1993). In the case of a review of a legal determination, no deference is due to the municipal court’s decision. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

³ A review of the Municipal Court Transcript reveals that the appellant was in actuality acquitted on the charge of Crossing Outside a Crosswalk. He was convicted of Walking With Traffic.

Generally, the Superior Court must determine “whether the findings made could reasonably have been reached on sufficient credible evidence present in the record.” State v. Johnson, 42 N.J. 146, 162 (1964).

On March 21, 2020, Governor Murphy issued Executive Order 107 in order to curb the spread of the novel Coronavirus. In relevant part, the order stated that

[a]ll New Jersey residents shall remain home or at their place of residence unless they are 1) obtaining goods or services from essential retail businesses, as described in Paragraph 6; 2) obtaining takeout food or beverages from restaurants, other dining establishments, or food courts, pursuant to Paragraph 8; 3) seeking medical attention, essential social services, or assistance from law enforcement or emergency services; 4) visiting family or other individuals with whom the resident has a close personal relationship, such as those for whom the individual is a caretaker or romantic partner; 5) reporting to, or performing, their job; 6) walking, running, operating a wheelchair, or engaging in outdoor activities with immediate family members, caretakers, household members, or romantic partners while following best social distancing practices with other individuals, including staying six feet apart; 7) leaving the home for an educational, religious, or political reason; 8) leaving because of a reasonable fear for his or her health or safety; or 9) leaving at the direction of law enforcement or other government agency.

Paragraph 24 of Executive Order 107 states, in pertinent part, “[i]t shall be the duty of every person...in this State...to cooperate fully in all matters concerning this Executive Order.” Violations of Executive Order 107 are punishable under N.J. Stat. App. A:9-49, a section of the Civilian Defense and Disaster Control Act (“Disaster Control Act”). The Disaster Control Act, originally passed in 1942 and periodically amended and reissued, sets forth the delegation of authority and additional powers given to the governor in times of emergency. Under the pertinent provisions, any person who “[r]effuse[s] to obey the lawful orders of any air raid warden, civilian protection worker, or other person who is duly authorized to perform any act or function during the threat or imminence of danger or any emergency” is guilty, as is anyone who “[v]iolate[s] any order, rule or regulation adopted by the Governor and promulgated as provider by this act.” N.J. Stat. App. A:9-49(g); N.J. Stat. App. A:9-49(h).

The provisions of the executive order are to be interpreted broadly. In Kravitz v. Murphy, the appellate division addressed a challenge to another executive order issued by the governor in

response to the COVID-19 pandemic. In that case, the court explained that the governor has the authority to declare a public health emergency, and during times of emergency, the governor may have, under the Disaster Control Act, the authority to “make such orders, rules and regulations as may be necessary adequately to meet the various problems presented by any emergency and from time to time to amend or rescind such orders, rules and regulations...” on subjects including “blackouts; air raid warnings; recruitment of volunteers including air raid wardens, police and firemen; designation of vehicles and persons who can move during an air raid or any emergency; conduct of civilian population during an emergency; air raid protocol for schools; counteracting threatened sabotage; and evacuating residents.” N.J. Stat. App. A:9-45; Kravitz v. Murphy, 468 N.J. Super. 592, 612, 614 (App. Div. 2021). When such orders, rules, or regulations are issued, they are given a broad interpretation. As the court stated, when the governor “is acting consistently with express or implied authority from the Legislature” the action “should be given the widest latitude of judicial interpretation” and the party seeking to challenge the governor’s action bears a heavy burden of persuasion. Id. at 622. When Governor Murphy issued Executive Order 107, he “explained that ‘to mitigate community spread of COVID-19, it is necessary to limit the unnecessary movement of individuals in and around their communities and person-to-person interactions in accordance with CDC and DOH guidance’” and he specified that those who violated the order might be subject to criminal liability. Id. at 609. This is reinforced by the New Jersey Supreme Court’s ruling in Worthington v. Fauver, in which the Court concluded that emergency executive orders can be valid if authorized by the Disaster Control Act, and stated that those executive orders, when authorized by the legislature, should be given the broadest judicial interpretation. 88 N.J. 183, 208, 210 (1982).

Disorderly Conduct is criminalized by N.J.S.A. 2C:33-2, which states in pertinent part that “[a] disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he (1) Engages in fighting or threatening, or in violent or tumultuous behavior; or (2) Creates a hazardous or physically dangerous condition by any act which serves no legitimate purpose of the actor.” In order to be criminalized under N.J.S.A. 2C:33-2(a)(2), the conduct in question must be the type of conduct that has the capacity to cause a hazardous or physically dangerous condition, and the appellant must not have a legitimate purpose behind the conduct. Stampono, supra, 341 N.J. Super. at 254-55. Conduct that is merely bothersome, unexceptional, or socially inappropriate does not necessarily make an actor guilty of

Disorderly Conduct. In Stampone, the court concluded that the conduct in question, specifically, slamming a car door shut and almost hitting a police officer, did not rise to the level of Disorderly Conduct. Ibid. In contrast, however, in State v. Moore the court upheld a conviction under New Jersey's previous Disorderly Conduct statute in a case where for between 12 to 15 minutes the appellant refused to yield the microphone or take his seat when directed to do so at a city council meeting, and persisted in arguing with the chairman of the meeting about a point of parliamentary procedure, resulting in a disruption to the meeting. 101 N.J. Super. 419, 421-423. The court concluded that the appellant's conduct clearly violated the statute, because he "certainly disturbed and interfered with the conduct of the hearing" by disregarding the chairman's repeated rulings, insisting on pressing his point of order, making ad hominem insults directed at the chairman, and disrupting the meeting "to the point where the assembly became noisy," two others became involved in the dispute, and "those in the audience took to the aisles." Ibid. The actual and potential impact on the public is a key consideration in determining whether an action constitutes Disorderly Conduct. Furthermore, expressive conduct may be entitled to protection under the First Amendment to the Constitution. In Cruise-Gulyas v. Minard, the 6th Circuit Court of Appeals addressed a case in which a motorist was pulled over and raised her middle finger at a police officer. The court stated that "[f]its of rudeness or lack of gratitude may violate the Golden Rule. But that doesn't make them illegal or for that matter punishable[...]." 918 F.3d 494, 495 (6th Cir., 2019). The Supreme Court has long recognized that protected speech may include symbolic or expressive conduct, like displaying a middle finger, or in this case even grabbing one's genitals, where the speaker intends to convey a message or idea, and has noted that police officers, when confronted with these nonverbal challenges to police action, are expected to exercise a higher degree of restraint than the average individual. In Spence v. Washington, the Supreme Court laid out the test for determining whether something is expressive conduct, and therefore entitled to protection under the First Amendment. 418 U.S. 405, 410-11 (1974). There must be an intent to convey a message, and that message must be generally understood. Ibid. New Jersey follows the same standard. State v. Vawter, 136 N.J. 56, 63-64 (1994).

Finally, under N.J.S.A. 39:4-34, "[o]n all highways where there are no sidewalks or paths provided for pedestrian use, pedestrians shall, when practicable, walk only on the extreme left side of the roadway or its shoulder facing approaching traffic."

Findings of Fact and Conclusions of Law

The appellant was convicted in municipal court on charges of Violating Executive Order 107 per N.J. Stat. App. A:9-49(h), and Disorderly Conduct for conduct occurring on April 7, 2020, as well as charges of Violating Executive Order 107 per N.J. Stat. App. A:9-49(g), and Walking with Traffic on May 6, 2020. The remaining charges were either merged or the appellant was found not guilty.

He has appealed his convictions, contending that the State's proofs at trial in the municipal court were insufficient to sustain a conviction. This court has reviewed the record of the municipal court de novo, and has considered the arguments of counsel. Based on this review, the court has reached its own findings of fact and conclusions of law as to those convictions on appeal. The court has also considered the charges on which the appellant was acquitted. Those charges were not argued on appeal, but based on an examination of the record, the court finds that they were determined by the municipal court judge based on sound reasoning. These conclusions have not been argued on appeal and therefore shall stand. The court has given due weight to the credibility findings of the municipal court judge.

I. The State has Met the Burden of Proof Necessary to Sustain a Conviction for Violating Executive Order 107 on April 7, 2020.

In order to convict the appellant of violating Executive Order 107, the State bears the burden of proving his guilt beyond a reasonable doubt. There is little case law or precedent concerning convictions based on violations of Executive Order 107, and therefore the court must rely primarily on the plain text of the order, as well as the text of the applicable sections (g) and (h) of N.J. Stat. App. A:9-49.

Executive Order 107 was issued by Governor Murphy during a time of emergency in order to prevent the spread of a novel Coronavirus between individuals. The order instructed New Jersey residents to remain home or at their place of residence. At the time of his interactions with law enforcement, there is no question that Mr. French was outdoors, and was not at his home or his place of residence. However, while Executive Order 107 clearly directs residents to stay home in order to curb the spread of a dangerous disease, the order just as clearly lays forth exceptions to

this stay-at-home order. The order states that residents are to stay at home “unless,” among other exceptions, the resident is “walking, running, operating a wheelchair, or engaging in outdoor activities with immediate family members, caretakers, household members, or romantic partners while following best social distancing practices with other individuals, including staying six feet apart.” Under other exceptions to the order, essential workers were permitted to go to and from work, or individuals were permitted to leave home for political reasons. The court finds that the appellant has argued that he was returning from work at the time of his encounters with the police on both April 7, 2020, and May 6, 2020. He was stopped, and in the footage of the April 7, 2020 encounter, he can be heard asking the police if they are expecting him not to be an essential employee. (V2 at 3:07). However, without making initial contact with an individual, law enforcement does not know why an individual is out and not at home. The initial investigatory stop on April 7, 2020, was proper. At that time, it had been approximately a month since the executive order was issued. The officers were justified in making contact with the appellant in order to determine whether or not he was in compliance with the order. Pursuant to Paragraph 24 of Executive Order 107, he was to cooperate fully in all matters regarding the order. However, the appellant immediately became combative. He can be heard to say, “I will not be a part of this investigation.” (V2 at 3:15). He is repeatedly told to stand still. (V2 at 2:18; 6:25). He proceeds to first walk closer to the officers, and then to walk away entirely while they instruct him not to go. (V2 at 7:26; 9:04). He orders the officers to get into their vehicle repeatedly if they want to have a private conversation. (V2 at 7:36). Clearly, he refused to cooperate with law enforcement – as with Paragraph 24 per N.J. Stat. App. A:9-49(g), it is a violation to refuse to cooperate with a “person who is duly authorized to perform any act or function in connection with activities during the threat or imminence of danger or any emergency.” The officers were performing their legal responsibilities during a state of emergency – an emergency that resulted in the deaths of thousands of individuals. A month into this state of emergency, they placed their lives on the line to ensure order, and the appellant’s conduct required the officers to leave the safety of their cars and engage in an encounter with a person whose medical history and level of exposure to COVID-19 was unknown. Then, when asked to keep a distance from the officers, the appellant instead approached them. A review of the video recordings in this case clearly shows the appellant refusing to cooperate, emphasized by his walking away from the officers while being ordered to remain. In doing so, he violated Executive Order 107 (24) as stated in N.J. Stat. App. A:9-49(g). Under N.J.

Stat. App. A:9-49(h), it is an offense to “[v]iolate any order, rule or regulation adopted by the Governor and promulgated as provider by this act.” N.J. Stat. App. A:9-49 itself is a rule which provides specific rules, guidelines and orders under the governor’s power to provide for the national defense in times of emergency. The governor had determined that a state of emergency existed in New Jersey, and had begun to issue executive orders in order to address that emergency. In Executive Order 107, he specified that violators of that order were subject to criminal penalties under N.J. Stat. App. A:9-49. The court is to give a broad interpretation to the orders of the executive in a time of emergency, and therefore the court finds that the governor’s intent in specifying N.J. Stat. App. A:4-94 was clearly that individuals abide by all provisions of that section of the Disaster Control Act, including (g). Moreover, Paragraph 24 of Executive Order 107 states that

It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Executive Order.

New Jersey residents were, under Executive Order 107, clearly allowed to leave their residences in order to engage in outdoor recreational activities while following best social distancing practices. However, as Governor Murphy stated in Executive Order 107 itself, it was necessary to limit the unnecessary movement of individuals in and around their communities to mitigate the spread of COVID-19.

The appellant was not engaged in a traditional recreational activity. Instead, he was protesting on the side of the road – he was engaged in a high-conflict activity with a much greater chance of resulting in interpersonal activity than jogging around one’s neighborhood or taking a solitary walk. The intent of the governor’s order was to minimize person-to-person interactions in order to curb the spread of a dangerous disease. Based on the evidence before this court, it appears that the appellant was alone. However, due to his strange and combative behavior, he was approached by the police not only on April 7, 2020, but on May 6, 2020, as well. The court finds that it was foreseeable that a protest, particularly during a state of emergency, might draw attention from law enforcement. Not only did the appellant choose to partake in a high-conflict activity outside of the scope of traditional outdoor recreational activities, but when approached by the

police, instead of cooperating with their investigation, he initiated a protracted verbal confrontation that put the officers at risk by requiring them to engage in a conversation with him during a time when the community was threatened by a communicable disease. The court finds that while the appellant was outside, he was not engaged in the sort of outdoor recreational activity contemplated by a broad interpretation of Executive Order 107 and a consideration of the purpose behind that order.

The appellant has further argued that in addition to engaging in outdoor activity, he was also commuting from work and engaged in political activity, both of which are also exceptions for which people could leave their residences under the executive order. He has argued that the court engaged in impermissible burden-shifting by requiring him to prove that he had a legitimate reason for being outside of his residence. The court finds that the appellant is correct that it is the State that bears the burden of proving all elements of a criminal offense beyond a reasonable doubt, including proving that an offense was in fact committed. However, the court does not find, based on the record, that the municipal court engaged in impermissible burden shifting by requiring that the appellant prove he was engaging in one of the exceptions to the executive order. The court finds that the municipal judge listened to the evidence presented, evaluated the evidence, and was persuaded beyond a reasonable doubt by the State that the appellant had violated the executive order. That is the proper procedure. Regarding the appellant's argument that he was commuting from work and that he was engaged in political activity, the court finds that the testimony of the officers and the presence of a sign bearing a misspelled profanity weigh against the possibility that the appellant was returning from work. Furthermore, even if he was returning from work, there can be no doubt that under the order, essential employees could leave their residences to go to work, and to go home from work, not to leave work, engage in a disallowed activity for a period of time, and then continue on the way home. The video shows that the appellant was not walking directly from one place to the other – he was protesting. The court further finds that while a protest may be a form of political activity, the order states that residents may “[leave] the home for an educational, religious, or political reason.” When read with the purpose of the act in mind, it is clear that individuals were to leave their residences, perform the educational, religious, or political purpose of their leaving in as efficient and socially-distanced a manner as possible, and then go home. Voting, for example, would fall under this type of exception. Instead, the appellant engaged

in a public, high-conflict activity of an indefinite duration; an activity which, unlike voting, could have waited until the threat of emergency had subsided.

Finally, the fact remains that under Paragraph 24, the applicant still had an explicit obligation to cooperate with law enforcement in connection with any allowed activities. He did not do so, and in not doing so, he violated a rule adopted and promulgated by the governor. The court finds that the appellant's conviction on the charge of violating Executive Order 107 should be upheld under N.J. Stat. App. A:9-49(h).

This is a trial de novo, and this court finds that on the charge of violating Executive Order 107 through his conduct on April 7, 2020, the appellant is found guilty beyond a reasonable doubt.

II. The State has Not Established the Conduct Necessary to Sustain a Charge of Disorderly Conduct

The appellant has argued that his conviction for Disorderly Conduct should be overturned because the State has failed to demonstrate the mens rea necessary to sustain a charge of Disorderly Conduct. The State, in turn, argues that it has met this burden, because under the statute either a purposeful or a reckless mens rea will suffice, and the appellant's behavior was certainly reckless. However, in order to be guilty of Disorderly Conduct, the appellant must have either purposely or recklessly engaged in fighting, threatening, violent or tumultuous behavior, or created a hazardous or physically dangerous condition through an act which served no legitimate purpose to him.

The court finds that in convicting the appellant of Disorderly Conduct, the municipal judge relied on the testimony of the officers and the video presented to the court to conclude that the appellant did grab his groin, and he then determined that such conduct clearly fell afoul of the statute. This court has reviewed the video, and the court does accept the municipal court's credibility findings with regard to the officers. This court finds them credible, and finds that the appellant's conduct was as they described. He has not contested such findings. However, the court does not find that the appellant's conduct created a risk of a hazardous or physically dangerous condition, as required by statute. The State has argued that the appellant's conduct occurred on the side of a public road; a driver might have seen it, become distracted, and caused a traffic accident. However, the court finds that this is simply too vague and speculative to sustain a conviction under the statute. The appellant's conduct would not have been substantially more distracting to drivers

than any other incident involving the police on the side of the road, and it is the responsibility of the motorist to keep eyes on the road rather than becoming distracted by the actions of others. In examining this case in light of precedent, the court finds that the facts bear more similarity to those of Stampone than those of Moore. Both Stampone and the present case involve unpleasant encounters with police. In Stampone, the defendant slammed a car door shut, while in this case, the appellant made a potentially crude gesture with his hand. However, in neither case did the targeted behavior attract widespread attention or cause widespread alarm, and in neither case was the behavior in question the type of behavior with the potential to do so. The evidence in this case demonstrates that the appellant made a brief, crude gesture. There is no evidence that this gesture was observed by others other than the officer, or that even if it had been observed by others, it would have created a risk of a hazardous or physically dangerous condition. This is in marked contrast with the circumstances in Moore, where the behavior in question lasted for more than 10 minutes, brought a public meeting to a standstill, and occurred in front of a captive audience of people who had come to attend a civic meeting, and where the defendant continued to engage in the same behavior even after it became apparent that it was resulting in significant disruption. The court accepts the municipal court judge's finding that the officer's testimony was credible, but disagrees that the actions described constitute Disorderly Conduct under the law. Furthermore, the court finds that in this case, the appellant's conduct was protected by the First Amendment. Under the First Amendment, conduct is considered expressive, and therefore provided with the protections afforded to speech, if it has the intent to portray a particularized message, and those who view the message have a great likelihood of understanding it. Vawter, supra, 136 N.J. at 63-64. In this case, the officer can be heard discussing the appellant's conduct. He states that the appellant is "shaking his genitals toward [the officer] in front of the public." (V4 at 7:45). In examining this case under the First Amendment, the court finds that there was an intent to convey a message to the officer, and that the message was clear. The officer is further heard describing the conduct as "non-sexual." (V4 at 10:22). Clearly, the conduct was intended for the officer, and was intended to convey the appellant's displeasure with the officer. As with displaying a middle finger, such conduct is rude and crude, but the court finds that it does not create a physically dangerous condition, and does meet the test of expressive conduct protected by the First Amendment. Therefore, the appellant is found not guilty of this charge.

III. The State has Met the Burden of Proof Necessary to Sustain a Conviction for Violating Executive Order 107 on May 6, 2020.

On May 6, 2020, Executive Order 107 remained in effect and New Jersey continued to operate in a state of emergency due to the ongoing threat posed by the COVID-19 pandemic. On that day, the court finds that the appellant once again had an encounter with the police. On that day, he was again on the side of the road, holding a sign. He has argued that as on the previous occasion, he was engaged in an outdoor activity, he was engaged in political activity, and he was on his way back from work. The court continues to find that Executive Order 107 did allow for individuals to engage in outdoor recreational activity while following best social distancing practices. The appellant was outdoors, he was alone, and he appeared to have a piece of fabric covering his face. However, he was not engaged in a recreational outside activity. He was in an unusual place. He was standing on the immediate shoulder of the road, very close to where cars would be driving, during a time of emergency. (V5 at 1:10). He was holding a sign that at one point, he straddled, and he was walking backwards on the wrong side of the road. (V5 at 1:27). Given the unusualness of the appellant's location as well as the ongoing state of emergency, the officers were justified in approaching the appellant to determine why he was standing on the shoulder of the road holding a sign, and to ascertain whether he followed the executive order. Once again, when Sergeant Glennon approached the appellant, he became combative. He straddled his sign, turned his back to the officers, and began to sway back and forth. (V5 at 1:27). When the officer got out of the car, he began to yell, and to make emphatic hand gestures. (V5 at 2:04). He asked the officer questions, and then proceeded to cut him off before he could fully respond. (V5 at 2:05). He demanded a lawyer. (V5 at 2:26). He stated that he did not want to be a part of the investigation any longer. (V5 at 4:40). When one of the officers asked him to listen, he refused to do so, and shortly thereafter referred to the officer as a "tyrant." (V5 at 3:05; 3:42; 4:06). Throughout the encounter, the officers demonstrated a tremendous amount of restraint. The appellant demonstrated an utter unwillingness to cooperate with the officers, or even to engage in reasoned conversation with them. He was hostile and combative toward officers who were carrying out their lawful duties during a time of emergency, and in doing so, he violated Executive order 107 per N.J. Stat. App. A:4-94(g). Therefore, he is found guilty on that charge beyond a reasonable doubt.

Regarding the appellant's arguments that he was returning from work and that he was engaged in political activity, the court finds them without merit for the reasons elaborated upon above. While in this case, the appellant was wearing a sweatshirt that appears to have possibly been issued by his job and it was confirmed that he had left work approximately 20 minutes beforehand, walking backward while holding a sign is simply not a part of commuting to and from work in an efficient and socially distanced manner.

IV. The State has Proved that the Appellant Violated Statute by Walking With Traffic.

Although this is a trial *de novo*, the court does give weight to the credibility determinations of the municipal court judge, who, having observed the testimony firsthand, is best placed to evaluate the witnesses' credibility. In this case, the court has examined the record before it, and finds that the judge heard witness testimony, and determined that the testimony was credible, and the officer provided evidence beyond a reasonable doubt to convict the appellant of this offense. The appellant has argued that the video taken of the events in question demonstrates that he was walking in the correct direction, and that at the point the officer alleged that he turned around and walked in the wrong direction, the officer's view was obstructed. The statute requires that an individual walking on the side of a highway walk on the extreme left of the road against traffic. The video footage in this case shows that the appellant was walking on the extreme right. This is a violation of the statute. Furthermore, Sergeant Glennon testified that at a certain point, the appellant turned around and began to walk in the direction of traffic. The video recording of the encounter does not capture this moment, but the officer was able to observe it while he was writing his report. He testified that eventually the appellant crossed the street. There is sufficient evidence to conclude that he did turn around at some point, creating further support for this conviction. The appellant has provided no evidence to dispute the officer's testimony. While the appellant has argued that the video shows that the officer's vision would have been obstructed based on the positioning of trees in the video of the encounter, the human eye is significantly more sensitive than the camera, and the absence of clear video footage does not mean that Sergeant Glennon could not have seen what he credibly testified that he saw. Here, the municipal judge heard Sergeant Glennon testify that he personally observed the appellant committing the offense in question, and when viewing that testimony in light of all the evidence produced at trial, including the video to

which the appellant referred, the judge concluded that the sergeant's testimony remained credible, and proved the appellant's guilt beyond a reasonable doubt. Given the municipal court's credibility findings the deference that they deserve, and based on the totality of the evidence, this court finds that the appellant is guilty of Walking With Traffic.

CONCLUSION

For the aforementioned reasons, the appellant's Municipal Appeal is hereby **GRANTED IN PART AND DENIED IN PART**. Appellant, on de novo review, is convicted on both charges of Violating Executive Order 107, as well as Walking With Traffic. He is acquitted on one charge of Disorderly Conduct. The appellant is sentenced to a fine of \$500 on each charge of Violating Executive Order 107; on the conviction for the events occurring on May 6, 2020, he is additionally sentenced to a 14-day suspended jail sentence with one year of probation. On each conviction there is a \$50 VCCO and \$75 SFSN as well as \$33 court costs. On the charge of Walking With Traffic he is sentenced to a \$103 fine and \$33 court costs. Fines are payable in Municipal Court.

The appellant has 45 days to appeal these convictions.