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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5832-13T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RICARDO DIAZ, a/k/a RICARDO
DIAZCAMEJO,

Defendant-Appellant.

Submitted October 17, 2016 – Decided November 2, 2016

Before Judges Sabatino and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
11-10-02521.

Jeffrey B. Steinfeld, attorney for appellant.

Diane Ruberton, Acting Atlantic County
Prosecutor, attorney for respondent (Melinda
A. Harrigan, Special Deputy Attorney General/
Acting Assistant Prosecutor, of counsel and
on the brief).

PER CURIAM

Defendant, Ricardo Diaz, pled guilty on April 17, 2012 to an
amended charge of second-degree robbery, N.J.S.A. 2C:15-1. The
plea was entered pursuant to a negotiated agreement with the State

in which it agreed to accept a second-degree robbery disposition in lieu of the indictment charging defendant with first-degree robbery. The State further agreed to recommend that defendant be sentenced in the bottom of the third-degree range to a three-year custodial term with an 85% period of parole ineligibility pursuant the No Early Release Act, N.J.S.A. 2C:43-7.2.

In response to the court's query at the plea hearing as to whether he had "any disability or condition which impairs [his] judgment," defendant stated that he has bipolar disorder. Defendant also informed the court that he was "on medication," specifically Risperdal and Depixol. Nevertheless, he acknowledged to the court that he could "understand what's going on [that day]." Defendant further asserted that he understood the questions on the plea form, that he was satisfied with the advice he received from his attorney, and that he "underst[oo]d what [he's] doing."

Factually, the State asserted that defendant had engaged in the offense of robbery by confronting a clerk in a convenience store, demanding money, and threatening to harm that clerk by putting his finger in his shirt in a manner that made it appear to be a gun. With respect to those contentions, defendant supplied the following factual basis for his guilty plea to second-degree robbery, doing so through colloquy with his plea counsel:

[DEFENSE COUNSEL]: Mr. Diaz, on September 15, 2011 were you in Atlantic City?

A Yes.

[DEFENSE COUNSEL]: And in that place and on that date did you come into contact with a man name[d] Kahn [phonetic spelling omitted]?

A Yes. . . .

[DEFENSE COUNSEL]: And did you then say to Mr. Kahn that if he didn't give you the money that you were going to kill him?

A I don't remember that. I don't remember that. I guess, yes.

[DEFENSE COUNSEL]: Okay, well, you can't guess yes. Is that what you did?

A Yes, yes.

[DEFENSE COUNSEL]: Okay. Mr. Diaz, no one wants you to plead guilty if you're not guilty, so in order to plead guilty you're going to have to tell the Judge what you did to make you guilty of the offense. The elements of a second degree robbery in this case would be theft or attempted theft with a threat or use of force. Can you tell the Judge what you did to make you guilty of a second degree robbery?

A Yes. I will be honest, my shirt and my finger. I was hallucinating, and I scared him. I didn't know what I was doing. I stayed in the parking lot. That's what I remember, waiting in the parking lot with the money and the cop caught me. I didn't run nowhere.

[DEFENSE COUNSEL]: So when you put your finger in your shirt, was that to look like a gun?

A Yes.

[DEFENSE COUNSEL]: And you did that so you could get the money?

A Yes.

[DEFENSE COUNSEL]: And you eventually got the money, didn't you?

A Yes.

[DEFENSE COUNSEL]: And Judge, I think that's enough.

[THE PROSECUTOR]: [The] State's satisfied.

THE COURT: [The] State's satisfied? All right. Very well.

[(Emphasis added).]

Two months later, on June 8, 2012, the trial court sentenced defendant consistent with the plea agreement to a three-year custodial term, subject to the NERA parole disqualifier. Defendant did not move at the time of sentencing to withdraw his earlier guilty plea.

On appeal, defendant now raises the following points in his brief for our consideration:

POINT ONE

APPELLANT'S CONVICTION SHOULD BE REVERSED AND HIS GUILTY PLEA VACATED, BECAUSE PRIOR TO ACCEPTING THE GUILTY PLEA, THE PLEA JUDGE DID NOT TAKE A VALID FACTUAL BASIS FROM THE APPELLANT. MOREOVER, APPELLANT'S MENTAL ILLNESS PREVENTED HIM FROM BEING ABLE TO

VOLUNTARILY ENTER A GUILTY PLEA IN THIS MATTER.

POINT TWO

IN THE ALTERNATIVE, APPELLANT'S CONVICTION MUST BE VACATED BECAUSE THE FACTUAL BASIS UNDERLYING THE PLEA DOES NOT SUPPORT THE PROPER MENS REA NECESSARY TO ESTABLISH ALL OF THE ELEMENTS OF THE CHARGED OFFENSE.

Before we comment on defendant's arguments, we note that his appellate appendix contains a certification from him dated July 22, 2014. The certification was provided in connection with defendant's motion to allow his appeal to proceed as within time. In paragraph 3 and 4 of that certification, defendant asserted that he did not truly understand what was occurring at the time he entered into his guilty plea because of the mental health disorder. He further certified that he likewise did not understand the effects of his actions on the date of the incident due to his disorder. He added that his plea counsel failed to give him proper advice concerning whether his alleged impairment provided a possible defense to the State's charges.

Specifically, the certification stated in these pertinent paragraphs as follows:

3. I have previously undergone a psychiatric evaluation and it was determined that I suffer from Bipolar Disorder. On the date that I entered the above-mentioned guilty plea, I was taking medication as treatment for my bipolar disorder. Because of my medication, I did not

understand the hearing that was going on in support of my entering my guilty plea.

4. In addition, I was not taking my medication on the date of the offense, and, as a result, I had no idea concerning the effects of my actions. I advised my Public Defender of this fact, but he did not advise me concerning my having a possible defense to the charges.

[(Emphasis added).]

Considering defendant's contentions as a whole, it appears that he essentially is advancing two related claims: (1) due to his condition at the time of the September 2011 incident at the convenience store, he lacked the requisite mental capacity to "purposely" commit the offense of robbery, as required under N.J.S.A. 2C:15-1; and (2) due to his condition at the time of his April 2012 plea hearing, he lacked the capacity to waive his rights knowingly and voluntarily, despite his representations on the record to the contrary.¹ Defendant's certification also suggests a third claim, i.e., that he did not receive the effective assistance of his plea counsel, although he has not yet apparently filed a petition for post-conviction relief ("PCR") formally making that assertion.

¹ We need not address here the apparent dissonance between defendant's assertion in paragraph 3 of impairment related to a use of medication and his assertion in paragraph 4 of impairment related to a lack of medication.

As relief on appeal, defendant requests that we vacate his conviction, a request that was not made at any time to the trial court. In essence, defendant wishes to have his guilty plea nullified, his conviction and sentence vacated, and the case presumably restored to the pretrial calendar.

Plainly stated, the essence of defendant's contentions is that he wants his plea agreement withdrawn. Given the nature of his allegations, and the fact that the sworn assertions in his July 22, 2014 certification have not been presented to the trial court, we conclude that the most prudent course of action is to remand this matter to that court for a hearing to evaluate whether defendant should be allowed to withdraw his guilty plea, pursuant to the criteria set forth in State v. Slater, 198 N.J. 145, 157-58 (2009).

Accepting for the moment, at face value, defendant's contentions of mental impairment at the time of both the September 2011 incident and his April 2012 plea hearing, defendant arguably has asserted a "colorable claim of innocence" with respect to the mens rea element of robbery, including his assertion at the plea hearing that he had been "hallucinating" at the convenience store. Id. at 158. He has also set forth potentially justifiable "reasons

for withdrawal" of his plea. Id. at 159.² These factually dependent points are best sorted out first at the trial level – possibly after an evidentiary hearing to resolve disputed facts, with appropriate medical corroboration – before any further appellate review is undertaken.

To accomplish this procedurally, we remand this matter to the trial court, where defendant may file within sixty days a plea withdrawal motion addressing the Slater criteria for the court's due consideration. If he so chooses, defendant may also concurrently file a petition for PCR, to the extent he contends that his plea counsel was constitutionally ineffective in violation of the standards of Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 697 (1984).

In remanding this matter for these specified and limited purposes, we offer no views as to whether any of defendant's contentions have sufficient merit to warrant relief of any kind. In the meantime, defendant's conviction and sentence shall remain intact, without prejudice to the right to pursue further appellate review following the remand disposition.

Remanded in accordance with the terms of this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION

² We need not discuss the remaining Slater factors here.