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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1011-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELIZABETH M. SILVA,

Defendant-Appellant.

Argued October 15, 2014 – Decided March 19, 2015

Before Judges Nugent and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Municipal Appeal No. 13-028.

John Menzel argued the cause for appellant.

Ian D. Brater, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Christopher J. Gramiccioni, Acting Monmouth County Prosecutor, attorney; Mr. Brater, of counsel and on the brief).

PER CURIAM

After pleading guilty in municipal court to driving while under the influence of intoxicating liquor (DWI), N.J.S.A. 39:4-50(a), and refusal to submit to a breath test (Refusal), 39:4-50.4(a), defendant Elizabeth M. Silva moved to withdraw her plea, asserting that the factual basis she gave was inadequate

to support the DWI violation. The municipal court judge denied her motion, as did the Law Division judge who presided over her trial de novo. Because the factual basis for her plea did not include an element of DWI — that she intended to drive the parked car she occupied when police arrested her - we vacate her convictions and remand for a trial.

In the early hours of a July morning in 2011, Belmar police officers issued nine traffic summonses to defendant, charging her with, among other motor vehicle violations, DWI and Refusal.[1] Three months later, defendant appeared in Belmar municipal court and agreed to plead guilty to DWI and Refusal in exchange for the prosecutor dismissing the remaining summonses. As to the summonses being dismissed, the prosecutor represented that the car with respect to which the remaining summonses were issued did not belong to defendant.

Before defendant entered her plea, the municipal court judge explained that he had conferenced the case with the prosecutor and defense counsel, understood the DWI and Refusal were defendant's first offenses involving alcohol, and would, in

[1] The other charges were no insurance, N.J.S.A. 39:3-29; failure to wear a seatbelt, N.J.S.A. 39:3-76.2f; improper display of license plates, N.J.S.A. 39:3-33; failure to show registration, N.J.S.A. 39:3-29; parking on roadway, N.J.S.A. 39:4-136; allowing unattended vehicle to stand on highway without setting brakes, N.J.S.A. 39:4-137; and parking in an area designated no parking, N.J.S.A. 39:4-138(g).

accordance with Supreme Court guidelines, be willing to impose concurrent sentences. To assure that there was a proper factual basis for defendant's plea, the court engaged in the following colloquy with defendant:

> Q Now, were you operating a BMW in the Borough of Belmar, and by operating it can mean as simple as the engine running at that time, in the Borough of Belmar at 16th and A Street on July 30th, 2011 about 12:25 in the morning? (emphasis added).
>
> A Yes, Your Honor.
>
> Q All right. And were you operating that vehicle while you [were] under the influence of alcohol?
>
> A Yes, Your Honor.
>
> Q And can you tell me what you had to drink that evening?
>
> A Just a few beers.
>
> Q All right. By a few, was it more than five?
>
> A No.
>
> Q And did you have any shots to drink or anything like that?
>
> A No.
>
> Q And what kind of beers were they? Do you remember?
>
> A Yeah. Coors Light.
>
> Q Coors Light. Were they bottles or cans?

A No. They were in bottles.

Q Bottles. Were they 12 or 16 ounce bottles?

A I don't know. They were in a glass.

Q They were poured into a glass. All right. Are you satisfied that the amount of alcohol you consumed placed you under the influence of alcohol and made it both illegal and improper for you to be operating a vehicle on that date and time?

A Yes, Your Honor.

Q All right. And when you were brought into headquarters, you were asked to submit to a breathalyzer, and you were read what they call a Paragraph 36, which tells you that if you don't submit to a breathalyzer you'll be charged with a refusal, is that correct?

A Correct.

Q All right. And is it accurate that you did not take the breathalyzer test in this matter, is that correct?

A Correct.

Before the judge sentenced defendant, she and her attorney explained that she and her friend had left a bar and "were in the car [with the engine running] trying to figure out who was going to drive."

The municipal court judge suspended defendant's driving privileges for concurrent terms of three months on the DWI and seven months on the Refusal, ordered her to spend twelve hours

in an intoxicated driver resource center, imposed appropriate fines and assessments, and ordered her to install an interlock device in her car for six months following restoration of her driving privileges. Defendant appealed to the Law Division, where, after delays caused by events not relevant to the issues on this appeal, the judge dismissed the appeal without prejudice to permit defendant "to file either a Motion to Withdraw Plea, or petition for Post Conviction Relief."

Defendant filed in municipal court a motion entitled "Motion to Either Withdraw Guilty Pleas or for Post Conviction Relief." Defendant made the following argument in support of her motion:

> [Defendant] alleges a misunderstanding of the element of the DWI offense concerning "operation," thus negating an essential element of the DWI allocation. This misunderstanding was buttressed by advice from the municipal court and given on the record and from her own attorney given both on and off the record. Second, [defendant] denies categorically that she refused to submit to breath samples, based on her submission of seven breath samples, two of which met minimum volume and duration requirements, and her intention to submit samples. The facts and circumstances on which this request for relief is premised are set forth at greater length in the documents submitted herewith.

Following argument, the municipal court judge denied defendant's motion. Defendant filed an appeal to the Law

Division, where the judge presiding over a trial de novo also denied defendant's motion. After considering the four factors concerning plea withdrawals set forth in State v. Slater, 198 N.J. 145, 157-58 (2009), the Law Division judge concluded defendant had not demonstrated a sufficient basis to withdraw her plea. Addressing the factual basis for defendant's DWI plea, the judge noted that movement of the vehicle itself or actual operation is not necessary to support a DWI conviction and that operation can be proved by direct or circumstantial evidence. The judge stated that the municipal court judge had given defendant the correct definition of "operation." The Law Division judge also noted that defendant conceded in her brief that, when arrested, she was sitting in the driver's seat with the engine running and her friend was seated in the passenger seat. Lastly, the judge concluded there was a sufficient factual basis to support defendant's Refusal plea. Defendant appealed.

Defendant raises these points on appeal:

> I. BECAUSE SHE DID NOT HAVE A CORRECT UNDERSTANDING OF THE MEANING OF "OPERATION" AS USED TO DEFINE THE OFFENSE OF OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, DEFENDANT IS ENTITLED TO VACATION OF HER PLEA TO THAT OFFENSE.
>
> II. BECAUSE DEFENDANT ATTEMPTED IN GOOD FAITH TO SUBMIT BREATH SAMPLES WHEN REQUESTED BY THE OFFICER, THIS COURT SHOULD

> VACATE HER PLEA TO THAT OFFENSE AND FIND HER NOT GUILTY.
>
> III. BECAUSE THE STANDARD STATEMENT FAILED TO ADEQUATELY INFORM DEFENDANT OF THE CONSEQUENCES OF REFUSAL, THIS COURT SHOULD ACQUIT HER OF BREATH TEST REFUSAL.
>
> IV. GIVEN HER COLORABLE CLAIM FOR RELIEF BASED ON SOUND REASONS AND THE ABSENCE OF A PLEA AGREEMENT OR ADVANTAGE TO HER OR PREJUDICE TO THE STATE, DEFENDANT IS ENTITLED TO WITHDRAW HER PLEA IN THE INTERESTS OF JUSTICE.

We agree with defendant's first point.

When a defendant appeals a trial court's denial of a motion to withdraw or vacate a guilty plea due to an inadequate factual basis, we review the matter de novo. State v. Tate, ___ N.J. ___, ___ (2015) (slip op. at 19). That is because

> "[a]n appellate court is in the same position as the trial court in assessing whether the factual admissions during a plea colloquy satisfy the essential elements of an offense. When reviewing the adequacy of the factual basis to a guilty plea, the trial court is not making a determination based on witness credibility or the feel of the case, circumstances that typically call for deference to the trial court."
>
> [Ibid.]

As the Supreme Court explained in Tate:

> Significantly, the standard of review here is different from a court's denial of a motion to withdraw a guilty plea where the plea is supported by an adequate factual basis but the defendant later asserts his innocence. In that circumstance, the trial

> court's decision is judged by the four-prong test set forth in Slater, supra . . . . In a Slater scenario, the appellate standard of review is abuse of discretion. State v. Lipa, 219 N.J. 323, 332 (2014). That is so because the trial court is making qualitative assessments about the nature of a defendant's reasons for moving to withdraw his plea and the strength of his case and because the court is sometimes making credibility determinations about witness testimony.
>
> To be clear, when the issue is solely whether an adequate factual basis supports a guilty plea, a Slater analysis is unnecessary. See State v. Campfield, 213 N.J. 218, 230-32, 235-37 (2013) (analyzing whether factual basis existed without discussing Slater factors); see also State ex rel. T.M., 166 N.J. 319, 325-27, 332-37 (2001) (concluding there was inadequate factual basis for defendant's guilty plea without discussing factors for plea withdrawal). This is a point that may not have been fully understood by the parties.
>
> [Id. at 19-20.]

Defendants who plead guilty must provide a factual basis for their pleas. Providing "a truthful account of what actually occurred to justify the acceptance of a plea. That approach in the long-run is the best means of ensuring that innocent people are not punished for crimes they did not commit." State v. Taccetta, 200 N.J. 183, 198 (2009). For that and other reasons, before accepting a plea a judge "'must be convinced that (1) the defendant has provided an adequate factual basis for the plea; (2) the plea is made voluntarily; and (3) the plea is made

knowingly.'" State v. Gregory, ___ N.J. ___, ___ (2015) (slip op. at 9) (quoting Lipa, supra, 219 N.J. at 331). These requirements are embodied in Rule 3:9-2, which provides in part:

> The court, in its discretion, may refuse to accept a plea of guilty and shall not accept such plea without first questioning the defendant personally, under oath or by affirmation, and determining by inquiry of the defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea.

Pleas entered in municipal court are subject to a similar requirement. Rule 7:6-2(a)(1) provides in relevant part:

> [T]he court shall not, however, accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant and, in the court's discretion, of others, that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea.

Rule 7:6-2 "is intended to afford defendants the same protections" as Rule 3:9-2. Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on Rule 7:6-2(a) (2015).

"The principal purpose of the factual-basis requirement of Rule 3:9-2 is to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the

charge but without realizing that his conduct does not actually fall within the charge.'" Tate, supra, slip op. at 22 (quoting State v. Barboza, 115 N.J. 415, 421 (1989)). "Rule 3:9-2 serves as a fail-safe mechanism that filters out those defendants whose factual accounts do not equate to a declaration of guilt." Ibid. Here, the "fail-safe mechanism" failed.

When defendant pled guilty in municipal court, she admitted to neither driving the car nor intending to drive it. If a person is seated in a parked car with the engine running, intent to drive the car is an element of DWI. As our Supreme Court held more than fifty years ago:

> We read the opinion of the Appellate Division, 77 N.J. Super. 512 (1962), to hold that a person "operates" -- or for that matter, "drives" -- a motor vehicle under the influence of intoxicating liquor, within the meaning of N.J.S.A. 39:4-50 and 39:4-50.1, when, in that condition, he enters a stationary vehicle, on a public highway or in a place devoted to public use, turns on the ignition, starts and maintains the motor in operation and remains in the driver's seat behind the steering wheel, with the intent to move the vehicle, and that in this case the trial court could clearly infer such intent from the evidence. We thoroughly agree and therefore affirm the judgment of conviction.
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> [State v. Sweeney, 40 N.J. 359, 360-61 (1963).]

In State v. Daly, the Supreme Court concluded, "as [it] did in Sweeney, that in addition to starting the engine, evidence of

intent to drive or move the vehicle at the time must appear." 64 N.J. 122, 125 (1973); accord, State v. Mulcahy, 107 N.J. 467, 479 (1987) ("We therefore believe that when one enters a car and puts one's self in the driver's seat, that person is in control of the car and an intention to drive the vehicle, combined with physical movements to put the car in motion, constitutes operation, at least sufficient to warrant an arrest for purposes of submission to the sobriety test required by N.J.S.A. 39:4-50.4a."); State v. Stiene, 203 N.J. Super. 275, 279 (App. Div.) (synthesizing cases and concluding "that when one in an intoxicated state places himself behind the wheel of a motor vehicle and not only intends to operate it in a public place, but actually attempts to do so (even though the attempt is unsuccessful) and there is the possibility of motion, he violates the statute"), certif. denied, 102 N.J. 375 (1985); State v. Morris, 262 N.J. Super. 413, 418 (App. Div. 1993) (noting "as stressed in State v. Tischio, [107 N.J. 504 (1987)], the focus of the 'operation' inquiry revolves primarily around the defendant's intent to operate the vehicle").

In the case before us, the municipal court judge inadvertently misled defendant by telling her that the DWI element of operation "can mean as simple as the engine running at the time." The operation element required more; it required

an intent to drive or put the car in motion. Mulcahy, supra, 107 N.J. at 479; Stiene, supra, 203 N.J. Super. at 279. Defendant admitted to neither when she gave the factual basis for her plea. Rather, she did little more than acknowledge the municipal court judge's erroneous explanation of "operation."

"The factual basis for a guilty plea can be established by a defendant's explicit admission of guilt or by a defendant's acknowledgment of the underlying facts constituting essential elements of the crime." Gregory, supra, slip op. at 9 (citing Campfield, supra, 213 N.J. at 231 (2013)). But "[a] defendant must do more than accede to a version of events presented by the prosecutor." State v. Perez, ___ N.J. ___, ___ (2015) (slip op. at 20) (citing T.M., supra, 166 N.J. at 333 (2001)). Rather, a defendant must admit that he engaged in the charged offense and provide a factual statement or acknowledge all of the facts that comprise the essential elements of the offense to which the defendant pleads guilty. Gregory, supra, slip op. at 9.

The State contends "[d]efendant's statement that she and her passenger were 'thinking about and talking about' getting someone else to drive 'when [their] car was still operating,' did not rebut [the] legal inference[,]" deduced from defendant entering the vehicle, turning on the car's ignition, and maintaining the motor in operation, that she intended to take

the next step, namely, putting the car in motion. This argument misapprehends the distinction between a defendant's admissions during a plea colloquy and legitimate inferences a factfinder can deduce from evidence after making credibility determinations.

A judge may certainly deduce from competent trial evidence inferences adverse to a defendant and reject a defendant's version of events. But such a situation is different from that of a guilty plea colloquy in which a defendant does not provide a factual basis for the element of an offense. As we previously explained, a judge does not make credibility findings when determining whether a defendant has provided a factual basis for a plea. See Gregory, supra, slip op. at 13 (rejecting the State's argument that factual basis for defendant's guilty plea was adequate because defendant's intent to distribute a controlled dangerous substance (CDS) could be inferred from the manner in which the CDS was packaged, and stating that "a court is not permitted to presume facts required to establish the essential elements of the crime" (internal quotation marks and citation omitted)).

If a defendant's guilty plea is not supported by a sufficient factual basis, we will vacate it on appeal:

> The remedy for an inadequate factual basis is an order vacating the guilty plea and

> restoring both parties to their positions prior to the trial court's acceptance of the plea. . . . If an appellate court determines that "a plea has been accepted without an adequate factual basis, the plea, the judgment of conviction, and the sentence must be vacated, the dismissed charges reinstated, and defendant allowed to re-plead or to proceed to trial."
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> [Campfield, supra, 213 N.J. at 232 (internal citation omitted) (quoting Barboza, supra, 115 N.J. at 420).]

Accordingly, we vacate defendant's DWI plea. We also vacate defendant's plea to Refusal in view of both her assertion that she provided at least two adequate breath samples as well as her inducement to enter a plea based on the municipal court judge's erroneous statement of "operation" for purposes of DWI and his statement that he would impose a concurrent sentence on the Refusal.

Defendant's argument in Point III — that she should be acquitted of Refusal because the standard statement did not adequately inform her of the consequences of refusing to give a breath sample — is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Reversed and remanded for trial.