FILED, Clerk of the Appellate Division, April 11, 2024, **A-000031-23**, AMENDED

REISIG
CRIMINAL DEFENSE & DWI LAW, LLC

ONE BROAD STREET
FREEHOLD, NJ 07728
NEWJERSEY-DUI-ATTORNEY.COM
NJ-DEFENSE-LAWYER.COM

TELEPHONE: 732-625-9660
FACSIMILE: 732-625-0310
EMAIL: INFO@REISIGLAW.COM

PRACTICE LIMITED TO:
CRIMINAL DEFENSE
DWI
MUNICIPAL COURT
DOMESTIC VIOLENCE
APPELLATE PRACTICE

MATTHEW W. REISIG*+
*CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CRIMINAL TRIAL ATTORNEY
+ CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A MUNICIPAL COURT LAW ATTORNEY

LUKE C. KURZAWA SENIOR ASSOCIATE

MICHAEL H. ROSS OF COUNSEL

April 8, 2024

Honorable Judges of the Appellate Division
New Jersey Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v.
Anthony Barbato (Defendant-Appellant)
Docket No. A-000031-23
Appellate Division Appeal from the Ocean County Law Division-Criminal Part (Honorable Michael A. Guadagno, J.A.D.)

Dear Sir(s)/Madam(es):

Pursuant to New Jersey Court Rule 2:6-2(b), please accept the within Amended Letter Memorandum of Law in lieu of a more formal brief in support of the within Defendant-Appellant's appeal.

TABLE OF CONTENTS

Table of Contents i

Table of Appendix ii

Table of Judgments, Orders & Rulings iii

Statement of Facts and Procedural History 1

Legal Argument 8

Point I 8

DEFENDANT IS ENTITLED TO RELIEF UNDER STATE V. LAURICK, 120 N.J. 1 (1990) BECAUSE HE WAS UNCOUNSELED WHEN HE ENTERED A GUILTY PLEA TO DWI ON MAY 15, 2017 IN THE MIDDLETOWN TOWNSHIP MUNICIPAL COURT. (DA10, DA11).

Point II 14

THE WITHIN DEFENDANT'S MOTION TO VACATE THE MAY 15, 2017 GUILTY PLEA SHOULD HAVE BEEN GRANTED ON DE NOVO REVIEW GIVEN THE MUNICIPAL COURT'S FAILURE TO ELICIT A SUFFICENT FACTUAL BASIS FOR THE ENTRY OF DEFENDANT'S GUILTY PLEA ON MAY 15, 2017 IN ACCORDANCE WITH R. 7:6-2A(1). (DA10, DA11).

Conclusion 19

TABLE OF APPENDIX

Motor Vehicle Ticket Details DA1

1/23/23 Order from Municipal Court Denying PCR DA6

1/23/23 Order from Municipal Court Denying Motion to Vacate DA7

2/13/23 Notice of Appeal to Law Division DA8

7/19/23 Order of the Law Division Denying Applications DA10

7/19/23 Opinion of the Law Division Denying Applications DA11

9/5/23 Notice of Appeal to Law Division DA20

Unpublished Opinion in State v. Vargas, A-5624-18T3 .... DA24

TABLE OF JUDGEMENTS, ORDERS, & RULINGS

1/23/23 Order from Municipal Court Denying PCR DA6

1/23/23 Order from Municipal Court Denying Motion to Vacate DA7

7/19/23 Order of the Law Division Denying Applications DA10

7/19/23 Opinion of the Law Division Denying Applications DA11

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On August 11, 2016, Anthony C. Barbato, hereinafter referred to as the Defendant, was operating a motor vehicle on the Garden State Parkway in Middletown, New Jersey. Defendant was stopped by a member of the New Jersey State Police for a suspected motor vehicle infraction. Subsequently, the State Trooper who conducted the motor vehicle stop initiated an investigation of Defendant for a potential violation of N.J.S.A. 39:4-50 (DWI).

Ultimately, Defendant was charged with alleged violations of N.J.S.A. 39:4-50 (DWI), N.J.S.A. 39:4-96 (Reckless Driving), N.J.S.A. 39:4-98 (Speeding), and N.J.S.A. 39:4-51B (Open Container of Alcohol), and N.J.S.A. 39:4-88B (Traffic on Marked Lanes). (DA1).

On May 15, 2017[2], Defendant appeared in the Middletown Township Municipal Court without an attorney. The State was apparently represented by Municipal Prosecutor John T. Lane, Jr., whose name is referenced on the cover page of the certified transcript, but who does not appear at any point in the record.

---

[1] In the interests of brevity and clarity, the Statement of Facts and Procedural History have been combined in the within Letter Memorandum of Law.

[2] T1 refers to the Certified Transcript of Proceedings in the Middletown Township Municipal Court on May 15, 2017.
T2 refers to the Certified Transcript of Proceedings in the Middletown Township Municipal Court conducted virtually via Zoom on January 23, 2023.
T3 refers to the Certified Transcript of Proceedings in the Monmouth County Law Division conducted virtually via Zoom on July 12, 2023.

At the inception of the proceedings, the Honorable James E. Berube, J.M.C. announced his understanding that the matter was going to be resolved by way of a plea to N.J.S.A. 39:4-50 (DWI) with the remaining charges being dismissed. (T1:3-4 to 3-7).

The Court then advised the Defendant of the potential penalties for a violation of N.J.S.A. 39:4-50 (DWI), depending upon which number of DWI offense it was. (T1:3-10 to 4-15).

The Court then engaged in colloquy with the Defendant regarding whether he wanted to continue with his plea without the benefit of counsel and Defendant indicated that he did. It should be noted that the Court indicated that Defendant had previously demonstrated an intent to get private counsel, but it does not appear, at least from this colloquy, that the Court ever provided Defendant with the steps necessary to apply for a public defender:

> THE COURT: As I indicated back in September, you have the right to be represented by an attorney. You indicated back in March of 17 that you intended to retain private counsel, and then when we rescheduled it for the 27th you failed to appear. I take it you wish to waive both the private counsel and the public defender and wish to plead guilty today, is that correct?
>
> MR. BARBATO: Yes. Yeah -- (T1:4-16 to 4-24).

After several more question regarding the knowing and voluntary nature of the plea he was about to enter, the Municipal Court then returned to the issue of whether the Defendant had "spoken" with private counsel:

> THE COURT: And did you get a chance to talk with private counsel?
>
> MR. BARBATO: No, -- I was homeless and I messed up and take the penalties and – stand up.
>
> THE COURT: All right. And again, you wish now to waive that right to appointment of the public defender and to plead guilty today, is that correct?
>
> MR. BARBATO: Yes. (T1:5-10 to 5-17).

Thereafter, the Municipal Court set about obtaining a factual basis in the within matter, which is set forth below:

> THE COURT: All right. You were operating a motor vehicle here in Middletown on August 11th, of 2016 while under the influence of alcohol, is that correct?
>
> MR. BARBATO: Yes.
>
> THE COURT: And how much have you had to drink?
>
> MR. BARBATO: I think it was a half a pint of vodka.
>
> THE COURT: And that was just prior to your operation?
>
> MR. BARBATO: Yes.
>
> THE COURT: Have you ever plead guilty to the 3-40 violation before?

MR. BARBATO: No.

THE COURT: I'm sorry, to the 4-50, the operating a motor vehicle under the influence of drugs or alcohol?

MR. BARBATO: No.

THE COURT: All right. I'm looking at your abstract, and it does appear that this would be a first offense. I do have in the file an alcohol influence report, which indicates a .17 blood alcohol concentration as a result of the three readings that were taken on that night. That would trigger the imposition of a interlock devise [sic] as well, you understand?

MR. BARBATO: (No audible response) (T1:5-18 to 6-20).

The foregoing is the entirety of the factual basis that was obtained in the within matter on May 15, 2017. The Defendant asked the Municipal Court a question about making time payments, and then the Municipal Court moved on to sentencing the Defendant. (T1:6-21 to 7-3).

The Municipal Court ultimately sentenced Defendant to fines and penalties consistent with his status as a first offender of the DWI statute. (T1:11-24 to 12-12).

On May 15, 2022, Defendant filed a Motion to Vacate Guilty Plea based upon an insufficient factual basis.

On November 14, 2022, Defendant filed an application for Post-Conviction Relief (PCR) based upon the legal authority set forth in State v. Laurick, 120 N.J. 1 (1990).

Defendant appeared in the Middletown Township Municipal Court on January 23, 2023 to argue both of the foregoing applications.

At the inception of the proceedings, the Municipal Court and Defense counsel briefly discussed that an off-the-record conference had taken place prior to the matter proceeding on the record. (T2:3-1 to 3-12).

Defense counsel then set forth the procedural history of the Defendant's two applications. (T2:3-7 to 5-6).

Defense counsel then read into the record the entirety of the factual basis that had been obtained by the Municipal Court on May 15, 2017. (T2:5-16 to 6-22).

Thereafter, in reference to the Laurick application, Defense counsel read into the record the three references to Defendant having "waived" his right to counsel in the May 15, 2017 proceeding. (T2:7-7 to 8-9).

Defense counsel then advanced oral argument to the Municiapl Court that the Defendant did not knowingly, voluntarily, and intelligently waive his right to counsel. (T2:8-11 to 13-16).

The Municipal Prosecutor then set forth his opposition to both of the applications pending before the Municipal Court. (T2:14-2 to 15-21).

Defense counsel then made oral argument in support of the Motion to Vacate Guilty Plea that had been filed on May 15, 2022. (T2:16-11 to 22-13).

The Municipal Prosecutor then offered brief additional oral argument in opposition to the Motion to Vacate Guilty Plea. (T2:22-20 to 23-17).

Thereafter, the Municipal Court denied the Defendant's two applications. (DA6, DA7). (T2:24-5 to 30-3).

Defendant ultimately filed a timely Notice of Appeal to the Law Division. (DA8).

The Honorable Michael A. Guadagno, J.A.D. presided over the de novo review of Defendant's two applications in the Monmouth County Law Division on July 12, 2023 (T3).

Defense counsel advanced oral argument to the Law Division, highlighting the legal arguments set forth in its letter memorandum of law. (T3:3-16 to 9-10).

The State then made oral argument in opposition to the Defendant's two applications. (T3:9-13 to 13-3).

Defense counsel then offered brief remarks in rebuttal to the State's argument. (T3:13-6 to 14-16).

The Law Division then reserved decision and indicated that it would issue a written opinion thereafter. (T3:14-17 to 14-20).

On July 19, 2023, the Law Division issued a one-page Order (DA10) and a nine-page Opinion (DA11) denying the Defendant's two applications.

On September 5, 2023, Defendant filed a timely Notice of Appeal to the Appellate Division challenging the Law Division's ruling on both applications. (DA20).

The within Letter Memorandum of Law follows.

<u>LEGAL ARGUMENT</u>

<u>POINT I</u>

DEFENDANT IS ENTITLED TO RELIEF UNDER <u>STATE V. LAURICK</u>, 120 N.J. 1 (1990) BECAUSE HE WAS UNCOUNSELED WHEN HE ENTERED A GUILTY PLEA TO DWI ON MAY 15, 2017 IN THE MIDDLETOWN TOWNSHIP MUNICIPAL COURT. (DA10, DA11).

In <u>State v. Crisafi</u>, 247 N.J. Super 486 (App. Div. 1991), the Appellate Division set forth the foundations for what constitutes a knowing, voluntary, and intelligent waiver of the right to counsel:

> The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees an accused the right to have the assistance of counsel in order to protect his fundamental right to a fair trial. *Faretta v. California,* , , 2532, , 572 (1975). The New Jersey Constitution contains comparable language, *i.e.,* "In all criminal prosecutions the accused shall have the right . . . to have the assistance of counsel in his defense." *N.J. Const. of 1947* art. I, para. 10. Although the Sixth Amendment also guarantees a defendant the right to conduct his own defense, he must knowingly and intelligently waive his right to counsel and be able and willing to abide by the rules of procedure and courtroom protocol. *McKaskle v. Wiggins,* , , 948-949, , 130 (1984). An indigent must be provided with counsel, but he has no right to select counsel who will completely satisfy a defendant's fancy as to how he is to be represented. *State v. McCombs,* , 165, (App.Div.), *aff'd,* , (1979) (*quoting State v. Rinaldi,* , 214, (App.Div. 1959), *cert. denied,* 366 U.S. 914, *81*

S.Ct. 1089, 6 L.Ed.2d 238 (1961)). In *Johnson v. Zerbst,* [illegible], [illegible], [illegible] (1938), the Supreme Court said:

> The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused — whose life or liberty is at stake — is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

Zerbst, [illegible], [illegible], [illegible].

Perfunctory questioning is not sufficient. The trial judge has the responsibility of insuring that any choice of self-representation is made knowingly and intelligently, with an awareness of the dangers and disadvantages inherent in defending oneself. *See Faretta v. California, supra.* To be valid, a defendant's waiver

> . . . must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, [illegible], [illegible], 323, , 321 (1948). A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Rule 7:8-10 similarly provides:

> In all cases other than parking cases, a request by a defendant to proceed to trial without an attorney shall not be granted until the judge is satisfied from an inquiry on the record that the defendant has knowingly and voluntarily waived the right to counsel following an explanation by the judge of the range of penal consequences and an advisement that the defendant may have defenses and that there are dangers and disadvantages inherent in defending oneself.

State v. Laurick, 120 N.J. 1 (1990), the New Jersey Supreme Court ruled that a prior uncounseled DWI conviction could not be used to enhance the incarceration penalties for a subsequent DWI offense if the Defendant did not have counsel and was not advised of his right to a public defender.

Rule 7:10-2(g)(2) sets forth that a petition to obtain relief from an enhanced custodial term based on a prior conviction "may be filed at any time." Thus, the within legal argument underpinning this Point Heading is timely.

Most recently, the New Jersey Supreme Court decided an appeal wherein it held that a prior uncounseled DWI conviction could not be used as a predicate offense to increase a jail term for the indictable version of Driving While Suspended pursuant to DWI/Refusal convictions in violation of N.J.S.A. 2C:40-26. State v. Konecny, 250 N.J. 321 (2022).

The Konecny opinion interpreted Laurick relief as:

> …available to defendants whose DWI conviction were uncounseled. All of this Court's caselaw applying Laurick dealt with proceedings in which the defendant did not have counsel, was not informed of the right to counsel, or was

> not told that counsel would be provided if the defendant could not afford an attorney. Konecny at 339-340.

Here, there is no factual dispute that Defendant was uncounseled when he entered his guilty plea before the Middletown Township Municipal Court on May 15, 2017. See the entire Certified Transcript of May 15, 2017 for that factual assertion.

However, as stated above, there were three ostensible waivers of Defendant's right to counsel set forth in his plea proceeding:

> THE COURT: As I indicated back in September, you have the right to be represented by an attorney. You indicated back in March of 17 that you intended to retain private counsel, and then when we rescheduled it for the 27th you failed to appear. I take it you wish to waive both the private counsel and the public defender and wish to plead guilty today, is that correct?
>
> MR. BARBATO: Yes. Yeah -- (T1:4-16 to 4-24).
>
> * * *
>
> THE COURT: And did you get a chance to talk with private counsel?
>
> MR. BARBATO: No, -- I was homeless and I messed up and take the penalties and – stand up.
>
> THE COURT: All right. And again, you wish now to waive that right to appointment of the public defender and to plead guilty today, is that correct?
>
> MR. BARBATO: Yes. (T1:5-10 to 5-17).

* * *

> THE COURT: Do you understand that these are serious penalties, even today you have the right to apply for the appointment of a public defender. Knowing all this you want to waive your right and proceed, is that correct?
>
> MR. BARBATO: Yes. (T1:7-12 to 7-17).

Notwithstanding the foregoing "waivers," Defendant submits that he could not have made a knowing, voluntary, and intelligent waiver of his right to counsel to the most serious motor vehicle offense heard in municipal court without the benefit of ever requesting and/or reviewing in his DWI prosecution. Defendant's plea proceeding makes clear that he never reviewed any of the State's discovery in the within matter.

DWI is unique in New Jersey criminal and quasi-criminal law. In an alcohol intoxication theory case, a given defendant's B.A.C. is dispositive regarding the State's proofs in any such prosecution. After all, New Jersey's DWI statute creates a per se offense.

As stated, there is no corollary criminal or quasi-criminal statute that contains a per se proof element of an offense. For instance, there is no per se Murder case. There is no per se Kidnapping case. There is no per se Burglary case. There is no per se Sexual Assault case. There is no per se Driving While Suspended case. In every respect, the alleged B.A.C. in a New Jersey DWI alcohol intoxication case is the dispositive evidence.

Here, there is only a solitary reference to Defendant's alleged B.A.C.:

> THE COURT: I do have in the file an alcohol influence report, which indicates a .17 blood alcohol concentration as a result of the three readings that were taken on that night. (T1:6-14 to 6-17).

The foregoing transcript reference raises several questions:

1. How did Defendant's alleged A.I.R. find its way into the Municipal Court's file?

2. Why were not the Calculation Worksheet(s) set forth during the Defendant's plea proceeding?

3. Since Defendant never requested and/or reviewed discovery, how would he ever know if the State's Alcotest foundational documents, which are required in State v. Chun, 154 N.J. 54 (2008), were provided?

4. Why was Defendant never asked to waive any defenses to his alleged .17 B.A.C.?

5. How could uncounseled Defendant ever waive his defenses to his purported .17 B.A.C. without requesting and/or reviewing his discovery?

6. Since this was a State Police case, did anyone ever request and/or view Defendant's Mobile Video Recorder (MVR)?

In summary, no quasi-criminal defendant can make a knowing, voluntary, and intelligent of their Right to Counsel in a New Jersey alcohol theory DWI case without having first requested and/or reviewed discovery.

FILED, Clerk of the Appellate Division, April 11, 2024, **A-000031-23**, **AMENDED**

POINT II

THE WITHIN DEFENDANT'S MOTION TO VACATE THE MAY 15, 2017 GUILTY PLEA SHOULD HAVE BEEN GRANTED ON DE NOVO REVIEW GIVEN THE MUNICIPAL COURT'S FAILURE TO ELICIT A SUFFICENT FACTUAL BASIS FOR THE ENTRY OF DEFENDANT'S GUILTY PLEA ON MAY 15, 2017 IN ACCORDANCE WITH R. 7:6-2A(1). (DA10, DA11).

Any examination of the sufficiency of a factual basis must begin with New Jersey Court Rule 7:6-2(a)(1), which states as follows:

> A defendant may plead not guilty or guilty, but the court may, in its discretion, refuse to accept a guilty plea. Except as otherwise provided by Rules 7:6-2, 7:6-3, and 7:12-3, the 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**. (emphasis added).

Rule 7:6-2(a)(1) mandates that the court not accept a guilty plea without first addressing the defendant personally. The court must determine by inquiry of the defendant and others that the plea is being made voluntarily, with a full understanding of the nature of the charge and the consequences of the plea. Moreover, the court must be satisfied that there exists a factual basis for the guilty plea. The defendant must admit to the violation of the law and all of its elements.

In State v. Barboza, 115 N.J. 415 (1989), the Supreme Court acknowledged that a defendant who pleads guilty waives important constitutional rights. This is why the Rules of Court have been designed to assure that a guilty plea be entered voluntarily, with a full understanding of the nature of the charges and the penal consequences of the sentence to be imposed. The recitation of the factual basis for the plea allows the court to ascertain whether the defendant is actually guilty of the offense charged. A plea of guilty that is entered under circumstances that are not voluntary and knowing violates the due process clause of the Fourteenth Amendment. McCarthy v. U.S., 394 U.S. 459 (1969). It is for this reason that New Jersey law permits a defendant who has entered a plea of guilty without a sufficient factual basis to support it to vacate the plea through a post-conviction relief (PCR) application. Rodriguez v. Rosenblatt, 58 N.J. 281 (1971).

N.J.S.A. 39:4-50 defines someone driving under the influence as "a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic, or habit-producing drug, or operates a motor vehicle with a blood alcohol content of 0.08% or more by weight of alcohol in the defendant's blood."

In the within matter, the Court did not obtain a sufficient factual basis to satisfy the requirements of the foregoing statute because the Court never elicited an

acknowledgment from the Defendant herself with regard to the admissibility of the alleged B.A.C. result of .17%.

Attached to the within Letter Memorandum of Law in accordance with Rule 1:36-3 is the unpublished Appellate Division opinion in State v. Christopher Vargas, Docket No. A-5624-18T3, Decided September 10, 2020, which supports the legal argument set forth herein.

In Vargas, the Appellate Division sets forth a framework for the acceptance of a guilty plea when the factual basis is reliant upon the alleged B.A.C. result in the within matter. As the Appellate Division provides, "The critical point is that the acknowledgment of guilty with respect to the BAC element of the per se DWI offense should be explicit and not just inferred from the fact that a defendant seeks to enter a guilty plea." (Vargas at page 15.)

In the within matter, wherein the factual basis was entirely dependent upon the admissibility of the alleged BAC result since there was no observational evidence relied upon during the plea proceeding, the lack of an acknowledgement from the Defendant regarding the accuracy of the alleged B.A.C. violates the framework of the unpublished opinion in State v. Vargas because the Appellate Division held that the Defendant has to explicitly agree that he or she is accepting the admissibility of the alleged BAC result. Such an explicit agreement never took place in this matter.

Indeed, while the Municipal Court referenced the Defendant's alleged B.A.C., the only query posed to the Defendant was whether he understood that he was subject to the imposition of the ignition interlock. The Municipal Court never asked the Defendant whether the B.A.C. that was referenced was accurate, and whether he had any reason to challenge the alleged B.A.C., which are the requirements set forth by the Appellate Division in Vargas.

Perhaps more fundamentally, however, is the fact when the Municipal Court did reference the B.A.C., the Defendant apparently gave no response anyway. So clearly, the factual basis in the within matter fails because the Court never asked the Defendant to acknowledge the alleged B.A.C., and even if one were to argue that the Court referenced the B.A.C. in the context of mentioning the interlock device installation requirement, the record reveals that the Defendant did not give any audible response.

The Defendant never acknowledged that his guilt with regarding to the B.A.C. element of the DWI offense in the within matter. He was never asked to acknowledge it, and he never gave any response to the insufficient reference that was made by the Municipal Court.

It must also be noted that the Law Division denied Defendant's Motion to Vacate predicated, at least in part, upon an evaluation under <u>State v. Slater</u>, 198 N.J. 145 (2009). However, the case law is clear that when a Defendant seeks to

vacate a guilty plea solely on the basis of an insufficient factual basis, as is the case in the within matter, no such Slater analysis is necessary. State v. Tate, 220 N.J. 393 (2015). Accordingly, the Law Division's rationale in denying the Defendant's Motion to Vacate Guilty Plea on de novo review is compromised, and Defendant's matter should be remanded, at the least, for another hearing wherein the application could be considered without the Slater analysis relied upon by the Law Division.

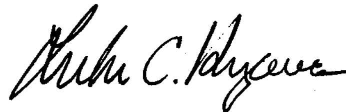
FILED, Clerk of the Appellate Division, April 11, 2024, **A-000031-23**, **AMENDED**

CONCLUSION

For all of the foregoing reasons, and in reliance upon the legal authority set forth herein, Defendant respectfully requests that the Appellate Division grant the Defendant's applications to vacate his prior guilty plea and have same marked as non-evidential for purposes of increasing the jail sentence of any subsequent offense under N.J.S.A. 39:4-50, N.J.S.A. 39:3-40, or N.J.S.A. 2C:40-26.

In the alternative, Defendant requests that the Appellate Division vacate the decision of the Law Division and remand the matter(s) back for another de novo hearing before same.

Respectfully submitted,



LUKE C. KURZAWA, ESQ.

Cc: Office of the Monmouth County Prosecutor
Mr. Anthony Barbato

FILED, Clerk of the Appellate Division, June 18, 2024, **A-000031-23**

OFFICE OF THE COUNTY PROSECUTOR
COUNTY OF MONMOUTH

132 JERSEYVILLE AVENUE
FREEHOLD, NJ 07728-2374

(732) 431-7160

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR

June 18, 2024

Melinda A. Harrigan, 062102014
Assistant Prosecutor
Of Counsel and
On the Letter Brief
email: mharrigan@mcponj.org

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Post Office Box 006
Trenton, New Jersey 08626

Re: State of New Jersey (Plaintiff-Respondent)
v. Anthony Barbato (Defendant-Appellant)
Appellate Division Docket No. A- 0031-23T1
Municipal Appeal No. MA23-005; Misc. Case No. ML-23-02-00026

Criminal Action: On Appeal from the Superior Court of New Jersey,
Law Division (Criminal), Monmouth County

Sat Below: Honorable Michael A. Guadagno, J.A.D. (ret. & t/a)

Honorable Judges:

Please accept this letter memorandum, pursuant to R. 2:6-2(b), in lieu of a more formal brief submitted on behalf of the State of New Jersey.

FILED, Clerk of the Appellate Division, June 18, 2024, **A-000031-23**

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS........ 1

LEGAL ARGUMENT

POINT I DEFENDANT MADE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF COUNSEL, AND THEREFORE IS NOT ENTITLED TO LAURICK RELIEF 9

POINT II THIS RECORD REFLECTS THERE WAS A SUFFICIENT FACTUAL BASIS 15

CONCLUSION........ 19

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

On August 11, 2016, at approximately 4:21 p.m., defendant, Anthony Barbato, consumed half a pint of vodka and got behind the wheel of his vehicle. (1T:5-18 to 6-4)[2]. Defendant was driving on the Garden State Parkway in Middletown when he was pulled over by a member of the New Jersey State Police. After an investigatory motor vehicle stop was conducted by the State Trooper, defendant was arrested and administered an Alcotest, which determined his blood alcohol content (BAC) was .17, well above the legal limit. (1T:6-12 to 6-19).

Defendant was charged with Driving While Intoxicated, in violation of N.J.S.A. 39:4-50; Reckless Driving, in violation of N.J.S.A. 39:4-96; Speeding (Exceeding 20-24 mph), in violation of N.J.S.A. 39:4-98.24; Open Container, in violation of N.J.S.A. 39:4-51B; and Failure to Maintain Lanes, in violation of N.J.S.A. 39:4-88B. (Da 1-5).

On August 27, 2016, this matter was listed for the first time, and defendant failed to appear. (2T:25-1 to 25-4). The matter was relisted on September 12, 2016, and defendant appeared in front of the Honorable Judge James E. Berube, J.M.C., and was advised of his right to a public defender if he could not afford private counsel. (2T:25-5 to 25-10). This matter was rescheduled for October 8, 2016, however, defendant failed to appear. (2T:25-

[1] Because the pertinent facts and procedural history are integrally intertwined to be concise, the State has combined its Counterstatement of Procedural History with its Counterstatement of Facts.

[2] 1T – refers to Transcript of Hearing, May 15, 2017;
2T – refers to Transcript of Hearing, January 23, 2023;
3T – refers to Transcript of Hearing, July 12, 2023.

11 to 25-12). On March 13, 2017, defendant appeared on video and indicated that he wished to hire private counsel. (2T:25-13 to 25-17). Thereafter, this matter was rescheduled for March 27, 2017, and the defendant failed to appear again. (2T:25-18 to 25-20).

On May 15, 2017, defendant appeared in front of the Judge Berube and indicated that he wished to plead guilty. Therefore, the Judge started off his colloquy with defendant, stating, "[w]e had given you advisements September 12th of 2016, indicating the potential penalties that you faced if I accept your guilty plea. I should run through them again for you, so that you are aware of that before you make any decisions." (1T:3-10 to 3-14). Judge Berube then proceeded to inform defendant of the penalties of the offense and the penalties for subsequent offenses:

> A first offense under the 4-50 statute requires a fine of $250 to $400, second offense, $500 to $1000, a third offense $1000 fine. For a second or third offenses for DWI also require that we impose $50 to the VCCB fund, $75 to the safe neighborhoods, and $225 to the DWI surcharge fund.
>
> A first offense comes with a potential for jail time, up to 30 days optional, but mandatory for a second to 90 days in jail, mandatory for a third, up to 180 days in jail. Some of which can be spent in an inpatient program.
>
> There is a loss of your driving privileges for up to seven months on a first offense. Mandatory two years on a second, and mandatory ten years on a third. Any potential prosecution for DWI in excess of Alcotest result of .15 would require the imposition of an interlock device and potential suspension of registration privileges for a period of one to three years after your initial driver's license suspension as well.

> There is also imposition of community service for a second and third offense. And IDRC program, Intoxicated Driver's Resource Center program from 12 to 48 hours on a first, that at a minimum for a second and third, but according to classification. So there are serious penalties involved.
>
> (1T:3-15 to 4-15).

After being informed of his rights and the penalties he faced, defendant waived his right to counsel and told the court that he "messed up and take[s] the penalties." (1T:5-12 to 5-13). The court asked defendant on multiple occasions if he would like to or if he had consulted with an attorney, and each time defendant waived his right to counsel:

> THE COURT: As I indicated back in September, you have the right to be represented by an attorney. You indicated back in March of 17 that you intended to retain private counsel, and then when we rescheduled it for the 27th you failed to appear. I take it you wish to waive both the private counsel and the public defender and wish to plead guilty today, is that correct?
>
> MR. BARBATO: Yes. Yeah –
>
> (1T:4-16 to 4:24).
>
> THE COURT: And did you get a chance to talk with private counsel?
>
> MR. BARBATO: No, -- I was homeless and I messed up and take the penalties and – stand up.
>
> THE COURT: All right. And again, you wish now to waive that right to appointment of the public defender and plead guilty today, is that correct?
>
> MR. BARBATO: Yes.

(1T:5-10 to 5-17).

> THE COURT: Do you understand that these are serious penalties, even today you have the right to apply for the appointment of public defender. Knowing all this you want to waive your right to proceed, is that correct?
>
> MR. BARBATO: Yes.

(1T:7-12 to 7-17).

Having advised defendant – multiple times – of his right to counsel and defendant clearly waiving said right, Judge Berube went forward and elicited a factual basis from defendant:

> THE COURT: All right. You were operating a motor vehicle here in Middletown on August 11th, of 2016 while under the influence of alcohol, is that correct?
>
> MR. BARBATO: Yes.
>
> THE COURT: And how much have you had to drink?
>
> MR. BARBATO: I think it was a half a pint of vodka.
>
> THE COURT: And that was just prior to your operation?
>
> MR. BARBATO: Yes.
>
> THE COURT: Have you ever plead guilty to the 3-40 violation before?
>
> MR. BARBATO: No.
>
> THE COURT: I'm sorry, to the 4-50, the operating a motor vehicle under the influence of drugs or alcohol?
>
> MR. BARBATO: No.

> THE COURT: All right. I'm looking at your abstract, and it does appear that this would be a first offense. I do have in the file an alcohol influence report, which indicates a .17 blood alcohol concentration as a result of the three readings that were taken on that night. That would trigger the imposition of an interlock device as well, you understand?
>
> MR. BARBATO: (No audible response)
>
> (1T:5-18 to 6-20).

To be sure that defendant understood the seriousness of the penalties and to confirm, yet again, that he did not want the assistance of counsel, the court continued:

> THE COURT: Luckily, it's a first offense, but it's at a higher tier level. So there will be a mandatory fine from – up to $500, loss of driving privileges, the imposition of the DWI surcharge, the VCCB and the safe neighborhood surcharge, optional imposition of jail, and imposition of the interlock device.
>
> Do you understand that these are serious penalties, even today you have the right to apply the appointment of public defender. Knowing all this you want to waive your right and proceed, is that correct?
>
> MR. BARBATO: Yes.
>
> (1T:7-5 to 7-17).

Judge Berube continued to ensure that defendant's waiver of counsel and plea was voluntarily, stating, "We want to make sure that your decision to plead is a voluntary one. Again because of the severity of the penalties that are imposed." (1T:8-19 to 8-20). After multiple occasions informing defendant of the seriousness of the charges and his right to counsel, and after defendant

repeatedly waived his right to any counsel prior to his decision to plead guilty, defendant pleaded guilty to DWI, to which the lower court then found:

> I do find that he enters this plea of guilty today knowingly, voluntarily and intelligently, after being made aware of the potential penalties that he faces, as well as the potential enhance penalties for driving while on the revoke list for this DWI.
>
> I do not find that he is under the influence of any drugs or alcohol which would impair his ability to make a decision to plead guilty, and that he does this in full knowledge of the potential penalties that had been detailed on the record before.

(1T:10-21 to 11-5) (emphasis added).

In return for defendant's guilty plea, the Reckless Driving, Speeding, Open Container and Failure to Maintain Lanes charges were dismissed. (1T:3-4 to 3-7). Thereafter, Judge Berube sentenced defendant to a $356 fine, $33 court costs, $50 VCCB, $75 SNSF, $225 DWI fund, seven months of license suspension, 12 hours IDRC, and one year of ignition interlock and registration suspension after completion of the license suspension. (1T:11-24 to 12-11).

On May 15, 2022, defendant filed a Motion to Vacate Guilty Plea, and on November 14, 2022, defendant filed an application for Post-Conviction Relief (PCR), seeking relief pursuant to State v. Laurick. Both motions were heard before Judge Berube on January 23, 2023. (See generally, 2T).

Defendant first addressed the PCR, arguing that he did not knowingly, voluntarily and intelligently waive his right to counsel. (2T:12-3 to 13-16). Judge Berube denied defendant's application for PCR, stating that he found defendant's guilty plea and waiver of counsel to be sufficient:

> In this case, it is a novel argument and I respect -- -- (inaudible) – Mr. Reisig that the indication of an AIR reading of .17 is of such critical importance to a decision whether to plead guilty or not that if – that – That is of such critical importance that if, that is not – that if the defendant is not aware of that critical importance or the effect that it might have both as to a guilty plea or subsequent sentencing considerations, that he could not – he, the defendant, the unrepresented or un-counseled defendant could not possibly provide a knowing, voluntary and intelligent waiver of counsel. Unfortunately, there is no State precedent that provides for that exception to the Laurick rule. I'm not prepared to make an exception in this matter. *In the Court's mind, there were sufficient, at least three opportunities, to secure either private counsel or – and there was acknowledge availability to apply for the public defender even up to the day that the – that the plea was taken.*

(2T:27-13 to 28-11) (emphasis added).

Defendant then addressed the motion to vacate his plea, arguing that the factual basis was insufficient, as defendant never acknowledged that his BAC was .17. (2T:16-20 to 22-13). However, Judge Berube also denied that motion, stating:

> In the papers that have been submitted, while there is an indication by the Court that the Court was going to sentence at a .17 reading supplied by the AIR, there is – the only response indicated on the transcript is an inaudible response, which does not mean that there was no response. It unfortunately just was not transcribed. I do not find that the circumstances arise to the level of appropriate vacation of the plea merely for that argument and the lack of enforceable precedent with which to grant that relief. So I'm going to deny the motion to vacate as well.

(2T:29-17 to 30-3).

On February 13, 2023, defendant filed a Notice of Appeal with the Law Division. (Da 8).

On July 12, 2023, oral arguments were held before the Honorable Michael A. Guadagno. Following oral arguments, Judge Guadagno reserved decision.

On July 19, 2023, Judge Guadagno filed his written decision and entered an order denying both of defendant's applications. (Da 10-19). Regarding defendant's argument that he was "uncounseled" because he did not review discovery, Judge Guadagno found that "While defendant was unrepresented when he entered his guilty plea, he was not uncounseled as defined in Patel, as he was advised by Judge Berube on at least three occasions that he had a right to counsel and if could not afford an attorney one would be appointed to represent him." (Da 18). Judge Guadagno further held, "[T]he record is clear that defendant made a choice to forego representation and, with it, everything that comes with a complete defense including obtaining and reviewing discovery" and "[t]his court can state with confidence that there is nothing more Judge Berube could have done to fully apprise defendant of his right to counsel, being mindful of defendant's Sixth Amendment right to represent himself." (Ibid.) Accordingly, Judge Guadagno denied defendant's petition for post-conviction relief premised upon State v. Laurick.[3]

Judge Guadagno also denied defendant's attack as to the sufficiency of the factual basis supporting his guilty plea, finding that defendant's citation to an unpublished case was unpersuasive and not legally binding. Likewise, he found that defendant had admitted to each essential element of the charge of driving while intoxicated, thus provided an adequate factual basis. He further

[3] State v. Laurick, 120 N.J. 1, 16-17 (1990).

found no "manifest injustice" under the legal framework of State v. Slater, 198 N.J. 145, 157-58 (2009). (Da 16-1717).

On September 5, 2023, defendant filed a Notice of Appeal to this Court. The State opposes defendant's appeal and submits the following in support of its opposition.

LEGAL ARGUMENT

POINT I

DEFENDANT MADE A KNOWING, VOLUNTARY AND INTELLIGENT WAIVER OF COUNSEL, AND THEREFORE IS NOT ENTITLED TO LAURICK RELIEF.

Defendant argues that the lower court erred in denying defendant's application for PCR and his request for Laurick relief. Specifically, defendant argues that he is entitled to said relief because he could not possibly have made an intelligent waiver of counsel when he never requested or reviewed discovery. (Db 12). However, defendant's reading of the Laurick decision and his reliance therein as being" uncounseled" is misplaced. Defendant was advised of his right to retain private counsel or be appointed a public defender by the municipal court on three separate occasions and unequivocally waived his right to any counsel prior to pleading guilty. As such, defendant's argument is without any substantive merit.

An Appellate Court's review of a trial court's judgment is restricted to the test of "whether there is sufficient credible evidence . . . in the record to

support the trial court's findings." State v. Robertson, 228 N.J. 138, 148 (2017); (quoting State v. Johnson, 42 N.J. 146, 162 (1964) (internal quotations omitted); State v. Locurto, 157 N.J. 463, 472 (1999). In addition, when the Law Division concurs with the municipal court, the two-court rule applies. "Under the two-court rule, appellate courts should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." State v. Locurto, 157 N.J. 463, 474 (1999). However, the legal rulings of a trial court are considered de novo. Robertson, 228 N.J. at 148.

Under R. 7:8-10:

> In all cases other than parking cases, a request by a defendant to proceed to a trial without an attorney shall not be granted until the judge is satisfied from an inquiry on the record that the defendant has knowingly and voluntarily waived the right to counsel following an explanation by the judge of the range of penal consequences and an advisement that the defendant may have defenses and that there are dangers and disadvantages inherent in defending oneself.

"Because the '[a]ssistance of counsel is essential to ensuring fairness and due process in criminal prosecutions,' relinquishing one's right to the benefits of representation by counsel can be allowed only when the court is satisfied that the defendant understands the 'implications of the waiver [of counsel].'" State v. Outland, 245 N.J. 494, 505 (2021) (quoting State v. Crisafi, 128 N.J. 499, 509 (1992)). "To ensure that a waiver of counsel is knowing and intelligent, the trial court should inform pro se defendants of the nature of the charges against them, the statutory defenses to those charges, and the possible range of punishment ... The colloquy between the court and the defendant will test the

defendant's understanding of the implications of the waiver, and will provide appellate courts with an objective basis for review." Crisafi, 128 N.J. at 510. "Caselaw makes clear that the goal of the colloquy is not to ascertain whether a defendant possess technical legal knowledge." Outland, 245 N.J. at 506.

A defendant who has "an uncounseled conviction without waiver of the right of counsel is invalid for the purpose of increasing a defendant's loss of liberty." State v. Laurick, 120 N.J. 1, 16 (1990) (emphasis added). Relief under Laurick is only applicable to "case[s] of repeat DWI convictions based on uncounseled prior convictions, the actual period of incarceration imposed may not exceed that for any counseled DWI convictions." Ibid. "Laurick created a special form of PCR that does not vacate the conviction, as in traditional PCR, but simply prevents the use of an uncounseled and unreliable DWI conviction to enhance a subsequent sentence." State v. Konecny, 250 N.J. 321, 339 (2022). Laurick relief differs from traditional PCR, as "an uncounseled DWI conviction only becomes ripe for challenge at some point in the future when the defendant is subject to increased penalties." Id. at 345 (2022); see also State v. Patel, 239 N.J. 424 (2022).

The New Jersey Supreme Court made clear in Patel what constitutes an uncounseled defendant:

> By "uncounseled" we mean an unrepresented defendant ***who was not advised by the municipal court*** of his right to retain counsel or, if indigent, of his right to appointed counsel without cost; who otherwise did not know of his right to counsel in the proceeding ***and did not waive that right***; and who, if properly advised of his rights, would have secured counsel or accepted appointed counsel. Patel, 239 N.J. at 448 (emphasis added).

As Judge Guadagno held, the record reflects that defendant was plenty advised of the penalties and the serious of the offense prior to waiving his rights to any type of counsel and pleading guilty. (Da 18). In adhering to the mandates of settled case law and our court rules and prior to accepting defendant's waiver of counsel, the municipal judge specifically stated to defendant on the record, "I should run through them [the potential penalties] again for you, so that you are aware of that before you make any decisions." (1T:3-13 to 3-14); see also Crisafi 128 N.J. at 510; R. 7:8-10. He then reiterated that defendant was afforded multiple opportunities to consult with an attorney. On September 12, 2016 defendant was advised of his right to counsel, and Judge Berube told him that he may apply for a public defender if he felt that he could not afford private counsel. (2T:25-5 to 25-10). Then, defendant was advised again on March 13, 2017 of his right to counsel, to which he indicated that "he would retain private counsel." (2T:25-16 to 25-17).

On May 15, 2017, Judge Berube reiterated that defendant was advised of his right to counsel and the seriousness of this offense on three separate occasions:

> THE COURT: As I indicated back in September, you have the right to be represented by an attorney. You indicated back in March of 17 that you intended to retain private counsel, and then when we rescheduled it for the 27th you failed to appear. I take it you wish to waive both the private counsel and the public defender and wish to plead guilty today, is that correct?
>
> MR. BARBATO: Yes. Yeah –
>
> (1T:4-16 to 4:24).

THE COURT: And did you get a chance to talk with private counsel?

MR. BARBATO: No, -- I was homeless and I messed up and take the penalties and – stand up.

THE COURT: All right. And again, you wish now to waive that right to appointment of the public defender and plead guilty today, is that correct?

MR. BARBATO: Yes.

(1T:5-10 to 5-17).

THE COURT: Do you understand that these are serious penalties, ***even today you have the right to apply for the appointment of public defender***. Knowing all this you want to waive your right to proceed, is that correct?

MR. BARBATO: Yes.

(1T:7-12 to 7-17)(emphasis added).

As demonstrated by the record in this case and as properly held by Judge Guadagno on de novo review, throughout the entire hearing on May 15, 2017, Judge Berube continuously advised defendant of the seriousness of the charges and his right to counsel. Indeed, Judge Guadagno specifically held, "This court can state with confidence that there is nothing more Judge Berube could have done to fully apprise defendant of his right to counsel, being mindful of defendant's Sixth Amendment right to represent himself." (Da 18 citing to Faretta c. Cal. 422 U.S. 806, 821 [1975] ("The Sixth Amendment, when naturally read, thus implies a right of self-representation."))

Despite the clear record in this case, defendant argues that he is entitled to relief pursuant to State v. Laurick. More specifically, defendant states that he "could not make a knowing, voluntary, and intelligent waiver of his right to counsel to the most serious motor vehicle offense heard in municipal court without the benefit of ever requesting and/or reviewing [discovery] in his DWI prosecution." (Db 12). However, defendant was not "uncounseled" because he was "advised by the municipal court of his right to retain counsel or, if indigent, of his right to appointed counsel without cost." Patel, 239 N.J. at 448. Contrary to defendant's interpretation of "uncounseled," Judge Guadagno properly adhered to the definition espoused in Patel, and held, "While defendant was unrepresented when he entered his guilty plea, he was not uncounseled as defined in Patel, as he was advised by Judge Berube on at least three occasions that he had a right to counsel and if could not afford an attorney one would be appointed to represent him." (Da 18; see also 1T:4-16 to 4-23; 2T:25-13 to 25-17).

As to defendant's discovery argument, Judge Guadagno further held that "[T]he record is clear that defendant made a choice to forego representation and, with it, everything that comes with a complete defense including obtaining and reviewing discovery." (Da 18). As such, defendant's remorse as to his decision to move forward unrepresented after multiple advisements that he had the right to counsel does not now transform his case as within the mandates of Laurick. Defendant was informed of the right to counsel, whether private or appointed, and knowingly, voluntarily, and intelligently waived his right to counsel. As such, Laurick does not apply because there is sufficient

credible evidence on this record that defendant was advised of his right to counsel and thereafter, waived his right to any type of counsel.

In any event, defendant's reliance on Laurick is likewise misplaced because this is his first DWI conviction. To be sure, the relief contemplated in Laurick is that *a prior uncounseled DWI conviction* cannot be used to enhance the penalties (incarceration) for a *subsequent* DWI offense if the defendant did not have counsel because he was not advised of his right to counsel or a public defender. Laurick, 120 N.J. at 16 (emphasis added). As this was defendant's first offense, there was no possibility of an enhanced penalty in this case. Therefore, Laurick does not apply.

POINT II

THIS RECORD REFLECTS THERE WAS A SUFFICIENT FACTUAL BASIS.

Defendant next argues that the factual basis supporting his guilty plea was insufficient because he did not acknowledge the blood alcohol content (BAC) result. However, defendant's argument is substantively without merit.

Under R. 7:6-2(a)(1):

> A defendant may plead not guilty or guilty, but the court may, in its discretion, refuse to accept a guilty plea. Except as otherwise provided by Rules 7:6-2, 7:6-3, and 7:12-3, the 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 other, 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.

A factual basis is a procedure that "ensures judicial oversight of 'the final relinquishment' of the defendant's core constitutional right to be presumed

innocent until proven guilty." State v. Campfield, 213 N.J. 218, 231 (2013) (quoting State v. Smullen, 118 N.J. 408, 414 (1990)). "The defendant's factual basis must satisfy each element of the offense charged." State v. E.J.H., 466 N.J. Super. 32, 37 (2021). "The factual foundation may take one of two forms; defendant may either explicitly admit guilt with respect to the elements or may 'acknowledge[] ... facts constituting the essential elements of the crime." Campfield, 213 N.J. at 231; (quoting State v. Sainz, 107 N.J. 283, 293 (1987)). "The trial court's task is to ensure that the defendant has articulated a factual basis for each element of the offense to which he pleads guilty." Id. at 232.

Under N.J.S.A. 39:4-50, driving while intoxicated is a defined as "[a] person who operates a motor vehicle while under the influence of intoxicating liquor ... or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood."

Here, the plea colloquy was sufficient to establish the elements of DWI under N.J.S.A. 39:4-50; (1) operating a motor vehicle (2) while under the influence of intoxicating liquor. Defendant explicitly admitted his guilt in the following plea colloquy:

> THE COURT: All right. You were operating a motor vehicle here in Middletown on August 11th, of 2016 while under the influence of alcohol, is that correct?
>
> MR. BARBATO: Yes.
>
> THE COURT: And how much have you had to drink?
>
> MR. BARBATO: I think it was a half a pint of vodka.
>
> THE COURT: And that was just prior to your operation?

MR. BARBATO: Yes.

(1T:5-18 to 6-4); Campfield, 213 N.J. at 231.
Defendant further owned up to his mistake, stating, "I messed up and take the penalties and – stand up." (1T:5-12 to 5-13).

Despite the clear factual basis on this record, defendant argues that he did not respond to the court asking him about his BAC being at 0.17. Defendant states that his lack of acknowledgment to his BAC on the record should be enough to vacate his plea. However, defendant not only ignores relevant case law on point regarding a sufficient factual basis, but relies on the unpublished opinion of State v. Vargas, Docket No. A-5624-18T3, Decided September 10, 2020. As Judge Guadagno aptly found, this unpublished case "[i]s unpersuasive and has no precedential value." (Da 17)(citing R. 1:36-3)).

To be a proper factual basis pursuant to Campfield, a defendant may either explicitly admit guilt or acknowledge facts that constitute an essential element. Campfield, 213 N.J. at 231. The elements of N.J.S.A. 39:4-50 are straightforward: was the defendant driving and was the defendant under the influence. In this case, defendant admitted to drinking a half a pint of vodka immediately prior to driving his vehicle. This admission, without more, satisfies the necessary elements of DWI, pursuant to N.J.S.A. 39:4-50.

In regards to the BAC, defendant was informed of the increased penalty due the BAC and that, "[a]ny potential prosecution for DWI in excess of Alcotest result of .15, would require the imposition of an interlock device and potential suspension of registration privileges for a period of one to three years after your initial driver's license suspension." (1T:4-4 to 4-9). Having this

knowledge, defendant acknowledged that his BAC was subject to increased penalties and answered in the affirmative after his first response was inaudible:

> THE COURT: Luckily it's a first offense, but it's at a higher tier level. So there will be a mandatory fine from – up to $500, loss of driving privileges, the imposition of the DWI surcharge, the VCCB and the safe neighborhood surcharge, optional imposition of jail, and imposition of the interlock devise.
>
> Do you understand that these are serious penalties, even today you have the right to apply for the appointment of public defender. Knowing all this you want to waive your right and proceed, is that correct?
>
> MR. BARBATO: Yes.

(1T:7-5 to 7-17).

Based on the record in this case, Judge Guadagno properly found that defendant explicitly admitted that he had drank half a pint of vodka and got behind the wheel of his vehicle. Judge Guadagno also found that defendant acknowledged that he understood that his BAC in this prosecution was subject to increased penalties. Defendant acknowledged that he understood the charges and penalties and thereafter, continued to own up to his actions. As such, there is a sufficient factual basis on this record because each element of N.J.S.A. 39:4-50, including the BAC reading in this case, was acknowledged and answered in the affirmative by defendant on the record. (Da 16-17). Campfield, 213 N.J. at 231; (quoting State v. Sainz, 107 N.J. 283, 293 (1987)).

Defendant's additional argument regarding Judge Guadagno's Slater[4] analysis is of no moment because the court had already found the factual basis

[4] State v. Slater, 198 N.J. 145 (2009).

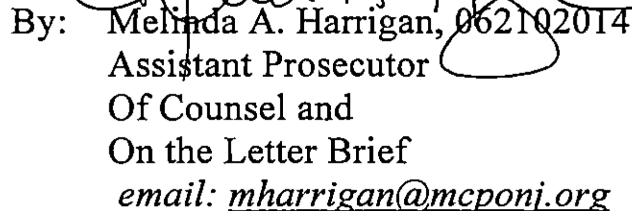
to be sufficient. Any analysis as to why there was no "manifest injustice" in this case is just further support of the unmeritorious nature of defendant's application to withdrawal his guilty plea in this case. As such, a remand is not necessary for the application to be considered without a Slater analysis. (Db 18).

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully requests this Court deny defendant's appeal and affirm the order entered by the lower court.

Respectfully submitted,

RAYMOND S. SANTIAGO
MONMOUTH COUNTY PROSECUTOR



By: Melinda A. Harrigan, 062102014
Assistant Prosecutor
Of Counsel and
On the Letter Brief
email: mharrigan@mcponj.org

MAH/mc

c: Luke Kurzawa, Esq.
Attorney for Defendant