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CRIMINAL DEFENSE
DWI
MUNICIPAL COURT
DOMESTIC VIOLENCE
APPELLATE PRACTICE

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February 13, 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-003654-22
Appellate Division Appeal from the Ocean County Law Division-
Criminal Part (Honorable Pamela M. Snyder, J.S.C.)

Dear Sir(s)/Madam(es):

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

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STATEMENT OF FACTS & PROCEDURAL HISTORY¹

On March 2, 2017, Anthony Barbato, hereinafter referred to as the Defendant, was operating his motor vehicle within the jurisdiction of Toms River, New Jersey, when he was stopped for an alleged motor vehicle violation by a member of the Toms River Police Department. Subsequent to said motor vehicle stop, Defendant began interacting with law enforcement, who initiated an investigation of Defendant for a potential violation of N.J.S.A. 39:4-50.

Defendant was thereafter placed into custody on suspicion of being under the influence of alcohol and transported to the Toms River Police Department where an Alcotest breath test was administered. An alleged B.A.C. result was obtained from same.

Ultimately, Defendant was charged with alleged violations on N.J.S.A. 39:4-50 (DWI), N.J.S.A. 39:3-40 (Driving While Suspended); N.J.S.A. 39:4-96 (Reckless Driving), and N.J.S.A. 39:4-51b (Open Container of Alcohol in a Motor Vehicle). (DA1).

On May 16, 2018², Defendant appeared in the Toms River Municipal Court with his attorney, Terry Brady, Esq., hereinafter referred to as prior Defense counsel. (T1).

¹ Defense counsel, in the interests of brevity and clarity, has combined the Statement of Facts and Procedural History into one section of the within Letter Memorandum of Law.

² T1 refers to the Certified Transcript of Proceedings in the Toms River Township Municipal Court on May 16, 2018.

At the inception of the proceedings, prior Defense counsel advised the Court that the Defendant intended to enter a guilty plea to DWI, with the understanding that the remainder of his charges would be dismissed. (T1:3-4 to 3-8). Prior Defense counsel specifically referenced that Defendant's blood alcohol content was a ".17." (T1:3-4 to 3-5).

The Honorable James Liguori, J.M.C. then questioned the Defendant regarding whether he did indeed intend to enter such a plea, whether he was entering that plea freely and voluntarily, and whether the Defendant understood that by entering such a plea he was giving up his right to a trial. (T1:3-13 to 4-5).

Judge Liguori then set about the process of obtaining a factual basis from the Defendant:

THE COURT: And, sir, you also understand by pleading guilty you are admitting to the Court that on the date and time the summonses were issued to you, that you had consumed alcohol, did operate a motor vehicle here in the jurisdiction of Toms River Township. And the consumption of that alcohol did affect your ability to properly operate your vehicle, and you were, in fact, under the influence of that alcohol?

MR. BARBATO: Yes, sir. (T1:2-21 to 3-10).

Judge Liguori then advised Defendant of the penalties that he would be facing as a result of pleading guilty to a second offense DWI. (T1:4-16 to 4-25).

T2 refers to the Certified Transcript of (the virtual) Proceedings in the Toms River Township Municipal Court on March 23, 2022.

T3 refers to the Certified Transcript of Proceedings in the Ocean County Law Division on June 15, 2023.

Judge Liguori, in accepting the Defendant's guilty plea, ultimately stated, "All right. I've a - - the Court finds the plea to be entered voluntarily. The factual basis being placed on the record, both by way of the admission, couple with my review and marking of the Alcotest tolerance worksheet, which is C-1 and confirms readings well above the presumptive level." (T1:6-5 to 6-10).

Judge Liguori then sentenced Defendant to penalties consistent with his status as a second offender under the DWI statute. (T1:6-14 to 7-1).

Defendant was then advised of the penalties for a third or subsequent DWI offense. (T1:7-2 to 7-17).

Judge Liguori advised the Defendant of the consequences of operating his vehicle while suspended and of his right to appeal the determination of the Court. (T1:7-19 to 8-3; 8-8 to 8-12).

On October 18, 2021, Defendant filed a Motion to Vacate Guilty Plea with the Toms River Township Municipal Court.

The matter was heard by the Honorable James J. Gluck, P.J.M.C., hereinafter referred to as the Municipal Court, virtually via Zoom on March 23, 2022. (T2). The State was represented at that hearing by Municipal Prosecutor Brian Wilkie, hereinafter after referred to as the Municipal Prosecutor

After some introductory comments by the Municipal Court, Defense attorney Matthew W. Reisig made oral argument to the Municipal Court in support of the Motion to Vacate Guilty Plea. (T2:4-2 to 12-18).

The Municipal Prosecutor then offered oral argument in opposition to Defendant's Motion. (T2:12-22 to 14-19).

Thereafter ensued an exchange between the parties wherein the Municipal Court asked questions of the Defense attorney, the Defense attorney made additional legal argument in reply to same, and the Municipal Prosecutor also weighed in with additional legal argument. (T2:14-20 to 21-25).

The Municipal Court then set forth its rationale in denying the Defendant's Motion to Vacate Guilty Plea. (T2:22-1 to 23-8). (DA5).

Defendant filed a timely Notice of Appeal to the Ocean County Law Division on April 7, 2023. (DA6).

The Honorable Pamela M. Snyder, J.S.C., hereinafter referred to as the Law Division, presided over the de novo review of Defendant's Motion to Vacate Guilty Plea in the Ocean County Law Division on June 15, 2023. (T3). With the prior agreement of all parties, the matter was heard virtually as opposed to in-person.

At the inception of the proceedings, the Law Division set forth the name of the matter onto the record, and then made general statements about the remote (virtual) nature of the court proceedings. (T3:3-6 to 3-25). The Law Division then asked all parties, including Defendant, to enter their appearance on the record. (T3:4-1 to 4-15).

Defense counsel then set forth into the record the basis for the de novo review of Defendant's Motion to Vacate Guilty Plea. More specifically, Defense counsel argued that the factual basis that had been elicited by the Municipal Court during the Defendant's guilty plea on May 16, 2018 was insufficient because of the limited colloquy that took place between the Municipal Court and the Defendant during same. Defense counsel pointed out to the Court that the Defendant never personally acknowledged the admissibility of the alleged B.A.C. result in his case, and that there was no observational evidence introduced during the factual basis to satisfy the factual basis requirement. (T3:5-17 to 6-18).

Defense counsel then referenced the unpublished decision in the matter of State v. Christopher Vargas, (Docket No. A-5624-18T3, Decided September 10, 2020), as persuasive but obviously not binding legal authority for the foregoing argument. (T3:6-19 to 9-8).

At that point, Defense counsel referenced the State's brief, which had raised the factors set forth in State v. Slater, 198 N.J. 145 (2009) as a basis for denying Defendant's Motion to Vacate Guilty Plea. Defense counsel pointed out to the Law Division that when the Motion to Vacate Guilty Plea was predicated solely upon an insufficient factual basis, no such Slater analysis was required. State v. Tate, 220 N.J. 393 (2015). (T3:9-15 to 10-7).

The Law Division and Defense counsel then engaged in a brief back and forth wherein the Law Division asked whether the Defendant had expressly

acknowledged “being under the influence of alcohol and that alcohol affected his ability to properly operate the vehicle...” Defense counsel conceded that Defendant had responded, “Yes, sir” when asked the foregoing question. (T3:10-17 to 11-19).

Thereafter, the State made oral argument in opposition to the de novo review of Defendant’s Motion to Vacate Guilty Plea. The State argued that the Defendant had acknowledged the “essential elements of DWI” so as to satisfy the factual basis requirement. In addition, the State conceded that an analysis under Slater was not necessary since the Motion was predicated solely upon an insufficient factual basis. The State concluded its argument by reiterating its position that the Defendant had acknowledged the “essential elements of DWI” during his guilty plea. (T3:11-22 to 13-12).

Defense counsel then argued to the Law Division that the Defendant merely acknowledging that he was under the influence of alcohol when he operated the motor vehicle was not sufficient. Indeed, Defense counsel offered extensive argument regarding why the factual basis in the within matter was insufficient. (T3:13-19 to 15-22).

The State then read into the record the language of N.J.S.A. 39:4-50. (T3:16-3 to 16-17).

The Law Division then set forth its decision on the record. (T3:16-24 to 29-19). At the inception of the decision, the Law Division set forth the procedural history of the Defendant's matter. (T3:16-25 to 20-22).

The Law Division then set forth the standard of review to be applied to the de novo review of Defendant's Motion to Vacate Guilty Plea. (T3:20-23 to 21-24).

Then, the Law Division summarized the arguments of both the Defendant and the State. (T3:21-25 to 23-20).

Ultimately, the Law Division ruled that, despite the fact that he had not directly acknowledged the admissibility of the alleged B.A.C. result and despite the fact that no observational evidence had been set forth on the record, that the Defendant's guilty plea was sufficient because the factual basis set forth the elements of DWI under N.J.S.A. 39:4-50. (T3:24-3 to 26-7).

The Law Division then addressed the Defendant's reliance on the Vargas matter and distinguished Vargas from Defendant's matter because the within Defendant had acknowledged being under the influence. (T3:26-8 to 28-2).

Thereafter, the Law Division denied Defendant's Motion to Vacate Guilty Plea on de novo review. (T3:29-18 to 29-19).

The Law Division, despite not having vacated Defendant's plea, stated that it would have resentenced the Defendant to the same penalties that had been previously imposed by the Municipal Court. The Law Division conceded that Defendant had satisfied all of his 2018 penalties in full. (T3:29-9 to 30-10).

The Law Division advised Defendant of his right to appeal its decision to the Appellate Division. (T3:30-11 to 30-14).

The matter concluded shortly thereafter.

The Law Division issued an Order later that day formally deny the de novo review of Defendant's Motion to Vacate Guilty Plea. (DA7).

On July 31, 2023, Defendant filed a timely Notice of Appeal to the Appellate Division. (DA9).

The within Letter Memorandum of Law follows.

LEGAL ARGUMENT

POINT I

THE WITHIN DEFENDANT'S MOTION TO VACATE GUILTY PLEA SHOULD HAVE BEEN GRANTED ON DE NOVO REVIEW PREDICATED UPON THE MUNICIPAL COURT'S FAILURE TO OBTAIN A SUFFICIENT FACTUAL BASIS FOR THE ENTRY OF DEFENDANT'S GUILTY PLEA ON MAY 16, 2018 IN ACCORDANCE WITH R. 7:6-2(A)(1). (T3:16-24 to 29-19). (DA7).

State v. Scott Robertson, 228 N.J. 138 (2017) is perhaps the best appellate opinion in setting forth the very particularized nature of trial de novo law in New Jersey. It is not an appeal. Rather, and as Robertson explains, the municipal court is the first trial court for motor vehicle offenses, certain code violations, and lesser criminal offenses. Every determination that a municipal court judge makes as the first trial court is subject to de novo review by the Law Division (Criminal Part) which sits as the second trial court. No legal determination by the first trial court is afforded any deference whatsoever on de novo review. However, due deference is afforded the first trial court's determination of witness credibility by the second trial court on de novo review. In every respect, the Law Division second trial court must decide the given case completely anew again on the record on de novo review.

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:

“Generally. 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 Municipal Court did not obtain a sufficient factual basis to satisfy the requirements of the foregoing statute because the Court never elicited an acknowledgement from the Defendant himself 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 R. 1:36-3 is the unpublished Appellate Division opinion in the matter of State v. Christopher Vargas, Docket No. A-5624-18T3, decided September 10, 2020, which supports the legal argument set forth herein. (DA13).

In State v. Christopher Vargas, Docket No. A-5624-18T3, decided September 10, 2020³, the Appellate Division set forth a framework for the acceptance of a guilty plea when the factual basis is reliant upon the alleged B.A.C. result in said matter.

³ Pursuant to New Jersey Court Rule 1:36-3, Defendant has attached a copy of the unpublished opinion of State v. Christopher Vargas. Defense counsel is not aware of any cases with contrary holdings.

As the Appellate Division points out, “The critical point is that the acknowledgment of guilt 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 12.)

In the within matter, the factual basis that was obtained is entirely dependent upon the admissibility of the alleged BAC result since there was no observational evidence ever introduced into the record during the plea. There was no colloquy regarding how the Defendant drove, what admissions he made to law enforcement that evening, the observations made by law enforcement, or the administration of psycho-physical tests. Indeed, in the within matter, the only thing that Defendant admitted to during the factual basis was that he had consumed alcohol on the date and time the summons were issued, that he had operated his motor vehicle in Toms River, that “the consumption of that alcohol did affect [his] ability to properly operate [his] vehicle, and that he was “under the influence of that alcohol.”

The foregoing is not a sufficient factual basis for the acceptance of a plea to DWI. The Municipal Court had been advised of an alleged B.A.C. result during the proceeding to presumably bolster the factual basis, but the Defendant himself never acknowledged its admissibility as evidence against him, which is specifically what the Appellate Division in State v. Vargas required.

Merely acknowledging that he was under the influence of intoxicating liquor is not, without more, sufficient to satisfy the factual basis. If it were, there would be

no need to place the alleged B.A.C. on the record. The B.A.C. substantiates the allegation that the Defendant was under the influence. The Defendant merely acknowledging being under the influence does not. In the absence of a B.A.C. result, the Defendant's plea to being under the influence can be substantiated by having the observational evidence placed on the record. But as stated above, that was not done in this matter.

Since there was no observational evidence relied upon by the Municipal Court during the plea proceeding, the provision of a Chun worksheet by prior Defense counsel does not satisfy 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.

CONCLUSION

Predicated upon the foregoing facts and circumstances, Defendant submits that his May 16, 2018 guilty plea to a violation of N.J.S.A. 39:4-50 (DWI) in the Toms River Municipal Court should have been vacated on de novo review, that the Appellate Division should do so now, and the matter should be remanded to the Toms River Municipal Court for new proceedings consistent with same.

Respectfully submitted,



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Cc: Cheryl Hammel, Ocean County Assistant Prosecutor
Mr. Anthony Barbato

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April 7, 2024

Honorable Judges of the Superior Court of 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-003654-22

Criminal Action: On appeal from a final order of conviction in the
Superior Court of New Jersey, Law Division, Ocean County

Sat Below: Hon. Pamela M. Snyder, J.S.C.

Appellant is not confined.

Honorable Judges:

Pursuant to R. 2:6-2(b) and R. 2:6-4(a), this letter in lieu of a formal brief is
submitted on behalf of the State of New Jersey.

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PROCEDURAL HISTORY¹

On March 2, 2017, Defendant received four summonses: Summons No. E17-002216 charged him with driving while suspended contrary to N.J.S.A. 39:3-40; Summons No. E17-002217 charged him with DWI contrary to N.J.S.A. 39:4-50; Summons No. E17-002218 charged him with reckless driving contrary to N.J.S.A. 39:4-96; and Summons No. E17-002219 charged him with open container contrary to N.J.S.A. 39:4-51a.b. (Ra1-Ra4)

On May 16, 2018, Defendant appeared with counsel before the Toms River Municipal Court and entered a negotiated plea of guilty. (1T3-2 to 5-3) The Hon. James Liguori, J.M.C., accepted Defendant's plea and, because it was Defendant's second conviction, sentenced him to 2 years' loss of driving privileges; 48 hours IDRC; \$506.00 fine; \$33.00 costs; \$225.00 DWI surcharge; \$50.00 VCCB; \$75.00 SNSF; 30 days of community service; and one-year ignition interlock (subsequent to the 2-year license revocation). Judge Liguori also suspended imposition of a 90-day jail sentence contingent upon Defendant's completion of community service. (1T6-14 to 6-24)

On March 23, 2022, Defendant moved before the Toms River Municipal

¹ The State adopts Appellant's appendix designations noted at Dbii-Dbiii; "1T" refers to transcript of proceedings dated May 16, 2018; "2T" refers to transcript of proceedings dated March 23, 2022; "3T" refers to transcript of proceedings dated June 15, 2023.

Court to vacate his 2018 guilty plea. The Hon. James J. Gluck, J.M.C., denied Defendant's motion. (2T23-6 to 23-8)

Defendant subsequently filed a notice of appeal with the Ocean County Superior Court, Law Division.

Trial de novo was held on June 15, 2023. At its conclusion, the Hon. Pamela M. Snyder, J.S.C., also denied Defendant's motion to vacate his 2018 guilty plea. (3T29-18 to 29-19)

This appeal follows.

STATEMENT OF FACTS

On March 2, 2017, Defendant was arrested for DWI for the second time. (1T3-4 to 3-8; 5-25 to 6-2)

On May 16, 2018, Defendant appeared with Terry Brady, Esq., Public Defender, ("Brady") at the Toms River Municipal Court. Brady advised Judge Liguori that Defendant was pleading guilty to the DWI charge and the remaining charges be dismissed. Defendant stipulated as to his BAC when Brady advised the Court that Defendant's BAC was .17, confirmed this was his second DWI, and provided the Court with copies of the Alcotest worksheet and Defendant's drivers abstract. (1T3-2 to 3-8) The following colloquy occurred:

THE COURT: Sir, I understand you've agreed to plead guilty to the charge of driving while intoxicated?

MR. BARBATO: Yes.

THE COURT: Anybody threatening you or forcing you to do so?

MR. BARBATO: No, sir.

THE COURT: You understand, sir, that you would be giving up your rights to have a trial and at the trial you would have the right to call witnesses in your defense or confront those witnesses that may be presented against you?

MR. BARBATO: Yes.

THE COURT: You understand sir by pleading guilty you're giving up your opportunity at that same trial to compel the State to meet their burden of proof beyond a reasonable doubt?

MR. BARBATO: Yes.

THE COURT: And sir you also understand by pleading guilty you are admitting to the Court that on the date and time the summonses were issued to you, that you had consumed alcohol, did operate a motor vehicle here in the jurisdiction of Toms River Township and the consumption of that alcohol did affect your ability to properly operate your vehicle, and you were, in fact, under the influence of that alcohol?

MR. BARBATO: Yes, sir.

THE COURT: And sir you understand as a second offense violator, minimum fines and costs would exceed \$850; you'd lose your license for 2 years; you must do 48 hours in the IDRC; 30 days of community service; placement of an ignition interlock device in your vehicle during the 2-year revocation and 1 to 3 years after that and you could go to jail for up to 90 days. Understood?

MR. BARBATO: Yes, Your Honor.

THE COURT: And all of that being said, do you still wish to plead guilty?

MR. BARBATO: Yes. (1T3-13 to 5-3)

Judge Liguori found Defendant was entering the plea voluntarily. (1T6-5 to 6-6) The Judge then accepted Defendant's plea finding, "The factual basis

being placed on the record, both by way of the admission, coupled with my review and marking of the Alcotest tolerance worksheet, which is C-1 and confirms readings well about the presumptive level.” (1T6-5 to 6-10)

On March 23, 2022, Defendant returned to the Toms River Municipal Court and moved to vacate his plea. Defendant argued the factual basis for his plea was insufficient because he was not asked about his BAC readings and did not state what he drank or how much he drank. (2T4-17 to 12-18; 21-9 to 21-19) In support of this argument, Defendant relied on the unpublished opinion in State v. Vargas, 2020 WL5415322 (App. Div. September 10, 2020).

Judge Gluck found Vargas inapplicable and denied Defendant’s motion, stating:

The Court finds that with the totality of the plea that was entered and the entire colloquy, including the colloquy between defense counsel and the Judge, Judge Liguori in this case when he proffered a .17 reading, and the court accepted that .17 and placed it on the record, accepted the Alcotest worksheet, marked it as C-1, entered it into evidence, questioned the defendant on his – whether he had consumed alcohol, whether he operated a vehicle, whether it affected his ability to properly operate a vehicle and the defendant said, yes. He admitted, in fact, that he was under the influence of alcohol. (2T22-9 to 22-20)

Trial de novo was held on June 15, 2023 before the Hon. Pamela M. Snyder, J.S.C. Judge Snyder found that on May 16, 2018 Defendant appeared with Brady who stipulated that Defendant was pleading guilty to his second

DWI offense and that his BAC was .17. (3T17-17 to 17-25) Judge Snyder then cited the plea colloquy which occurred between Defendant and Judge Liguori in which Defendant admitted consuming alcohol prior to driving; that his consumption affected his ability to drive; and that he was under the influence of that alcohol. (3T18-2 to 18-13) Judge Snyder acknowledged Judge Liguori's acceptance of Defendant's plea and the subsequent sentence he imposed. (3T18-14 to 18-25)

Next, Judge Snyder found that on March 23, 2022, Defendant moved to vacate his plea. The Judge noted Defendant's reliance on the unpublished opinion of State v. Vargas² in arguing that the factual basis for his plea was inadequate because he was never questioned about his BAC and that it was only Brady who discussed Defendant's BAC with Judge Liguori. (3T19-10 to 19-20) Judge Snyder then cited the denial of Defendant's motion by Judge Gluck who had found a sufficient factual basis for the plea based on the totality of the plea entered; the entire colloquy between Defendant and Judge Liguori; and Judge Liguori's acceptance of Brady's representation regarding Defendant's .17 BAC coupled with the entry of the Alcotest worksheet into evidence. (3T20-5 to 20-22)

² 2020 WL5415322 (App. Div. September 10, 2020)

Judge Snyder acknowledged that State v. Tate, 220 N.J. 393, 403-404 (2015), imposed a de novo standard of review upon a reviewing court presented with a motion to vacate a guilty plea for lack of an adequate factual basis. (3T21-12 to 21-16) The Judge also found that where, as here, the only issue is whether an adequate factual basis supports the plea, a Slater³ analysis is unnecessary. (3T23-25 to 24-6)

As to Defendant's continued reliance on Vargas, Judge Snyder recognized it was neither binding nor precedential. (3T26-8 to 26-9; 27-3 to 27-6) Nevertheless, Judge Snyder distinguished Vargas stating, "The case before this Court is differentiated from Vargas in that here, Defendant explicitly acknowledged that he was under the influence of alcohol while operating the motor vehicle and that his consumption of alcohol affected his ability to properly operate his vehicle." (3T27-7 to 27-21)

Judge Snyder then noted that before accepting a guilty plea, a trial court must be satisfied from the lips of the defendant that he committed the acts which constitute the crime and that a factual basis must include either an admission or the acknowledgement of facts that meet the essential elements of the crime. (3T24-19 to 25-4)

³ 198 N.J. 145 (2009)

After reciting the relevant portion of N.J.S.A. 39:4-50, Judge Snyder found that Brady informed Judge Liguori that Defendant intended to plead guilty to DWI; that Defendant's BAC was .17; that this was Defendant's second DWI; and that the State would agree to dismiss the remaining charges. (3T25-5 to 25-22)

Judge Snyder then found that during the colloquy with Judge Liguori, Defendant personally admitted he consumed alcohol before operating a motor vehicle; that his consumption affected his ability to properly operate that vehicle; and that he was under the influence of alcohol while operating that vehicle. (3T25-23 to 26-7) The Judge thus found:

In this matter, Defendant explicitly acknowledged to the Court that he operated his motor vehicle while under the influence of alcohol and the alcohol affected his ability to properly operate that vehicle. Therefore, a sufficient factual basis for the guilty plea was established. (3T27-22 to 28-2)

Notably, Judge Snyder also distinguished the present matter from Tate, finding:

Unlike the colloquy in Tate, **it is clear from the record in this case, that Defendant did, in fact, admit to committing the acts which constituted the crime.** Defendant admitted to consuming alcohol and operating a motor vehicle while under the influence of that alcohol. He also admitted that his consumption of alcohol affected his ability to properly operate his vehicle. **Even without accepting or considering the stipulation of defense counsel regarding**

Defendant’s BAC, the admissions of Defendant are enough to satisfy the requirement for an adequate factual basis of a guilty plea. (emphasis added)
(3T29-1 to 29-12)

Having found there was a sufficient factual basis underlying his guilty plea, Judge Snyder denied Defendant’s motion to vacate his 2018 plea.

LEGAL ARGUMENT

POINT I

**THE DE NOVO COURT PROPERLY DENIED
DEFENDANT’S MOTION TO VACATE HIS PLEA
BECAUSE THERE WAS A SUFFICIENT FACTUAL
BASIS FOR THAT PLEA**

Defendant persists in arguing that his motion should be granted under Vargas. This argument remains without merit.

A court must elicit from a defendant a factual basis for every element of the crime to which defendant pleads guilty. See State v. Tate, 220 N.J. 393, 403-404 (2015). However, “[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.” See State v. Perez, 220 N.J. 423, 433-434 (2015) (citing other sources) (emphasis added)

In State v. Gregory, 220 N.J. 413, (2015), the Court examined another claim of insufficiency of a factual basis for a plea and held, “Simply put, a

defendant must acknowledge facts that constitute the essential elements of the crime.” Id. at 420.

The essential elements of DWI are clear. A person who operates a motor vehicle while under the influence of intoxicating liquor **or** operates a motor vehicle with a blood alcohol concentration (BAC) of 0.08% or more by weight of alcohol in the blood is guilty of DWI. See N.J.S.A. 39:4-50.

As found by the De Novo Court, this Defendant admitted that on March 2, 2017, he consumed alcohol before driving and that alcohol “impaired his ability to drive.” (1T4-6 to 4-15) Defendant’s admission acknowledged facts comprising the essential elements of DWI: he was operating a motor vehicle while under the influence of alcohol. Both Judge Gluck and the De Novo Court found there was an adequate factual basis for Defendant’s plea, leading both courts to properly deny Defendant’s motion to vacate his plea.

“When there are concurrent judgments of two lower courts upon pure questions of fact, a court of last resort will not ordinarily make an independent finding of facts in the absence of a showing of a manifest miscarriage of justice.” Midler v. Heinowitz, 10 N.J. 123, at 128-129 (1952) citing 3 Am.Jur., Appeal & Error, sec. 908, p. 474. Under the “two-court rule”, appellate courts ordinarily 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. Id.

Here, the Law Division's De Novo review mirrored the trial court's proceedings. Both courts made the same findings leading both courts to deny Defendant's motion.

CONCLUSION

During his plea, Defendant admitted facts which comprise the essential elements of DWI. (1T4-6 to 4-15) Judge Liquori found there was a sufficient factual basis and accepted Defendant's plea. (1T6-5 to 6-10) Subsequently, Judge Gluck found Vargas inapplicable and properly denied Defendant's motion to vacate his plea. Similarly, after distinguishing Vargas, Judge Snyder found there was a sufficient factual basis and also properly denied Defendant's motion to vacate his plea. That decision should be affirmed and Defendant's request for relief should be denied.

Respectfully submitted,
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