

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0074-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LAMONTE L. MCGHEE,

Defendant-Appellant.

Argued December 5, 2017 - Decided December 20, 2017

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 14-
10-2613.

Cody T. Mason, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Cody T. Mason, of counsel and on the briefs).

Stephen A. Pogany, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for respondent (Robert D. Laurino,
Acting Essex County Prosecutor, attorney;
Stephen A. Pogany, on the brief).

PER CURIAM

On January 27, 2014, the New Jersey State Police (NJSP) responded to a report of a "strong armed robbery" of a gas station attendant at a Sunoco station along the Garden State Parkway in Bloomfield. The victim told police the individual who robbed him drove a silver sedan bearing Vermont license plates. The suspect attempted to pay for the gas with a credit card that was declined. The suspect then asked the victim for change of a twenty-dollar bill. As the victim removed cash from his pocket, he was "struck . . . and tackled to the ground." His assailant gathered the money, got into his car, and fled the scene.

The NJSP took a taped statement from the victim, who provided a description of the suspect and his vehicle. Police also viewed a surveillance video, which purportedly corroborated the victim's account. Additionally, police obtained the receipt from the declined credit card, which led to the identification of defendant, Lamonte McGhee, as the card owner.

Further inspection of defendant's credit card usage reports revealed previous transactions in Burlington, Vermont. Vermont authorities were contacted and informed the NJSP of defendant's suspected involvement in a grand theft auto in Vermont on January 25, 2014. Notably, the stolen vehicle was a silver sedan with Vermont license plates.

On January 29, 2014, police conducted a photo lineup during which the victim identified defendant as the individual who robbed and assaulted him. The following day, an arrest warrant was issued for defendant charging him with the gas station robbery.

The United States Marshals Service arrested defendant in Vermont on February 5, 2014. Defendant was charged with being a fugitive from justice from New Jersey, and various Vermont offenses relating to drug distribution and providing false information to a law enforcement officer. Following his arrest, defendant was lodged in a jail in Vermont. On October 16, 2015, defendant was sentenced on the Vermont charges.

In the interim, on October 29, 2014, an Essex County grand jury indicted defendant for second-degree robbery, N.J.S.A. 2C:15-1. After defendant was sentenced in Vermont, he was extradited to New Jersey on December 4, 2015.

Defendant pled guilty to the robbery charge on March 8, 2016. During the plea colloquy, the court questioned defendant as follows:

Q: Has anyone forced or threatened you to enter into this plea today?

A: No.

Q: Do you understand what you're doing here today?

A: Yes.

Q: What are you doing here today, sir?

A: Entering a plea of guilty.

. . . .

Q: And you understand that if I accept your plea[,] once you are sentenced[,] you will have a conviction just as if you had been found guilty after a trial?

A: Yes.

Q: Are you satisfied with the advice of your attorney?

A: No. . . . [But] I cannot afford to retain my own [private] counsel, so I would not be asking for any other counsel today.

Q: All right. Are you entering into this plea freely and voluntarily?

A: Yes, Your Honor.

With the permission of the court, the prosecutor then questioned defendant about his dissatisfaction with the public defender assigned to represent him:

Q: Okay. [Your attorney has] provided you with the discovery and the indictment of the case that can be provided to you?

A: Yes.

Q: And you've had an opportunity to discuss that discovery with [your attorney]?

A: Yes.

Q: And you had the occasion today and on previous days to ask questions of [your attorney]?

A: Yes.

Q: And [your attorney] has, on those dates and on today's date, responded, correct?

A: He has responded, yes.

Q: Okay. And [your attorney] has also explained to you the charge of second[-]degree robbery?

A: Yes, he has.

Q: And he's explained to you the sentence exposure for the second[-]degree robbery?

A: Yes, he has.

Q: And . . . without telling me anything about the case[,] you and your attorney have discussed your options with respect to this charge?

A: Yes, we have.

Q: And are there any questions that you have now that you need more time to talk to [your attorney] about?

A: No.

Q: [W]ould you agree with the statement that [your attorney] has provided you with legal counsel throughout your time here in New Jersey with this charge?

A: Yes, he has.

Q: And whether or not you disagree with it[,] you agree that he has been available to you throughout your being held in New Jersey for this charge?

A: Yes, he has.

Defense counsel then questioned defendant about the January 27, 2014 robbery:

Q: On that date[,] were you in the Township of Bloomfield, New Jersey?

A: Yes.

Q: Had you driven into a Sunoco gas station for the purpose of getting gas?

A: Yes.

Q: Initially, did you give a credit card to the gas attendant[,] attempting to get gas for your card?

A: Yes.

Q: Is it true that your credit card was declined?

A: Yes.

Q: Subsequently, you did not get gas from the attendant? Is that true?

A: Yes.

Q: You asked the attendant if he would give you change of a [twenty-dollar] bill[?]

A: Correct.

Q: While the attendant was in the process of giving you the change[,] is it true that you hit, pushed, and knocked the attendant down?

A: Yes.

Q: Subsequent to that, as a result of him falling to the ground[,] the money . . .

he had in his possession fell to the ground[?]

A: Yes.

Q: You then picked up the money that had fallen, got back into your car, and drove away[?]

A: Yes.

Finally, the judge asked defendant, "do you want me to accept your plea of guilty because you are, in fact, guilty?" Defendant responded, "[y]es." Accordingly, the court accepted defendant's factual basis and found the plea was knowing and voluntary.

Prior to sentencing, defendant moved to withdraw his guilty plea with the assistance of a second public defender who was assigned to represent him. Defendant argued his plea was not entered knowingly, voluntarily and intelligently. Following oral argument, the court found defendant failed to meet the standards established in State v. Slater, 198 N.J. 145 (2009). Pursuant to the plea agreement, the court then sentenced defendant to a five-year prison term with an eighty-five percent parole ineligibility period pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant was awarded thirty-five days of jail credit. This appeal followed.

Defendant presents the following arguments on appeal:

I. [DEFENDANT] SHOULD HAVE BEEN ABLE TO WITHDRAW HIS PLEA BECAUSE THE FACTUAL

BASIS WAS INADEQUATE (NOT RAISED BELOW), AND THE PLEA WAS NOT ENTERED KNOWINGLY AND VOLUNTARILY, AND BECAUSE ALLOWING WITHDRAWAL WAS IN THE INTEREST OF JUSTICE.

- A. The Factual Basis Did Not Establish that [Defendant] Was Guilty of Second-Degree Robbery Because It Did Not Address [Defendant's] State of Mind During the Assault or Demonstrate that the Assault Occurred in the Commission of a Theft.
- B. The Plea Was Not Knowingly and Voluntarily Entered Because [Defendant] Was Misinformed Regarding His Right to Seek New Appointed Counsel.
- C. [Defendant] Should Have Been Able to Withdraw His Plea, Even if it Was Valid, Pursuant to the Slater Factors and the Interests of Justice.

II. [DEFENDANT] IS ENTITLED TO JAIL CREDIT FOR THE 618 DAYS HE WAS HELD IN JAIL BETWEEN HIS ARREST FOR THE PRESENT OFFENSE AND THE IMPOSITION OF AN UNRELATED SENTENCE IN VERMONT.

We address these arguments in turn.

I.

A.

For the first time on appeal, defendant argues that his guilty plea must be vacated because he did not provide an adequate factual basis to establish second-degree robbery. We disagree.

When a defendant challenges the factual basis for a guilty plea, our review is de novo. State v. Tate, 220 N.J. 393, 403-04 (2015). That is so 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." Id. at 404.

Trial courts may not accept a guilty plea unless there is a factual basis supporting it. R. 3:9-2. "Indeed, 'it is essential to elicit from the defendant a comprehensive factual basis, addressing each element of a given offense in substantial detail.'" State v. Perez, 220 N.J. 423, 432 (2015) (quoting State v. Campfield, 213 N.J. 218, 236 (2013)). Trial courts "'must be satisfied from the lips of the defendant' . . . that he committed every element of the crime charged." Id. at 432-33 (citations omitted).

Requiring a factual basis for a plea serves several salient purposes. As our Supreme Court explained, "the factual basis enables a judge to 'ascertain the plea's voluntariness . . . [b]ecause a guilty plea is an admission of all the elements of a formal criminal charge [and] cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.'" State v. Urbina, 221 N.J. 509, 526 (2015) (quoting McCarthy v. United States, 394 U.S. 459, 466 (1969)).

Additionally, "the requirement of a factual basis helps '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.'" Id. at 527-28 (quoting State v. Barboza, 115 N.J. 415, 421 (1989)). For all those reasons, "if a factual basis has not been given to support a guilty plea, the analysis ends and the plea must be vacated." Tate, 220 N.J. at 404.

Here, defendant pled guilty to second-degree robbery, which is committed when one, "in the course of committing a theft, . . . [i]nfllicts bodily injury or uses force upon another." N.J.S.A. 2C:15-1(a)(1). Theft is defined as "unlawfully tak[ing], or exercis[ing] unlawful control over, moveable property of another with purpose to deprive him thereof." N.J.S.A. 2C:20-3(a).

Defendant's factual basis included his admissions that he hit, pushed, and knocked down the gas station attendant while stealing his money. These actions qualify as use of force upon another. See N.J.S.A. 2C:15-1(a)(1). They further establish that defendant's use of force on the victim was for the purpose of taking and permanently carrying away the victim's money. Contrary to defendant's argument, in the present case it cannot be said

"the violence and the theft are unconnected" State v. Lopez, 187 N.J. 91, 101 (2006).

B.

Defendant next argues his guilty plea was neither knowing nor voluntary because the court "effectively coerced [him] into entering it" despite his "expressed dissatisfaction with his appointed counsel." Specifically, defendant contends he was misinformed by the court regarding his right to seek new appointed counsel. We do not find this argument persuasive.

A defendant cannot be regarded as having voluntarily pleaded guilty if the plea is attributable to ineffective assistance of counsel. See State v. Rhein, 117 N.J. Super. 112, 117-18 (App. Div. 1971) (requiring a guilty plea to be set aside if it was made upon counsel's error as to the elements of the offense and the defendant denies the facts necessary to support his legal liability for same); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 1.2 on R. 3:9-2 (2017).

On the other hand, as defendant candidly concedes, while an accused has a constitutional right to counsel, he "does not enjoy an unencumbered right to counsel" of his choice. State v. Crisafi, 128 N.J. 499, 517 (1992). For this reason, we have declined to

deviate from a long line of cases recognizing that a court may not require the Public Defender to assign new counsel to a defendant

who was dissatisfied with the attorney assigned to represent him, absent a showing of "substantial cause." State v. Lowery, 49 N.J. 476, 489-90 (1967) and State v. Wiggins, 158 N.J. Super. 27, 34 (App. Div. 1978). Disagreement over defense strategy does not rise to the level of good cause or substantial cause. . . . Crisafi, 128 N.J. [at 518]. The constitutional right to the assistance of counsel provides a fair opportunity to secure and consult counsel of a defendant's own choice, but there is no absolute right to a particular counsel. State v. Reddy, 137 N.J. Super. 32, 35 (App. Div. 1975).

Moreover, the constitution does not guarantee that counsel appointed for a defendant shall measure up to his notions of ability or competency. Assigned counsel is not required to dance to the prisoner's tune. State v. Rinaldi, 58 N.J. Super. 209, 214 (App. Div. 1959). Simply put, a defendant does not have the right to accept or reject assigned counsel, as whim or scheme dictates. Ibid. The right to assigned counsel is not the right to pick an attorney of one's own choosing, nor the right to select counsel who will completely satisfy a defendant's fancy as to how he is to be represented. Ibid.

[State v. Coon, 314 N.J. Super. 426, 438 (App. Div. 1998).]

Here, we agree with the State that the trial court conducted an exhaustive inquiry of defendant regarding his dissatisfaction with his court-appointed counsel. This inquiry at most showed defendant was dissatisfied with his attorney. It failed to establish the "substantial cause" that would require the Public Defender to provide defendant with new court-appointed counsel.

The record, viewed as a whole, clearly belies defendant's contention that his plea was not entered knowingly and voluntarily.

C.

Alternatively, defendant contends the court erred in denying his motion to withdraw his guilty plea because he asserted a colorable claim of innocence and otherwise satisfied the criteria established in Slater. Again, we disagree.

A determination of whether to allow a defendant to withdraw a guilty plea lies within the sound discretion of the trial court, and will be reversed "only if there was an abuse of discretion which renders the lower court's decision clearly erroneous." State v. Simon, 161 N.J. 416, 444 (1999) (citing State v. Smullen, 118 N.J. 408, 416 (1990)). In all plea withdrawal cases, "the burden rests on the defendant, in the first instance, to present some plausible basis for his request, and his good faith in asserting a defense on the merits." Slater, 198 N.J. at 156 (quoting Smullen, 161 N.J. at 416).

"Generally, representations made by a defendant at plea hearings concerning the voluntariness of the decision to plead, as well as any findings made by the trial court when accepting the plea, constitute a 'formidable barrier' which defendant must overcome before he will be allowed to withdraw his plea." Simon,

161 N.J. at 444 (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977)).

A court must consider and balance four factors when evaluating a motion to withdraw a guilty plea: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused." State v. Munroe, 210 N.J. 429, 442 (2012) (quoting Slater, 198 N.J. at 157-58). "No single Slater factor is dispositive; 'if one is missing, that does not automatically disqualify or dictate relief.'" State v. McDonald, 211 N.J. 4, 16-17 (2012) (quoting Slater, 198 N.J. at 162).

With respect to the first factor, "[a] bare assertion of innocence is insufficient to justify withdrawal of a plea." Slater, 198 N.J. at 158. Instead, "[d]efendants must present specific, credible facts and, where possible, point to facts in the record that buttress their claim." Ibid. There must be more than just a "change of heart" to warrant leave to withdraw a guilty plea once entered. Id. at 157.

According to Slater, the second factor, the nature and strength of defendant's reasons for withdrawal, "focuses on the basic fairness of enforcing a guilty plea by asking whether

defendant has presented fair and just reasons for withdrawal, and whether those reasons have any force." Id. at 159. Although we are not to approach the reasons for withdrawal with "skepticism," we "must act with 'great care and realism' because defendants often have little to lose in challenging a guilty plea." Id. at 160 (quoting State v. Taylor, 80 N.J. 353, 365 (1979)).

With respect to the third Slater factor, whether the plea was entered as the result of a plea bargain, the Court noted that "defendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain." Ibid. However, the Court did "not suggest that this factor be given great weight in the balancing process." Id. at 161.

As to the fourth factor, unfair prejudice to the State or unfair advantage to the accused, the Court stated there was "no fixed formula to analyze the degree of unfair prejudice or advantage that should override withdrawal of a plea" and that "courts must examine this factor by looking closely at the particulars of each case." Ibid. The "critical inquiry . . . is whether the passage of time has hampered the State's ability to present important evidence." Ibid. The State need not show prejudice "if a defendant fails to offer proof of other factors in support of the withdrawal of a plea." Id. at 162.

Here, the judge considered all of the Slater factors and concluded defendant did not satisfy his burden to establish a valid basis to withdraw his plea. The judge reasoned:

[D]efendant has not set forth a colorable claim of innocence in this case. He appears to express dissatisfaction, but beyond that has not set forth a basis under which he is innocent of the charges stated. He did give a factual basis [for the charge of second-degree robbery] during the plea, and through the evidence that's available at this time he has not set forth a colorable claim of innocence.

The nature and strength of [defendant's] reasons for the withdrawal are not present either[;] there's no misinformation. [Defendant] argues that there is some discovery that he would like. However, at the time the plea was entered into[,] [defendant] entered into the plea with the discovery available at that time. And none of the discovery he requests sets forth a basis for his innocence either.

Three, there is a . . . plea agreement in effect. While this is not a strong reason to deny the motion, it is at least a factor to consider. The plea agreement was gone over at length with . . . defendant, and the court under oath in open court, and was clearly explained to him.

And whether the withdrawal would result in unfair prejudice to the State or unfair advantage to the accused, the State is entitled to the benefit of its bargain.

We conclude the judge correctly weighed the Slater factors. Defendant relies on his attorney's certification and arguments

advanced in his attorney's brief, which do not constitute legally competent evidence. See R. 1:6-6. Thus, defendant merely advances a "bare assertion of innocence," predicated on a voluntary intoxication defense, which is insufficient. Slater, 198 N.J. at 158. The fact that the gas station surveillance video may no longer be available in discovery also does not establish defendant's innocence or a valid reason to withdraw the plea. Because defendant failed to satisfy the other factors, the State was not required to demonstrate prejudice. Id. Consequently, as defendant has failed to establish that it is in the interest of justice to vacate his guilty plea, we conclude the judge did not abuse his discretion in denying defendant's motion to vacate.

II.

As noted, on February 5, 2014, defendant was arrested in Vermont as a fugitive from New Jersey as well as on unrelated Vermont charges. He remained in custody in Vermont until he was sentenced on the Vermont charges on October 16, 2014. Defendant argues he is entitled to an additional 618 days of jail credit for that period, in addition to the 35 days he was awarded at sentencing. This argument warrants little discussion.

Recently, in State v. Joe, 228 N.J. 125 (2017), our Supreme Court decided the issue of "whether incarceration outside of New Jersey on out-of-state charges entitles a defendant to jail credit

pursuant to Rule 3:21-8." Id. at 126. The Court concluded that incarceration that is not based solely on New Jersey charges does not justify an award of jail credits. Id. at 135. Accordingly, defendant's request for an additional 618 days of jail credit while he was also being held on Vermont charges was properly denied.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION