SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0260-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GREGORY CLAPPER,

Defendant-Appellant.

Submitted February 13, 2017 – Decided March 3, 2017

Before Judges Nugent and Haas.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Municipal Appeal No. 05-15.

Pascarella & Associates, P.C., attorneys for appellant (Stephen M. Pascarella, on the brief).

Joseph D. Coronato, Ocean County Prosecutor, attorney for respondent (John C. Tassini, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Gregory Clapper appeals from the July 6, 2015 Law Division order denying the appeal of his municipal court sentence for refusal to submit to a breath test. When sentenced, defendant

had three previous convictions for Driving While Intoxicated (DWI), the last having occurred more than ten years before his refusal offense. He argues he should have been sentenced as a second offender under the "step-down" provision of N.J.S.A. 39:4-50(a)(3), and the Law Division judge erred by finding to the contrary.[1] This is defendant's second appeal. It should be dismissed. Nonetheless, for the reasons that follow, we affirm.

In 2011, defendant pled guilty in municipal court to refusal to submit to a breath test, N.J.S.A. 39:4-50.4(a), and reckless driving, N.J.S.A. 39:4-96. He had three previous convictions for DWI, N.J.S.A. 39:4-50, though his third DWI offense had occurred more than ten years before his refusal offense. The refusal statute, N.J.S.A. 39:4-50.4(a), provides for enhanced penalties for repeat convictions:

> Except as provided in subsection b. . . ., the municipal court shall revoke the right to operate a motor vehicle of any operator who, . . . shall refuse to submit to a [breath] test . . . for not less than seven months or

[1] N.J.S.A. 39:4-50(a)(3) provides in pertinent part: "[I]f the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes." The statute applies to sentencing for refusal convictions enhanced by previous DWI convictions. State v. Taylor, 440 N.J. Super. 387, 392 (App. Div.), certif. denied, 223 N.J. 283 (2015).

> more than one year unless the refusal was in connection with a second offense under this section, in which case the revocation period shall be for two years or unless the refusal was in connection with a third or subsequent offense under this section in which case the revocation shall be for ten years.[2]

Consistent with the statute, the municipal court judge sentenced defendant as a "third or subsequent offender." On the refusal charge, the judge suspended defendant's license for ten years, required him to install an ignition interlock device for one year, ordered him to attend forty-eight hours at an Intoxicated Driver Resource Center, fined him $1,006, and imposed a $100 surcharge and $33 in court costs. The judge also fined defendant $206 and imposed $33 in court costs on the reckless driving charge. The judge stayed the sentence for twenty days pending appeal to the Law Division.

Defendant appealed his sentence to the Law Division, contending he should have been sentenced as a first-time offender because his offense was for a refusal and his previous convictions

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[2] Previous DWI convictions enhance a subsequent sentence for refusal. State v. Frye, 217 N.J. 566, 569 (2014); see also In re Bergwall, 85 N.J. 382 (1981), rev'g on dissent, 173 N.J. Super. 431, 436 (App. Div. 1980) (Lora, P.J.A.D., dissenting); State v. Fielding, 290 N.J. Super. 191, 193-94 (App. Div. 1996) (explaining that a defendant previously convicted of DWI must receive an enhanced suspension for a subsequent refusal conviction).

were for DWI. The Law Division judge denied the appeal and imposed the same sentence as the municipal court judge.

Defendant appealed. We affirmed and the Supreme Court denied certification. State v. Clapper, No. A-2338-11T1 (App. Div. Nov. 19, 2012), certif. denied, 217 N.J. 623 (2014). When the Supreme Court denied defendant's petition for certification, his refusal conviction and sentence became final. All that remained for him to do was surrender his driver's license to the municipal court judge, arrange to pay his fines, and comply with the other terms of his sentence. That did not happen.

In February 2015, eight months after the Supreme Court denied certification, the parties returned to municipal court for what defense counsel announced was a "resentencing."[3] When the municipal judge inquired, "[h]asn't this been decided on appeal," defense counsel responded his new argument had not. Defense counsel proceeded to argue defendant was entitled to a step-down for purposes of sentencing under State v. Revie, 220 N.J. 126

[3] Defendant cited no authority for either the assertion that the matter was back for "resentencing" or the proposition that he had a right to make a new argument after exhausting his right to appeal. The municipal court judge asked for none. In his appellate brief, defendant cites to neither the record nor to any law to support the assertion that he was to be "resentenced." Contrarily, he states that the matter was returned to municipal court for "execution of defendant-appellant's original sentence."

(2014) (holding "a repeat DWI offender may invoke the statutory 'step-down' provision a second time, provided that more than ten years have passed with no infraction since the defendant's most recent DWI offense").

The municipal court judge disagreed and resentenced defendant as a third or subsequent offender.[4] The judge imposed the same sentence he had previously imposed, except he increased the period for the interlock device from one to two years.

Defendant appealed to the Law Division. The Law Division judge considered the merits of defendant's Revie and step-down arguments, rejected them, and imposed the same sentence the municipal court judge had imposed. This appeal followed.

On appeal, defendant argues:

> POINT ONE
>
> THE LOWER COURT MISAPPLIED THE CONCEPT OF "ADMINISTRATIVE PENALTIES" DISCUSSED IN REVIE TO THE CASE AT BAR.
>
> POINT TWO
>
> DEFENDANT-APPELLANT, IN ACCORDANCE WITH REVIE, SHOULD BE TREATED AS A [SECOND] OFFENDER.

[4] The municipal court transcript reflects the judge "resentenced" defendant by telling counsel the sentence defendant faced, even if the offense was stepped down to a third conviction, and then telling the attorney, "I just sentenced him."

We begin with the fundamental principle that a party is entitled to one appeal as of right. The New Jersey Constitution provides that "[a]ppeals may be taken to the Appellate Division of the Superior Court from the law and chancery divisions of the Superior Court and in such other causes as may be provided by law." N.J. Const. art. VI, § 5, ¶ 2. Our judicial system "contemplates one appeal as of right to a court of general appellate jurisdiction." Midler v. Heinowitz, 10 N.J. 123, 129 (1952); State v. Fletcher, 174 N.J. Super. 609, 614 (App. Div. 1980), certif. denied, 89 N.J. 444 (1982). See also In re LiVolsi, 85 N.J. 576, 592 n.17 (1981).

Here, defendant's one appeal as of right culminated in our affirming his sentence and the Supreme Court denying certification. His sentence was final. Defendant was not entitled to a second appeal simply because he came up with a new argument he had not raised previously. When defendant reappeared in municipal court following the exhaustion of his appeal as of right, the judge should have compelled him to comply with the original sentence. Thereafter, the Law Division judge should have dismissed defendant's appeal. We should too. Nonetheless, because the attorneys and courts did not recognize this issue, defendant has not had the opportunity to address it. For that reason, and because we are reluctant to decide an appeal on an issue the

parties have not addressed, we exercise our discretion and address defendant's arguments.

We find defendant's arguments devoid of sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only the following brief comments. The "step-down" statute is clear and unambiguous. It requires a court to treat a second offense occurring more than ten years after the first offense as a first conviction for sentencing purposes. N.J.S.A. 39:4-50(a)(3). The statute also requires a court to treat a third offense occurring more than ten years after the second offense as a second conviction for sentencing purposes. Ibid. The statue neither requires nor authorizes a court to treat a fourth offense that occurs more than ten years after a third offense as a second conviction for sentencing purposes.

Nor does Revie provide support for defendant's argument. The defendant in Revie was facing sentencing for a fourth DWI conviction. Supra, 220 N.J. at 128. Previously, his sentence for his third DWI conviction had been stepped down for sentencing purposes to a second offense, more than ten years having elapsed between his second and third offenses. Id. at 128-29. In addition, following his third conviction, a court granted the defendant post-conviction relief with respect to his second DWI conviction, which resulted from defendant's uncounseled guilty

plea. Id. at 129. The Court held "defendant's uncounseled guilty plea . . . may not be used for the purpose of enhancing defendant's term of incarceration when he is sentenced in the present case." Id. at 139. The Court went on to hold, however, the "[uncounseled] DWI conviction constitutes a prior conviction for purposes of determining the administrative penalties as prescribed by N.J.S.A. 39:4-50(a) -- the revocation of defendant's driver's license, the imposition of fines, and the installation of an interlock device pursuant to N.J.S.A. 39:4-50.17." Here, defendant did not claim that any of his previous DWI convictions resulted from uncounseled guilty pleas. More important, defendant's refusal offense did not expose him to a loss of liberty. For those reasons, his reliance on Revie is misplaced.

Defendant has not argued that the municipal court and Law Division judges were without authority to increase the time for maintaining the interlock device when defendant appeared before them the second time. The record is inadequate to permit us to determine whether the issue has become moot due to intervening time, events, or for other reasons. Hence, we decline to remand the matter for resentencing. Defendant may make an application to the Law Division if appropriate.

Affirmed.