

**NOT FOR PUBLICATION WITHOUT THE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-4540-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELIZABETH SILVA,

Defendant-Appellant.

Argued October 4, 2017 – Decided October 23, 2017

Before Judges Koblitiz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Municipal
Appeal No. 16-005.

Matthew W. Reisig argued the cause for
appellant (Reisig Criminal Defense & DWI Law,
LLC, attorneys; Mr. Reisig, on the brief).

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

PER CURIAM

Defendant Elizabeth M. Silva appeals from her conviction
after pleading guilty to refusal to submit to a breath test. On

appeal, Silva argues that the plea colloquy did not satisfy the elements of the offense based upon her testimony, the plea proceeding was improper, and the court erroneously relied upon a prior plea allocution. Having carefully reviewed the record and arguments raised on appeal, we affirm.

As we write for the parties and their respective counsel, there is no need to recite the extensive prior procedural history in detail. Suffice it to state that subsequent to Silva's original conviction for driving while intoxicated (DWI) and for refusal to submit to a breath test, after appeal to this court, we reversed and remanded to the municipal court for trial. State v. Silva, No. A-1011-13 (App. Div. March 19, 2015) (slip op. at 15).

On December 16, 2015, after Silva's motion to recuse the municipal court judge who presided over her original plea was denied and then upheld by the Law Division, she appeared before that judge with counsel and pled guilty to refusal. The remaining charges originally lodged against her, including the DWI, were dismissed on motion of the prosecutor.

During the plea proceeding, Silva stated that she desired to plead guilty and was entering her plea knowingly and voluntarily. Silva also acknowledged that she was satisfied with her attorney's representation.

The court commenced the elicitation of the factual basis by reviewing with Silva the factual basis she provided during her October 2011 plea of guilty to the refusal, in which she admitted under oath that she "did not take the breathalyzer test."

Silva's defense counsel then elicited the following testimony from her relative to her guilty plea:

[Q.] Now, Ms. Silva, let me take you back to July [30,] 2011. Do you have a recollection of that date?

[A.] Yes.

[Q.] And you were arrested in the driver's seat of a motor vehicle [here in] Belmar when police came upon, came upon you, is that correct?

[A.] Correct.

[Q.] And the car was running, is that correct?

[A.] Correct.

[Q.] And you agree that the officers – And you had been at Bar A, correct?

[A.] Correct.

[Q.] And you told the officers that, correct?

[A.] Correct.

[. . . .]

[Q.] And the officers had you engage in what we call Field Sobriety Testing, do you remember that?

[A.] Yes.

[Q.] And do you remember that they also had you stand heel to toe, and walk heel to toe in a particular way, is that correct?

[A.] Correct.

[Q.] And do you agree that based on the observations that they made, as they put it in their police reports, based on the information you gave them, that at that time they had good reason to arrest you for the purpose of continuing an investigation as to whether or not you were driving while under the influence. Do you agree with that?

[A.] Uh huh.

[Q.] You have to say yes or no.

[A.] Yes.

[Q.] Okay. Now, you know we've discussed that, but that's what we call the factual element of probable cause to arrest you for DWI. You understand that, correct?

[A.] Correct.

[Q.] And the officers then brought you back here to police headquarters, is that right?

[A.] Right.

[Q.] And an [o]fficer read to you a document called a Standard Statement. Do you understand?

[A.] Correct.

[Q.] And you and I have gone over that Standard Statement, is that right?

[A.] That's right.

[. . . .]

[Q.] Let me show you that. This is the document we've been referring to. Is that right?

[A.] That's right.

[Q.] You and I have had a chance to go over that and talk about that, correct?

[A.] Correct.

[Q.] And you agree that -- [n]ow, there's two parts to this document. There's a top part where it says, "The arresting officer must read the following to the defendant. Full text of Standard Statement follows." Do you see that section?

[A.] Yes.

[Q.] And you agree that the officer, whoever it was, read you the statements that are printed on the top part of what we're going to label as J-2. Do you understand that?

[A.] I understand.

[Q.] And then there's a place where an answer has been inserted. Is that correct?

[A.] Correct.

[Q.] And that answer was what?

[A.] That's fine.

[Q.] Those are your words, correct?

[A.] Correct.

[Q.] And then the officer proceeded to have you submit breath samples, is that correct?

[A.] Correct.

[. . . .]

[Q.] Now, Ms. Silva, you and I have had a chance to review this document that we've identified as J-1 many times, isn't that right?

[A.] Right.

[Q.] You recognize this as the Alcohol Influence Report Form, which is the record of the attempts you made to submit breath samples, is that correct?

[A.] Correct.

[Q.] And as you look at J-1, you made how many attempts to submit breath samples?

[A.] Seven.

[Q.] And did the instrument accept those samples? And you understand the

instrument did not accept your
breath samples, is that right?

[A.] Right.

Following Silva's plea allocution, the court placed the results of her attempts to submit breath samples, as indicated in the Alcohol Influence Report (AIR), on the record. The AIR was admitted into evidence as a joint exhibit.

The court then permitted the municipal prosecutor, with comment but without objection by Silva's counsel, to supplement her factual basis with testimony from the arresting officer and testimony from the officer who administered the Alcotest. The arresting officer's testimony was limited to Silva's operation of the motor vehicle. The Alcotest officer testified as to Silva's failed attempts to provide an adequate breath sample.

At the conclusion of the proceeding, the court accepted Silva's guilty plea, finding that her plea was knowing, intelligent, and voluntary. The court also found that the plea was supported by "more than an adequate factual basis." Upon review of the statutory elements for refusal, the court held that the elements were satisfied by the testimonial and documentary evidence. Silva was then sentenced to the required period of license suspension, a period of utilization of an interlock device, and related mandatory penalties. Credit was provided to Silva for

each aspect of the sentence that she served as a result of her prior plea and resultant sentence.

Silva filed an appeal to the Law Division seeking to vacate her plea raising the same arguments now raised on appeal before this court. After conducting a de novo hearing, Judge Anthony Mellaci rejected Silva's arguments in a comprehensive, well-reasoned oral opinion. The judge, among other findings, held that there was no error in the plea proceedings and that Silva had provided an adequate factual basis predicated upon her own allocution. We agree and add only the following.

A guilty plea may not be entered by the trial court without the judge first addressing defendant personally and determining by inquiry of defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, with an understanding of the nature of the charges and consequences of the plea. R. 3:9-2; State v. Kovack, 91 N.J. 476, 484 (1982); accord State v. Simon, 161 N.J. 416, 443 (1999); State v. Barboza, 115 N.J. 415, 420-21 (1989); State v. Howard, 110 N.J. 113, 122 (1988); State v. Sainz, 107 N.J. 283, 292-93 (1987). The factual basis for a guilty plea must include defendant's admission of guilt of the crime or the acknowledgment of facts constituting the essential elements of the crime. Sainz, supra, 107 N.J. at 293. "The need to establish a sufficient

factual basis for a guilty plea is not obviated by the fact that the plea is part of a negotiated plea agreement." Ibid.

Under New Jersey's Implied Consent Law, N.J.S.A. 39:4-50.2,

[a]ny person who operates a motor vehicle on any public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood[.]

Failure of a person to act in accordance with N.J.S.A. 39:4-50.2 can result in prosecution for refusing to submit to a breath test. State v. Widmaier, 157 N.J. 475, 488-89 (1999). The purpose [of] the statute is to encourage motorists suspected of driving under the influence to submit to breath tests. Id. at 487 (citing State v. Wright, 107 N.J. 488, 499 (1987)).

In State v. Marquez, 202 N.J. 485, 503 (2010), our Supreme Court, in referencing the statutory factors needed to sustain a refusal conviction, citing N.J.S.A. 39:4-50.2(e) and N.J.S.A. 39:4-50.4a(a), held:

(1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test.

The State must prove these elements beyond a reasonable doubt. State v. Cummings, 184 N.J. 84, 88 (2005). Only the third element is at issue here.

Following Silva's assent to a breath test, she was required to provide at least two "valid" breath samples. State v. Chun, 194 N.J. 54, 81, cert. denied, 555 U.S. 825, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008). To be "valid," a breath sample must meet the following four criteria: (1) minimum volume of 1.5 liters; (2) minimum blowing time of 4.5 seconds; (3) minimum flow rate of 2.5 liters per minute; and (4) that the [infrared] measurement reading achieves a plateau (i.e., the breath alcohol does not differ by more than one percent in .025 seconds). Id. at 97.

Here, Silva admitted that she gave seven breath samples yet was unable to provide the requisite two valid samples. That admission alone constituted an adequate basis that she refused to take the test in satisfaction of Rule 7:6-2(a)(1).

Silva's remaining arguments, not specifically addressed herein, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION