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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-2889-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONG SEOK,

Defendant-Appellant.

Submitted January 29, 2018 – Decided April 16, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
16-02-0534.

Andrew R. Burroughs, attorney for appellant
(Andrew R. Burroughs and Dennis Cleary, of
counsel and on the briefs).

Gurbir S. Grewal, Attorney General, attorney
for respondent (Arielle E. Katz, Deputy
Attorney General, of counsel and on the
brief).

PER CURIAM

On July 15, 2016, following multiple adjournments so
defendant Dong Seok could seek the advice of independent

immigration counsel, the judge accepted defendant's guilty plea to third-degree conspiracy to "violate the narcotics laws," N.J.S.A. 2C:5-2 and 35-5, and third-degree possession of heroin with intent to distribute within one thousand feet of a school, N.J.S.A. 2C:35-7(a). Under oath, defendant, who was not a United States citizen, indicated he clearly understood his rights, understood his guilty plea could result in deportation and told the judge he was pleading guilty voluntarily. In return, the State agreed to recommend a non-custodial probationary sentence and dismiss ten other counts in the indictment against defendant.¹

As to the conspiracy count, defense counsel elicited the following factual basis for the plea:

Q. [D]irect[ing] your attention to August 25th of 2015. . . . [D]id you . . . have a phone conversation with someone on that day?

A. Yes, sir.

. . . .

Q. And during that conversation, you discussed the purchase and sale of narcotics – specifically, heroin

A. Yes, sir.

¹ The indictment contained a total of 62 counts, against 26 defendants, including defendant's mother, brother and ex-girlfriend. The prosecutor consented to their entry into the Pre-trial Intervention Program as part of the plea bargain.

Q. [A]t some point, you were going to meet with [your co-defendant] and . . . either purchase or sell him narcotics.

A. Yes.

Directing defendant's attention to a different date, defense counsel asked:

Q. [A]t some point, the police came to your house and executed a search warrant, right?

A. Yes.

Q. And during the search of your home, certain drugs were discovered.

A. Yes.

Q. And one of those drugs was heroin.

A. Yes.

Q. And you're a user of heroin.

A. Mm-hmm.

Q. You knew it was heroin, right?

A. Yes, sir.

Q. You knew it was illegal to possess heroin.

A. Yep.

. . . .

Q. Now with those drugs that you had in your possession, your plan was to maybe not sell them, but definitely share them with people that you take drugs with, right? Give it out?

A. Mm-hmm.

. . . .

Q. Yes or no?

A. Yes.

On October 11, 2016, defense counsel moved to be relieved because of a "fundamental disagreement" with defendant, who now wished to withdraw his guilty plea and go to trial.² On the scheduled sentencing date, counsel told the judge defendant "was looking to seek different counsel." The judge noted the plea had been adjourned several times, and the sentencing had been adjourned from a prior date. He told defendant, "This [i]s the sentencing date. There's no one here representing that they will represent you."

Defendant told the judge he thought successor counsel had contacted the court or spoken to the prosecutor, and he expected to have the funds necessary to retain successor counsel the next week. However, the judge said no one called the court and no one filed an appearance. He denied the adjournment request.

Believing she had an obligation to advance defendant's withdrawal motion, counsel argued the four factors outlined by the

² Apparently, defendant sent a certification to the judge outlining his desire to withdraw his guilty plea. It is not in the appellate record.

Court in State v. Slater, 198 N.J. 145, 158-62 (2009).³ Counsel said defendant believed he was innocent of the charges. After considering the Slater factors, the judge denied the motion to withdraw and sentenced defendant in accordance with the plea agreement.

Approximately two weeks later, successor counsel filed a motion for reconsideration. He certified that at the time of defendant's guilty plea, he "was not fully aware of the immigration consequences that would ensue." Counsel asserted that defendant had since hired an immigration lawyer and was now aware "of his likely deportation as a result of th[e] conviction."⁴

The judge held oral argument on the motion for reconsideration. Defendant asserted the judge erred by denying the adjournment request, and that he should have permitted defendant to withdraw his guilty plea. Regarding the latter, counsel argued relief was not premised upon the Slater factors;

³ The judge agreed, likening counsel's responsibility to the obligation of post-conviction relief counsel. See State v. Rue, 175 N.J. 1, 19 (2002) ("[C]ounsel must advance the claims the client desires to forward in a petition and brief and make the best available arguments in support of them.").

⁴ The certification was not based on successor counsel's "personal knowledge" and does not comply with Rule 1:6-6. Claypotch v. Heller, Inc., 360 N.J. Super. 472, 489 (App. Div. 2003).

rather, defendant provided an inadequate factual basis at the time of his guilty plea.

The judge acknowledged he had not previously engaged in a thorough review of the factors that guide a trial court's exercise of discretion in considering a late adjournment request. See State v. Hayes, 205 N.J. 522, 538 (2011) (quoting State v. Ferguson, 198 N.J. Super. 395, 402 (App. Div. 1985)). In a comprehensive oral decision, the judge did so and denied the motion for reconsideration of the denial of defendant's request to adjourn sentencing.

The judge then considered the newly asserted basis for withdrawal of defendant's guilty plea. Defendant argued his factual basis established only that he jointly possessed the heroin with others, not that he possessed the drug with the intent to distribute. Relying on the factual basis we cited above, the judge denied defendant's motion for reconsideration of the denial of his withdrawal motion. This appeal followed.

Before us, defendant reiterates the arguments made during his motion for reconsideration. We affirm.

The Court faced a similar situation in Hayes, a case which defendant does not cite in his brief. There, after pleading guilty to counts in two separate indictments while represented by two different attorneys, the defendant sought to withdraw his guilty

pleas. Hayes, 205 N.J. at 528-30. Trial counsel on one of the indictments confirmed that the defendant was seeking new counsel, and that one of the attorneys contacted agreed to represent the defendant on the withdrawal motion but had a schedule conflict that kept him from appearing that day. Id. at 530-31. Trial counsel could not advance an argument himself because he likely would be a witness regarding the defendant's claim of ineffective assistance. Ibid. He asked for an adjournment. Id. at 531. Without ruling, the judge then heard from the defendant, who essentially argued his motion to withdraw his guilty plea. Id. at 531-32. The judge denied the request for an adjournment, denied the motion to withdraw and proceeded to sentence the defendant. Id. at 532-33.

After considering the factors set out in Ferguson, id. at 538, the Court said,

No doubt, when defendant requested an adjournment of his sentencing proceeding in order to secure uncompromised counsel to represent him in respect of the motion to withdraw his guilty pleas, the trial court was confronted with a quandary, although one that, common experience tells us, occurs with disturbing regularity.

. . . .

[I]n the circumstances presented, the denial of defendant's request for an adjournment was unreasonable and prejudicial to defendant's rights.

[Id. at 539-40.]

The Court also rejected the State's argument that any error in denying the defendant's adjournment request was harmless. Id. at 540. It specifically found the trial court provided "no meaningful analysis of the denial of defendant's withdrawal motion," id. at 540-41, and the Court had "no confidence in the uncounseled proceedings below," noting "[w]e cannot know whether defendant might have been able to satisfy the Slater standards with the help of a lawyer." Id. at 541.

Since deciding Hayes, the Court has reiterated that "[i]f a trial court conducts a reasoned, thoughtful analysis of the appropriate factors, it can exercise its authority to deny a request for an adjournment to obtain counsel of choice." State v. Kates, 216 N.J. 393, 396-97 (2014) (citations omitted).

Thus, we underscore that only if a trial court summarily denies an adjournment to retain private counsel without considering the relevant factors, or abuses its discretion in the way it analyzes those factors, can a deprivation of the right to choice of counsel be found. Structural error is not triggered otherwise.

[Id. at 397.]

Here, the judge himself noted that he originally failed to engage in a detailed weighing of the Hayes factors on sentencing day. The judge conducted a more thorough analysis when defendant

moved for reconsideration. Based on his comprehensive oral opinion denying the reconsideration motion, we have no doubt that the judge did not mistakenly exercise his discretion by denying any further adjournment prior to imposing sentence.

Of course, without a full explanation of the judge's reasoning on sentencing day, defendant was placed in the unenviable position of having an attorney, who herself was seeking to be relieved, argue his motion to withdraw his guilty plea. Unlike the defendant in Hayes, however, defendant was not without the benefit of counsel. From the record provided, it appears that the only legal support defendant supplied his attorney at the time was a claim of actual innocence, something belied by defendant's own words at the time of his plea allocution. Yet, counsel fashioned an argument based upon the Slater factors as best she could.

More importantly, even if the judge should have granted yet another adjournment of the sentencing, we are convinced, unlike the Court was in Hayes, that any mistaken exercise of the judge's discretion was harmless. We say that with assurance because the reconsideration motion, albeit heard after sentence was imposed, provides the essence of what would have been defendant's argument had sentencing been adjourned, i.e., that defendant's factual

basis was inadequate, a legal argument not asserted prior to sentencing.⁵

Defendant argues that he only admitted to possessing heroin with an intent to "share" the drugs with others. Therefore, his factual basis asserted an affirmative defense to the possession with intent charge.⁶ See State v. Morrison, 188 N.J. 2, 18 (2006) (quoting State v. Lopez, 359 N.J. Super. 222, 233 (App. Div. 2003) ("We accept the self-evident precept . . . that 'one cannot acquire something one already possesses' and thus two or more persons cannot 'distribute to each other drugs they jointly possess.'")).

We acknowledged a defendant asserting facts that imply an affirmative defense to the charge cannot provide an adequate factual basis for a guilty plea. State v. Urbina, 221 N.J. 509, 528 (2015). However, nothing in defendant's allocution implied that others jointly possessed the heroin with defendant, an underlying predicate of the holdings in Morrison and Lopez. In

⁵ As noted, we do not have the certification defendant apparently sent to the judge that was his de facto motion for withdrawal, so we cannot tell precisely upon what he based a claim of actual innocence. It may well have mirrored successor counsel's assertion that defendant admitted facts that were legally insufficient to prove the elements of conspiracy and possession with intent.

⁶ Other than to quote the Criminal Code's definition of conspiracy, defendant's brief makes no specific argument regarding the conspiracy count. An argument not briefed is deemed waived. State v. L.D., 444 N.J. Super. 45, 56 n.7 (App. Div. 2016).

addition, our Criminal Code makes it unlawful for someone to "distribute" or "possess or have under his control with intent to . . . distribute . . . a controlled dangerous substance." N.J.S.A. 2C:35-5(a)(1). "'Distribute' means to deliver," and "'[d]eliver' or 'delivery' means the actual, constructive, or attempted transfer from one person to another of a controlled dangerous substance." N.J.S.A. 2C:35-2. In short, possessing heroin with the intent to share it with another is distribution, and defendant's admissions under oath made him guilty of the charge.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION