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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-4781-14T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

MARK TILSON,

Defendant-Respondent.

Argued telephonically April 9, 2018 –
Decided April 23, 2018

Before Judges Nugent, Currier, and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Municipal Appeal
No. 6011.

John Vincent Saykanic argued the cause for
appellant.

Mark A. Festa, Assistant Prosecutor, argued
the cause for respondent (Camelia M. Valdes,
Passaic County Prosecutor, attorney; Tom
Dominic Osadnik, Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant appeals his conviction of disorderly persons simple
assault and his sentence of a ninety-day jail term and one year

probation. Finding none of his five appellate arguments meritorious, we affirm.

The victim charged defendant with disorderly persons simple assault, N.J.S.A. 2C:12-1(a)(1), on June 27, 2013. Thereafter, defendant filed a cross-complaint against the victim, which the court dismissed before the April 2, 2014 trial.

Before trial, defendant also demanded the prosecution produce video from three surveillance cameras at a public area and two businesses in the vicinity of the incident. The prosecution did not obtain the videos and the municipal court denied defendant's subsequent motion to dismiss the charge against him because the prosecutor did not "turn over . . . video that we don't know . . . exists."

At trial on April 2, 2014, defendant renewed his motion to dismiss because of the State's failure to turn over the video. The municipal court judge considered the motion as one for reconsideration, denied it, and proceeded to trial. The judge noted she previously addressed each of defendant's motions, "including [a] motion to recuse, which I'm not hearing again tonight."¹

¹ The record does not indicate when defendant filed a motion to recuse the municipal court judge.

Defendant and the victim were the only witnesses to testify at the municipal trial. The incident resulting in the charge against defendant occurred on the afternoon of June 27, 2013, on Main Street in Paterson, where defendant was selling downloadable music and movies for phones, iPods, and MP3 players. The victim knew defendant as "the download guy."

The victim testified she was walking on the sidewalk when defendant "shoved [a] paper in [her] face" and said, "download." She replied, "no. No thank you." When she told him to "get this paper out of my face," he began to call her illiterate and dumb. She said "[your] mother, and he hit[] [her]."

According to the victim, defendant punched her in the chin. Her chin began to bleed. She ran down the street and called the police. Emergency medical personnel arrived and treated her for a gash under her chin, but the injury was not serious.

The victim filed a complaint against defendant. The complaint stated:

[Defendant] did commit the act of simple assault specifically by striking the victim in the mouth with a closed hand causing a minor injury which consisted of a small laceration, swelling, and redness on her lower lip. She received medical attention on scene. The incident occurred after the victim refused to purchase downloaded music.

In response to defense counsel's cross-examination, the victim said she swung her pocketbook at defendant and hit him after he punched her. Defense counsel also brought out some inconsistencies between the complaint and the victim's direct testimony.

Defendant testified that on the afternoon of the incident he "pitched [his] services" to the victim by showing her a flyer and making a verbal pronouncement. Defendant stated, "[t]hat's a general announcement I make while walking around. I may be showing the flyers to whoever. Somebody walk[s] past me, I show the flyers, make the pitch."

According to defendant, the victim said something rude to him, he verbally responded, the two got into an argument, and the victim put her hand in defendant's face and "mushed" his face. When asked if the victim actually touched defendant's face, he stated the victim pushed him with her hand and, in response, he hit the victim. Defendant denied the victim swung her pocketbook at him. He said she struck him with an open hand.

The municipal court judge found defendant guilty and sentenced him to a ninety-day custodial term followed by a one-year probationary period and the condition defendant complete anger management counseling. The judge also imposed fines, penalties, and costs. The jail term was stayed pending appeal.

Defendant appealed to the Law Division. The court assigned pro bono counsel for the appeal. Before the de novo trial took place, defendant moved to have his attorney relieved and a new attorney appointed. Defendant also moved to have the Law Division judge recuse himself. The judge denied both motions in an oral opinion he delivered from the bench on March 11, 2015.

At the de novo trial, defendant renewed his motion to dismiss based on the State's failure to produce video surveillance tapes. The judge denied the motion. In a thorough and well-reasoned oral opinion, the judge found defendant guilty of simple assault and imposed the same sentence the municipal court judge had imposed. Defendant filed this appeal.

On appeal, defendant argues:

POINT I

THE DEFENDANT WAS DENIED HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL BY THE STATE'S FAILURE TO PRESERVE AND TO PROVIDE RELEVANT EXCULPATORY VIDEOS.

POINT II

THE COURT BELOW ERRED IN FINDING THE DEFENDANT GUILTY DE NOVO OF ASSAULT AS THE STATE FAILED TO PROVE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

POINT III

THE REFUSAL BY THE LAW DIVISION JUDGE TO GRANT DEFENSE COUNSEL'S MOTION TO BE RELIEVED WAS AN ABUSE OF DISCRETION; THIS DECISION

IRREPARABLY PREJUDICED DEFENDANT AS IT RESULTED IN THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY THE NEW JERSEY CONSTITUTION MANDATING A REVERSAL OF HIS CONVICTION.

POINT IV

DEFENDANT WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, PARAGRAPH 10 OF THE NEW JERSEY STATE CONSTITUTION; A PRESUMPTION OF PREJUDICE IS JUSTIFIED.

POINT V

THE COURTS BELOW (BOTH TRIAL AND DE NOVO APPEAL) ERRED IN DENYING THE RECUSAL MOTION IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS.

We reject defendant's arguments in Points I through III and Point V as it applies to the trial de novo substantially for the reasons expressed by the Law Division judge in his March 11 and April 30, 2015 oral opinions. To the extent Point V pertains to the recusal of the municipal court judge, the record is inadequate for proper appellate review. We note defendant's argument on this point is of questionable merit, because when reviewing an "appeal from a de novo trial on the record, [the appellate court] consider[s] only the action of the Law Division and not that of the municipal court." State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001) (citation omitted).

Nonetheless, even if there is merit to defendant's argument – that if the municipal court judge was biased because she found in a previous trial defendant was not a credible person, the Law Division's deference to her credibility findings in the present trial tainted the de novo proceeding – there is no record on which to evaluate defendant's contention.² The extent of the record concerning defendant's motion for the municipal court judge to recuse herself is a passing reference by the judge to earlier motions. If defendant filed a written motion, it is not included in the record. Nor does the record contain a transcript of either the motion or the municipal court judge's decision.

Moreover, as appellant's counsel conceded at oral argument, the argument on this point is in essence a claim that trial counsel was ineffective for not obtaining transcripts and making a proper record. We decline to consider the argument. "Our courts have expressed a general policy against entertaining ineffective-assistance-of-counsel claims on direct appeal because such claims involve allegations and evidence that lie outside the trial record." State v. Preciose, 129 N.J. 451, 460 (1992) (citing State v. Dixon, 125 N.J. 223, 262 (1991)).

² We note the appeal of the previous conviction was argued back-to-back with the current appeal. Today, we affirmed defendant's conviction and sentence in that matter. State v. Tilson, No. A-2995-16 (App. Div. Apr. 23, 2018).

We reject defendant's argument in Point IV for the same reason. In Point IV, defendant argues his trial counsel was ineffective for failing to properly investigate the municipal court proceedings, obtain relevant transcripts, and properly advocate for defendant against the assault charge at the trial de novo. Defendant must seek post-conviction relief on this argument.

Ibid.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION