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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1687-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN C. GENTNER,

Defendant-Appellant.

Submitted April 28, 2022 – Decided June 2, 2022

Before Judges Mawla and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 18-05-1130.

Joseph E. Krakora, Public Defender, attorney for appellant (Daniel S. Rockoff, Assistant Deputy Public Defender, of counsel and on the brief).

Grace C. MacAulay, Acting Camden County Prosecutor, attorney for respondent (Jason Magid, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Kevin C. Gentner appeals from the September 27, 2019 order denying his motion to withdraw a guilty plea, and an October 4, 2018 order denying him entry into the pretrial intervention (PTI) program. See N.J.S.A. 2C:43-12. We do not reach the latter issue as we find the plea lacked a sufficient factual basis. The elements of the crime were not elicited, in fact, a key factor was not even mentioned during the plea allocution by anyone. Thus, we vacate the plea, reinstate the indictment, and remand for further proceedings. Defendant experienced additional health problems subsequent to the initial PTI application. Because the plea is vacated and the indictment reinstated, he has the right to renew his PTI application.

Defendant entered a guilty plea to N.J.S.A. 2C:40-26(b). This offense requires proof that a defendant was driving while suspended for a second or subsequent driving while intoxicated conviction, N.J.S.A. 39:4-50. This was the entirety of the factual statement:

THE COURT: Mr. Gentner, I understand today that you intend to plead under Indictment 1130-05-18 to Count 1, driving while suspended, a fourth degree crime.

THE DEFENDANT: Yes.

....

Q. Did you have a full and complete opportunity to discuss the charge against you and your decision to plead guilty to it with your attorney . . . ?

A. Yes

Q. Now, I've gone over the charge to which you intend to plead guilty. Is that the charge to which you intend to plead guilty?

A. Yes.

Q. Are you pleading guilty to that charge because you are guilty?

A. Yes.

....

[Defense Counsel]: Mr. Gentner, on February 15th, 2018, you were in Berlin; correct?

A. Correct.

Q. Camden County, New Jersey; right?

A. Yes.

Q. And at that time you were driving a car; correct?

A. Yes.

Q. And you were driving the car even though you knew your license had been suspended?

A. Yes.

[Defense counsel]: I submit.

[Prosecutor]: The State is satisfied.

....

[Defense counsel]: Your Honor, . . . I think I need to add something to the factual.

THE COURT: Okay.

Q. And Mr. Gentner, your license was suspended because of a DWI conviction; correct?

A. Correct.

The plea hearing record is devoid of any reference to the statutory element that the act of driving while suspended occurred when "the actor's license was suspended or revoked for a second or subsequent violation of N.J.S.A. 39:4-50" N.J.S.A. 2C:40-26(b).

Defendant alleges the following errors on appeal:

POINT I

THE GUILTY PLEA TO N.J.S.A. 2C:40-26B WAS NOT VALID AND MUST BE VACATED BECAUSE THE DEFENDANT'S DEFICIENT FACTUAL BASIS FAILED TO SATISFY THE REQUIRED STATUTORY ELEMENTS. ALTERNATIVELY, HE SHOULD BE PERMITTED TO WITHDRAW UNDER STATE V. SLATER.^[1]

¹ 198 N.J. 145 (2009).

POINT II

THIS COURT SHOULD REVERSE THE DENIAL OF GENTNER'S PTI APPLICATION, AND EITHER ADMIT HIM INTO PTI, OR REMAND FOR A FRESH LOOK.

A trial court may accept a plea only if it is convinced that the plea is supported by a sufficient factual basis. State v. Gregory, 220 N.J. 413, 418 (2015). "The factual basis for a . . . plea can be established by a defendant's explicit admission of guilt or by a defendant's acknowledgment of the underlying facts constituting essential elements of the crime." Id. at 419.

In State v. Tate, 220 N.J. 393 (2015), the Court clarified that a trial judge eliciting a plea "must be satisfied from the lips of the defendant that he committed the acts which constitute the crime." Id. at 406 (internal quotation marks omitted). Tate explains the principal purpose of the factual basis is to protect defendants who plead guilty without realizing that their conduct does not equate to the charged offense. Ibid. Although a factual basis may derive from "stipulations and facts admitted or adopted by the defendant[.]" Gregory, 220 N.J. at 420, a plea is valid only if a court is "satisfied from the lips of the defendant that he committed the acts which constitute the crime." Tate, 220 N.J. at 407. In other words, a plea taken under N.J.S.A. 2C:40-26(b) can only be

accepted if a defendant admits to having driven while suspended for a second or subsequent DWI.

We review whether an adequate factual basis has been established de novo. Tate, 220 N.J. at 403-04. We do so because the court on appellate review is in the same position as the trial judge in determining whether the statutory elements have been met. Ibid. Where the factual basis is deficient, review ends, and the plea must be vacated. Id. at 404. The plea withdrawal analysis pursuant to Slater is not reached. Ibid.

Simply stated, in some fashion, a defendant must establish an adequate factual account making him guilty of the crime. Id. at 405 (citing R. 3:9-2). Although within that requirement there is certainly a range, a defendant must acknowledge guilt. Gregory, 220 N.J. at 419.

Defendant did not state, nor was he asked to testify, that he drove after being suspended for DWI a second time. His plea colloquy only made him guilty of the motor vehicle offense of driving while suspended, N.J.S.A. 39:3-40.

It would not have been clear to this defendant from anything said in court that he pled guilty to an offense requiring two prior convictions for DWI. It is not even clear from the record, if counsel understood the statutory elements of the crime, but for some reason chose not to refer to them.

Finally, defendant applied for admission into PTI. Since the plea is vacated and the indictment reinstated, he may wish to exercise his right to reapply. We do not reach his claim that the failure to admit him into the program was a patent and gross abuse of discretion on the part of the prosecutor. See State v. Waters, 439 N.J. Super. 215, 226 (App. Div. 2015).

The guilty plea is vacated, and the indictment reinstated. The matter is remanded to the trial court. We do not retain jurisdiction.

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



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