SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1946-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREA RIVERA,

Defendant-Appellant.

Argued March 8, 2023 - Decided May 16, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Municipal Appeal No. 21-22.

John Menzel argued the cause for appellant.

Edward F. Ray, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; Edward F. Ray, on the brief).

PER CURIAM

In March and July 2013, defendant was charged with operating a vehicle under the influence of liquor or drugs (DWI), N.J.S.A. 39:4-50, and refusal to

consent to taking breath samples (refusal), N.J.S.A. 39:4-50.2.[1] Defendant was also convicted of DWI prior to March 2013.

When defendant appeared in court on both the March and July charges, the municipal prosecutor asked the court to address the July DWI charge first. Defendant pleaded guilty to the July DWI charge. The remaining charges from July were dismissed. Defendant then pleaded guilty to the March refusal charge. Again, the other charges from March were dismissed. Thereafter, the court sentenced defendant as a third-time refusal offender based on the two prior DWI convictions, which included the July 2013 DWI conviction.

Eight years later, defendant moved to withdraw her guilty plea and for a new sentence. The motions were denied by the municipal court and Law Division. We affirm the February 1, 2022 Law Division order denying defendant's motions to withdraw her guilty plea and to reconsider her sentence.

I.

In August 2013, defendant appeared with counsel in municipal court on the March and July 2013 charges. The prosecutor asked the court to address the July DWI offense first. Defense counsel did not object. The attorneys advised

[1] On both occasions, additional summonses were issued that are not pertinent to the issues on appeal.

the court defendant was going to plead guilty to the July DWI, which was a second offense.

The following colloquy occurred:

> [COURT]: Ma'am, your lawyer says you're pleading guilty to drunk driving on July 13th here in Edgewater; is that true?
>
> [DEFENDANT]: Yes, Your Honor.
>
> [COURT]: Is your attorney or anybody forcing you to plead guilty?
>
> [DEFENDANT]: No.
>
> [COURT]: Do you understand you can plead not guilty and we can have a trial; do you understand that?
>
> [DEFENDANT]: Yes.
>
> . . . .
>
> [COURT]: Have any other promises been made to you by your attorney, the [p]rosecutor, or anybody else concerning what my sentence will be?
>
> [DEFENDANT]: No.
>
> [COURT]: Were you here in Edgewater July 13th operating a motor vehicle while you were intoxicated?
> [DEFENDANT]: Yes.

Defense counsel requested a sentence with the minimum mandatory penalties. The court imposed sentence, including license suspension of two years and ignition interlock device restrictions for three years.

Counsel then discussed the March 2013 DWI and refusal charges with the court. The State advised it could not prove the DWI charge beyond a reasonable doubt. Therefore, it moved to dismiss the DWI. However, the refusal charge, as a third offense, subjected defendant to a ten-year loss of her license and the use of the ignition interlock device for eleven years.

The following plea colloquy took place:

> [COURT]: Ma'am, your lawyer says you're pleading guilty to the refusal to take the breathalyzer test; is that true?
>
> [DEFENDANT]: Yes.
>
> [COURT]: And again—. . . you know you can have a trial where the State has to prove that against you beyond any reasonable doubt; you understand that?
>
> [DEFENDANT]: Yes.
>
> [COURT]: And you can contest this matter and bring your own witnesses to confront the State's witnesses . . . if you wanted to; you understand that?
> [DEFENDANT]: Yes.
>
> [COURT]: [Y]ou're going to be sentenced as a third offender refusal. In other words you're going to lose your license for ten years and have the interlock . . . so

> that will be a [twelve]-year loss of your driver's license; two for the last case, ten added onto that. Plus . . . ignition interlock is going to stretch on forever. Do you understand all that?
>
> [DEFENDANT]: Yes.
>
> [COURT]: Knowing all that do you still wish to plead guilty?
>
> [DEFENDANT]: Yes.
>
> . . . .
>
> [COURT]: You refused—when stopped by a police officer here in Edgewater, did you refuse to take the breathalyzer test?
>
> [DEFENDANT]: Yes.
>
> [COURT]: This was on March 18th.
>
> [DEFENDANT]: Yes.

The court imposed sentence, suspending defendant's driver's license for ten years to begin after the conclusion of the DWI license suspension and use of the interlock ignition device for eleven years plus fines and costs. The municipal court judge warned defendant she was exposed to mandatory jail time if she incurred a third DWI. The judge stated:

> [Y]ou're at a stage now where you're talking mandatory jail if you're convicted again. That's why he did what he did. Okay, because he didn't want you to go to jail. It would be mandatory. So he made an arrangement; he

> got it worked out quite satisfactory . . . . But he's not going to be able to do that again.

Defendant signed a "Request to Approve Plea Agreement" for both charges. The forms listed the seven original charges and noted the two offenses to which defendant was pleading guilty. On the March plea form, the "Recommended Sentence/Comments" section noted "[third] offense. No jail." The same section on the July DWI plea stated "[second] offense—[two] day [Intoxicated Driver Resource Center] overnight in lieu of jail." On each form, defendant signed her name under the "Defendant's Acknowledgement" section which set forth:

> I understand the nature of the amended charge(s) against me and the consequences of my guilty plea. I understand and agree voluntarily to the terms of the plea agreement set forth above.
>
> I further understand that if the judge does not accept my guilty plea or agree with the recommended sentence, I can withdraw it and plead not guilty.

II.

In May 2021, defendant moved before the municipal court to vacate the July 2013 DWI plea, asserting it lacked a sufficient factual basis. Alternatively,

defendant asserted she should have been sentenced on the March 2013 refusal charge first because it occurred before the July 2013 DWI.[2]

The court noted the pleas were negotiated "for a most favorable disposition for the defendant." After stating the application was not fair to the State, the municipal court denied the motion.

Defendant appealed to the Law Division, renewing her motion to withdraw her guilty plea to the July 2013 DWI and, alternatively, to reconsider her sentence.

The Law Division judge denied both motions in a February 1, 2022 order and written opinion. In considering the motion to withdraw defendant's guilty plea, the judge noted the more stringent standard applicable to a motion made after sentencing requiring a defendant to show a manifest injustice.

The judge referenced the colloquy between the municipal court judge and defendant in which the municipal court judge advised defendant she would be sentenced as a third offender on the refusal charge which would result in the loss of her license for twelve years and the use of an ignition interlock would "stretch on forever." The judge found "there [wa]s no manifest injustice that would

[2] The record reflects defendant filed another motion earlier in May. We were not provided with a transcript of those proceedings. It is not clear what relief was sought but the motion was denied.

warrant withdrawal of the guilty plea post-sentencing because [defendant's] plea was knowing and voluntary of the consequences stemming from the guilty plea." The judge stated that "the factual basis may have been insufficient," but "it would be extremely prejudicial to both [defendant] and the State if the court . . . withdr[e]w the guilty plea presently, eight years after [defendant's] conviction."

In denying the motion to reconsider defendant's sentence, the Law Division judge noted the refusal statute, N.J.S.A. 39:4-50.4a(3), "explicitly considers the date of conviction when enhancing a refusal offense," and defendant "offer[ed] no authority that directs the court to sentence defendants in the order in which they committed an offense."

III.

On appeal, defendant renews her arguments:

> I. As a Matter of Fairness, This Court Should Resentence Defendant as a Second Refusal Offender Because Imposition of a Third Offense Sentence Was Arbitrary, Unfair, and Unjust
>
> II. This Court Should Vacate the DWI Guilty Plea Because the Municipal Court Failed to Obtain an Adequate Factual Basis from Defendant for the Guilty Plea

Our review of a municipal appeal from the Law Division "focuses on whether there is 'sufficient credible evidence . . . in the record' to support the

trial court's findings." State v. Robertson, 228 N.J. 138, 148 (2017) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). We do "not undertake to alter concurrent findings of fact and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Ibid. (quoting State v. Locurto, 157 N.J. 463, 474 (1999)). However, we consider the trial court's legal rulings de novo. Ibid.

A.

Defendant initially argues the municipal court should have addressed the charges in the order they were committed. She contends if she was convicted of the March 2013 refusal prior to the July 2013 DWI conviction, she would have been sentenced as a second offender on the March refusal charge. That would have resulted in a lesser period of license suspension. Defendant contends that adjudicating the charges out of sequence caused a "significant, material, and overwhelming effect on her aggregate [loss of license term]" and was "grossly unfair."

We review the imposition of sentence for an abuse of discretion. State v. Jones, 232 N.J. 308, 318 (2018). This deferential standard applies "only if the trial judge follows the Code and the basic precepts that channel sentencing

discretion." State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting State v. Case, 220 N.J. 49, 65 (2014)).

A defendant violates the refusal statute if they refuse to submit to a blood alcohol concentration breath test. State v. Frye, 217 N.J. 566, 575-76 (2014) (citing N.J.S.A. 39:4-50.4a). A first-time refusal conviction triggers the suspension of a driver's license ranging from seven months to one year. N.J.S.A. 39:4-50.4a. Following a second conviction, a two-year license suspension is imposed. Ibid. "The statute further requires a ten-year license suspension where the refusal conviction is 'in connection with a third or subsequent offense under this section.'" Frye, 217 N.J. at 576 (quoting N.J.S.A. 39:4-50.4a).

Our Supreme Court has held that a defendant's previous DWI conviction can enhance a penalty for a subsequent refusal sentence. In re Bergwall, 85 N.J. 382, 383 (1981), rev'g on dissent, 173 N.J. Super. 431, 436-40 (App. Div. 1980) (Lora, P.J.A.D., dissenting); Frye, 217 N.J. at 577-82. However, a "defendant's prior refusal conviction cannot be considered as a 'prior conviction' for purposes of [a] subsequent DWI conviction." State v. Ciancaglini, 204 N.J. 597, 600 (2011).

Here, because defendant was convicted of the July DWI before the March refusal, the prior DWI conviction was used to enhance defendant's refusal

sentence. If the pleas were taken in the opposite order, in the chronological order of the offenses' commission, defendant would not have had a second DWI conviction prior to her refusal conviction. Therefore, she would only have been sentenced as a second-time refusal offender and the DWI sentence would not have enhanced the refusal sentence.

Defendant has not cited case law to support her contentions regarding the order of adjudication of charges. And counsel do not dispute that municipal court and Criminal Part judges routinely consider and adjudicate the multiple charges, summonses, and indictments a defendant might have accumulated.

Defendant has not asserted the imposed sentence is illegal. See State v. Hyland, 238 N.J. 135, 147-48 (2019) (stating an illegal sentence is one not allowed by statute). Lacking such assertion, we see no authority permitting the vacatur of her sentence. To the contrary, the refusal statute is a deterrence-oriented statute[3] and we have stated that "[c]hronologically sequential offenses and convictions are not relevant when the focus of the legislation is on the crime

[3] See State v. Scudieri, 469 N.J. Super. 507, 514 (App. Div. 2021) (stating the "Legislature determined that the installation of ignition interlock devices was a more effective way to prevent drunk driving than license suspension").

and the goal is 'deterrence and only deterrence.'" State v. Hill, 327 N.J. Super. 33, 43 (App. Div. 1999).

We can surmise from the "Request to Approve Plea Agreement" forms that the prosecutor and defense counsel discussed and agreed upon the handling of the charges. The forms listed the charges and sentences and stated that defendant would be a third-time refusal offender subject to an enhanced sentence. The forms reflected the intent to not impose a jail term in sentencing on both pleas. The municipal court and Law Division judges both referred to the lack of jail time and the favorable disposition afforded to defendant regarding the outcome of the charges.

Defense counsel did not object to the order in which the pleas were handled. Defendant was advised during both plea hearings of the parameters of the sentence including the loss of license and use of the ignition interlock device. She informed the court she understood the penalties and wished to plead guilty. We discern no basis, eight years later, for the court to vacate the sentence.

B.

Defendant further contends the court erred in denying her motion to vacate her guilty plea to the DWI charge because there was no factual basis for the plea. Although the Law Division judge acknowledged the inadequacy of the factual

basis, he nevertheless determined that "no constitutional defect . . . would warrant the withdrawal of this guilty plea."

Our review of a court's denial of a motion to vacate a guilty plea for lack of an adequate factual basis is de novo. State v. Tate, 220 N.J. 393, 403-04 (2015) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). "[W]hen the issue is solely whether an adequate factual basis supports a guilty plea, a [State v. Slater, 198 N.J. 145 (2009)] analysis is unnecessary." Id. at 404.

When a defendant moves to withdraw a guilty plea after sentencing, a court may only grant the motion "to correct a manifest injustice." R. 3:21-1; R. 7:6-2(b). "A factual basis for a plea must include either an admission or the acknowledgement of facts that meet 'the essential elements of the crime.'" Tate, 220 N.J. at 406 (quoting State ex rel. T.M., 166 N.J. 319, 333 (2001)).

However, "[a]s long as a guilty plea is knowing and voluntary . . . a court's failure to elicit a factual basis for the plea is not necessarily of constitutional dimension and thus does not render illegal a sentence imposed without such a basis." State v. Mitchell, 126 N.J. 565, 577 (1992). Our Supreme Court has stated that a factual basis for a plea is only constitutionally required when "indicia" are present "that the defendant does not understand enough about the

nature of the law as it applies to the facts of the case to make a truly 'voluntary' decision on [their] own." Id. at 577.

Defendant moved to withdraw her guilty plea after sentencing. Thus, the heightened constitutional standard applies. Although the factual basis may have been minimal, Mitchell only requires a knowing and voluntary plea. See 126 N.J. at 581 ("Even assuming, arguendo, that the court should have elicited a more expansive factual basis . . . [the] defendant has not alleged . . . [he] was . . . sentenced for a crime he did not commit."). We are satisfied the colloquy between defendant and the municipal court judge during the DWI plea demonstrated defendant knowingly and voluntarily pleaded guilty to the charge. We also note defendant has never claimed innocence of the charge. And she waited nearly eight years after her license was suspended to file the motion to withdraw her guilty plea. We discern no manifest injustice that requires correction.

C.

We need only briefly address defendant's contention that the plea agreements here were illegal under the applicable municipal court guidelines.

The Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey expressly prohibit plea agreements in DWI cases. Guidelines for

Operation of Plea Agreements in the Municipal Courts, Pressler & Verniero, Current N.J. Court Rules, Appendix A to Part VII, www.gannlaw.com (2014).[4] However, Guideline Three provided, in part,

> Nothing in these Guidelines should be construed to affect in any way the prosecutor's discretion in any case to move unilaterally for an amendment to the original charge or a dismissal of the charges pending against a defendant if the prosecutor determines and personally represents on the record the reasons in support of the motion.
>
> [Ibid.]

The Comment to the Guidelines defines "dismissals" to "involve motions to dismiss a pending charge or plea agreement when the municipal prosecutor determines, for cause (usually for insufficient evidence), that the charge should be dismissed." Pressler & Verniero, cmt. on Appendix A to Part VII.

Therefore, the Guidelines and the Comment permitted the State to unilaterally dismiss the March 2013 DWI charge for lack of sufficient evidence.

Affirmed.

[4] We refer to the guidelines in effect at the time of defendant's pleas.