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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2788-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLO AMATO,

Defendant-Appellant.

Submitted September 28, 2023 – Decided October 10, 2023

Before Judges Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 17-10-1560 and Accusation No. 18-04-0631.

Law Office of Jarred S. Freeman, LLC, attorney for appellant (Jarred S. Freeman, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Mercedes N. Robertson, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant appeals from a March 24, 2022 order denying his motion to

withdraw his guilty plea. We affirm substantially for the reasons expressed by the motion judge in his thoughtful oral and written opinions.

I.

In October 2017, an Ocean County Grand Jury returned Indictment No. 17-10-1560, charging defendant with: four counts of second-degree healthcare claim fraud, N.J.S.A. 2C:21-4.1(a); two counts of third-degree theft by deception, N.J.S.A. 2C:20-4; third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1); five counts of second-degree theft by deception, N.J.S.A. 2C:20-4; second-degree insurance fraud, N.J.S.A. 2C:21-4.6(a); and two counts of first-degree financial facilitation of criminal activity, N.J.S.A. 2C:21-25(b)(2)(a) and N.J.S.A. 2C:21-25(c).

Two months later, defendant was charged with second-degree financial facilitation of criminal activity, N.J.S.A. 2C:21-25(c); second-degree theft by deception; and fourth-degree making a false written statement, N.J.S.A. 2C:28-3(a). These additional charges stemmed from defendant allegedly filing false disability claims.

Following issuance of an arrest warrant and execution of a search warrant at defendant's residence in December 2017, he was charged with second-degree financial facilitation of criminal activity, N.J.S.A. 2C:21-25(a), and fourth-

degree possession of a fictitious driver's license, N.J.S.A. 2C:21- 2.1, prompting the State to move for his pretrial detention. The trial court granted the State's motion in January 2018, but defendant received jail credits as of December 12, 2017, when he was first incarcerated.

In April 2018, defendant accepted a plea offer from the State to plead guilty to one count of first-degree financial facilitation of criminal activity under Indictment No. 17-10-1560, and one count of second-degree theft by deception under Accusation No. 18-04-631. Before he entered his guilty pleas, the State outlined the terms of the plea offer on the record, stating that in exchange for defendant's guilty pleas, it would: dismiss all other pending charges; allow defendant to exculpate his wife; recommend a ten-year prison term with a five-year parole disqualifier on the first-degree offense, to run consecutive to a flat five-year term on the second-degree theft charge; recommend that defendant's aggregate sentence run concurrent to a sentence due to be imposed on his pending federal charges; and consent to delay defendant's sentencing on state charges until after his sentencing on federal charges.

Once the assistant prosecutor placed the terms of the plea agreement on the record, plea counsel stated, "yes, that does co[nstitute] the entire agreement." With that representation, the judge questioned defendant directly about the plea

agreement. In response to the judge's inquiries, defendant testified he: reviewed the plea agreement "in detail" with counsel; "read . . . and . . . understood the contents of each and every page" of the plea agreement; understood he was "waiving certain constitutional rights[,] " including the right to trial by entering into the plea agreement; "had sufficient time to confer with counsel"; was satisfied with counsel's services; understood "and appreciate[d] the consequences of th[e] plea"; entered into the plea agreement "freely and voluntarily"; and had no questions for the judge or his attorney.

Plea counsel and defendant then engaged in the following exchange about jail credits:

Counsel: Mr. Amato, . . . I've discussed with you, your jail credits; is that correct?

Defendant: Yes.

Counsel: And you[r] entitlement to jail credits; is that correct?

Defendant: Yes.

Following this discussion, as well as a brief exchange between defendant and his attorney about defendant's entitlement to commutation credits, defendant provided a factual basis for his guilty pleas. At the conclusion of the hearing, the judge stated he was "satisfied with the factual bas[es]" of the pleas. He also

found defendant pleaded guilty "freely and voluntarily" and understood "the consequences of the proceeding."

On May 9, 2019, two days after defendant was sentenced in federal court, he was sentenced on his state charges. Consistent with defendant's plea agreement, the judge imposed a ten-year prison term for the first-degree offense, subject to a five-year parole disqualifier, and imposed a consecutive five-year term for the second-degree offense. The judge rejected defendant's argument that only one-third of his sentence on the first-degree offense should be subject to a parole ineligibility period; he also denied defendant's request to have the two state sentences run concurrent to one another.

Also, during sentencing, the judge and the State accepted the "estimation" from defendant's attorney that defendant was "entitled to 511 days" of jail credits. Accordingly, the judge stated, "let the record reflect that the defendant [is] entitled to 511 days." Before the proceeding concluded, the judge reiterated, "defendant is entitled to 511 days of jail credit."

Subsequently, the judge executed a Judgment of Conviction (JOC) for each conviction. One of the JOCs mistakenly reflected a duplicate award of 511 days of jail credit, contrary to State v. C.H., wherein the Court held "double credit should not be awarded where a defendant is sentenced to consecutive

sentences under separate [cases] and receives the optimal benefits of jail credit for time spent in pre-sentence custody." 228 N.J. 111, 123 (2017). The Department of Corrections notified the judge of the error and he, in turn, informed counsel of the inadvertent mistake. On July 19, 2019, the judge issued an amended JOC for the conviction under Accusation No. 18-04-631, deleting the duplicate award. Based on the amended JOC, defendant's maximum release date shifted from July 24, 2027, to December 27, 2028.

In March 2020, defendant filed and then withdrew a petition for post-conviction relief (PCR). The following month, he moved to withdraw his guilty pleas to the two state charges, contending his "reasonable sentence credit expectations [were] defeated and [his] due process rights [were] violated." Defendant also argued he was denied effective assistance of counsel because plea counsel failed to advise him duplicate jail credits could not be awarded on his consecutive state sentences. Defendant certified that if plea counsel had advised him that he was not entitled to a duplicate award of 511 credits, he "would not ha[ve] accepted the plea offer from the State and would have insisted on going to trial."

The same judge who presided over defendant's plea and sentencing proceedings heard argument on defendant's motion on March 24, 2022 and

orally denied the motion the same day. The judge rejected defendant's contention that his "reasonable sentence credit expectations [were] defeated," finding defendant's "plea form [did] not contain any specific language with respect to the award of jail credits" and "[t]he issue of jail credits [was] only sparingly mentioned in the [plea] transcript." Additionally, the judge stated, "I do not find that vacating the plea and allowing . . . defendant to withdraw his plea is . . . the appropriate remedy under the circumstances."

On April 1, 2022, the judge issued a supplemental written opinion further explaining his decision on defendant's application. In his comprehensive opinion, the judge found "the dictates of R[ule] 3:9-2¹ were followed" during the plea hearing. He also noted he did not accept defendant's pleas until after defendant testified he: "reviewed the plea form with his attorney; . . . understood

¹ The Rule provides in part:

The court, in its discretion, . . . shall not accept [a guilty] plea without first questioning the defendant personally, under oath . . . and determining by inquiry of the defendant . . . that there is a factual basis for the plea and that the plea is made voluntarily, not as a result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea.

[Rule 3:9-2.]

the plea form; . . . understood he was waiving certain constitutional rights by proceeding with the plea; and . . . nevertheless sought to plead guilty to the offenses." Additionally, the judge found that when plea counsel questioned defendant about his state charges, defendant "admitted . . . he fraudulently billed approximately \$1.5 million to various insurance companies. . . . [and] conceded that he submitted false disability claims when no such disability existed," thereby establishing "a factual basis for the plea[s]."

Next, the judge addressed the four-pronged test set forth in State v. Slater, 198 N.J. 145, 155 (2009)² to clarify why he denied defendant's request to withdraw his guilty pleas. The judge found the first Slater factor did not support defendant's request because he did "not assert any claim of innocence, much less a colorable one." Next, in examining the nature and strength of defendant's reasons for withdrawal under the second Slater factor, the judge found "[t]he core" of defendant's application was his allegation that plea "counsel was ineffective for failing to advise him of the holding in State v. C.H." The judge stated that although 511 days of jail credits were "of some consequence to

² The four Slater factors are: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal [will] result in unfair prejudice to the State or unfair advantage to the accused." 198 N.J. at 157-58.

[d]efendant," his "characterization of [his] off-the-record plea discussions [with counsel] raise[d] the spectre of unreliability." Additionally, the judge concluded defendant had "significant exposure [for prison time] at the state and federal levels" and because he "proceeded with his plea," he was able to "reduc[e] his overall penal exposure."

Turning to the third Slater factor, the judge acknowledged defendant pleaded guilty based on a "plea bargain." But the judge observed that under the plea agreement, "[d]efendant received several benefits," including: his ability to exonerate his wife; the dismissal of his other charges; the State's assurance it would stop "investigating other known, uncharged criminal conduct"; the State's agreement he could be sentenced on his state charges after his federal sentence was imposed so his penal exposure diminished; and the State's agreement that defendant's state and federal sentences would run concurrently. Thus, the number and scope of the benefits afforded to defendant under the plea agreement led the judge to conclude the State exerted "near-herculean efforts . . . to provide [d]efendant with a favorable deal . . . [a]nd these circumstances do not support withdrawal of the plea."

Finally, regarding the fourth Slater factor, i.e., whether withdrawal would result in unfair prejudice to the State or provide an unfair advantage to the

accused, the judge found "withdrawal of [d]efendant's guilty plea would hinder the State's ability to engage in a fair and effective prosecution." He explained the State might be constrained in prosecuting defendant and his wife "long after" criminal conduct purportedly occurred, due to the "[un]availability of records," "faded memories of witnesses," and the statute of limitations pertaining to such conduct. Accordingly, the judge found withdrawal of defendant's guilty pleas was unwarranted.

The judge next addressed defendant's argument that he should be permitted to withdraw his plea because his due process rights and right to counsel under the Fifth, Sixth, and Fourteenth Amendment of the United States Constitution were violated by plea counsel's ineffectiveness. The judge noted defendant's "sole complaint rest[ed] upon the alleged misinformation [provided by] plea counsel as to the award of jail credits."

In that regard, the judge again observed that neither defendant's plea colloquy, nor his plea agreement referenced defendant's entitlement to duplicate jail credits on his consecutive sentences. Moreover, after the State placed the terms of the plea offer on the record, defendant's plea counsel confirmed the terms constituted "the entire agreement." Accordingly, the judge stated, "[j]ail credits were referenced only passingly" and then, only later in the plea hearing

when plea counsel asked defendant if they had discussed defendant's entitlement to jail credits and defendant answered, "Yes." Given these facts, the judge found that "[o]ther than [d]efendant's bare assertions that he was misinformed by counsel, [there was] no conclusive evidence . . . that support[ed] a finding . . . [d]efendant was promised a certain attribution of jail credits."

Additionally, the judge determined "[d]efendant received a host of benefits" when he accepted the State's plea offer and none of those benefits "w[ere] affected by the number of jail credits awarded for his state sentences." Therefore, he concluded there was no "reasonable likelihood [d]efendant would have insisted on going to trial, even if his claim that he was misadvised as to the award of jail credits had merit."

Based on these findings, the judge also found it unreasonable to "put[] the entirety of [d]efendant's matter back in the starting position years after its apparent conclusion." He found "[s]uch a remedy would grant [d]efendant an enormous windfall and squander the resources that [d]efense counsel, the State, the federal government, and this court expended to get [d]efendant the favorable plea he requested." Additionally, the judge concluded the issue before the court was "a sentencing issue," "not a plea issue," and there was "no manifest injustice requiring withdrawal of the plea[s]." Still, the judge revisited defendant's

sentences and found they should run concurrently rather than consecutively, thereby giving "[d]efendent . . . exactly what he asked for at the time of sentencing."

II.

On appeal, defendant raises the following arguments for our consideration:

POINT I

[DEFENDANT'S] PLEA AGREEMENT WAS VOID AB INITIO AND HIS CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED WHERE THE PLEA AGREEMENT PROVIDED FOR AN ILLEGAL SENTENCE, REQUIRING THE GUILTY PLEAS BE WITHDRAWN.

POINT II

[DEFENDANT'S] FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHERE HIS REASONABLE SENTENCING EXPECTATIONS WERE DEFEATED DUE TO DEFENSE COUNSEL'S INEFFECTIVENESS AT ENTRY OF HIS PLEA OF GUILTY AND AT SENTENCING.

POINT III

THE COURT BELOW MISAPPLIED THE SLATER FACTORS IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS PLEAS OF GUILTY.

POINT IV

THE COURT BELOW COMMITTED PLAIN ERROR IN DENYING DEFENDANT'S MOTION TO WITHDRAW THE PLEA OF GUILTY BECAUSE A "MANIFEST INJUSTICE" WAS DEMONSTRATED; IN THE ALTERNATE, THE CASE SHOULD BE REMANDED FOR AN EVIDENTIARY HEARING BEFORE A DIFFERENT JUDGE. (NOT RAISED BELOW).

None of these arguments are persuasive. We add the following comments.

We review a trial court's Slater analysis under an abuse of discretion standard, recognizing a trial court must make "qualitative assessments about the nature of a defendant's reasons for moving to withdraw [the] plea and the strength of [the] case." State v. Tate, 220 N.J. 393, 404 (2015). We "reverse the denial of a motion to withdraw a guilty plea 'only if there was an abuse of discretion which renders the lower court's decision clearly erroneous.'" State v. Hooper, 459 N.J. Super. 157, 180 (App. Div. 2019) (quoting State v. Simon, 161 N.J. 416, 444 (1999)). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). It also is well settled that an award of jail credits raises issues of law subject to de novo review. State v. DiAngelo, 434 N.J. Super. 443, 451 (App. Div. 2014).

When a motion to withdraw a guilty plea is filed after sentencing, a trial court may only vacate a guilty plea to correct a "manifest injustice." State v. Johnson, 182 N.J. 232, 237 (2005) (quoting R. 3:21-1). "Courts should not upset a plea solely because of post[-]hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee v. United States, 582 U.S. 357, 369 (2017).

A defendant seeking to withdraw a guilty plea "bears the burden of presenting a 'plausible basis for [the] request' and a good-faith basis for 'asserting a defense on the merits.'" State v. Munroe, 210 N.J. 429, 442 (2012) (quoting Slater, 198 N.J. at 156). "But an application based on a failure to understand the penal consequences of a plea requires a showing that [the] defendant would not have pleaded guilty but for the misunderstanding." Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 3:21-1 (2023). Stated differently, "[a] defendant seeking relief under Rule 3:21-1 . . . 'must show not only that he was misinformed of the terms of the agreement or that the sentence violated his reasonable expectations, but also that he is prejudiced by enforcement of the agreement.'" Johnson, 182 N.J. 241-42 (quoting State v. Howard, 110 N.J. 113, 123 (1988)).

"Consideration of a plea withdrawal request can and should begin with proof that before accepting the plea, the trial court followed the dictates of Rule 3:9-2." Slater, 198 N.J. at 155 (citation omitted). That is because "[a] guilty plea may be accepted as part of a plea bargain [only] when the court is assured . . . the defendant enter[ed] into the plea knowingly, intelligently and voluntarily." Johnson, 182 N.J. at 236 (citing R. 3:9-2). "For a plea to be knowing, intelligent and voluntary, the defendant must understand the nature of the charge and the consequences of the plea." Ibid.

Criminal defendants are entitled to "receive credit on the term of a custodial sentence for anytime served in custody in jail . . . between arrest and the imposition of sentence." R. 3:21-8(a); see also N.J.S.A. 2C:44-5(b)(2). Those credits apply to the "front-end" of a sentence. State v. McNeal, 237 N.J. 494, 499 (2019) (citing C.H., 228 N.J. at 117, 121). As such, they reduce the minimum mandatory term a defendant must serve before becoming eligible for parole. Ibid.

However, a defendant sentenced to consecutive terms of imprisonment on separate criminal matters is not entitled to the application of jail credits on both cases. C.H., 228 N.J. at 123. Indeed, our Supreme Court limited its holding in

State v. Hernandez, 208 N.J. 24 (2011) to the extent it had been interpreted to require such double credits. C.H., 228 N.J. at 123.

"An incorrect calculation of a defendant's jail credits may impact the voluntariness of the guilty plea," McNeal, 237 N.J. at 499 (citations omitted), and a defendant is "entitled to withdraw a guilty plea if the court imposes a harsher sentence than that contemplated by the plea agreement," State v. Bellamy, 178 N.J. 127, 135 (2003) (citation omitted). Additionally, "a defendant's misunderstanding of credits may affect [their] understanding of the maximum exposure" and therefore, a "guilty plea based on this misunderstanding may fail to satisfy the constitutional requirement that a plea be voluntarily, intelligently and knowingly entered, at least where the denial of the expected credits results in the imposition of a sentence longer in duration than the maximum contemplated." State v. Alevras, 213 N.J. Super. 331, 338 (App. Div. 1986).

Governed by these principles, we are convinced the judge properly denied defendant's Slater motion after finding the dictates of Rule 3:9-2 were followed at the time of defendant's plea hearing. We also are persuaded that consistent with the holding in C.H., the judge correctly found defendant was not permitted to receive a duplicate award of 511 jail credits on the consecutive sentence he

received under Accusation 18-04-0631, considering he received that exact number of jail credits for his sentence under Indictment 17-10-1560 during the same sentencing proceeding. 228 N.J. at 121.

In declining to second-guess the judge's analysis of the four Slater factors, we are mindful the Court held in Slater, a guilty plea "create[s] a 'formidable barrier' the defendant must overcome in any subsequent proceeding." Slater, 198 N.J. at 156-57 (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977)). Thus, a defendant "must present specific, credible facts and, where possible, point to facts in the record that buttress" the claim supporting the motion to withdraw a guilty plea. Id. at 158.

Here, the judge carefully considered each Slater factor and concluded not one of them supported withdrawal of defendant's pleas under the "manifest injustice" standard. In fact, he first found defendant did "not assert any claim of innocence, much less a colorable one." Further, the judge concluded: defendant's purported "off-the-record plea discussions" were not shown to be reliable; he "pled guilty after substantial negotiations between [defense counsel] and the State"; he "received several benefits under the plea"; and "withdrawal of [d]efendant's guilty plea would hinder the State's ability to engage in a fair and effective prosecution." These findings are fully supported on the record

before us.

We also disagree with defendant's argument that he demonstrated his Fifth, Sixth, and Fourteenth Amendment rights were violated due to plea counsel's ineffectiveness, and specifically, his "ignorance as to the existence of C.H." While we recognize defendant withdrew his PCR petition before filing his Slater motion, because he then raised ineffective assistance of counsel (IAC) claims in conjunction with his Slater motion, we briefly address those claims.

A defendant's right to effective assistance of counsel extends to the plea-negotiation process. Lafler v. Cooper, 566 U.S. 156, 168 (2012); see also State v. Chau, 473 N.J. Super. 430, 445 (App. Div. 2022) (citations omitted). To establish an IAC claim following the entry of a guilty plea, a defendant must satisfy a modified version of the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984),³ i.e., "(i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases'; and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" State v. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (alteration in original) (quoting State

³ Our Supreme Court adopted the two-pronged Strickland test in State v. Fritz, 105 N.J. 42, 58 (1987).

v. DiFrisco, 137 N.J. 434, 457 (1994)); see also Lafler, 566 U.S. at 163 (holding a defendant claiming ineffective assistance at the plea stage must show that "the outcome of the plea process would have been different with competent advice"). Additionally, a defendant seeking to set aside a guilty plea based on a plea agreement must "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (citation omitted); see also State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020).

When assessing the first Strickland prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. Thus, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Ibid. And because prejudice is not presumed, Fritz, 105 N.J. at 52, a defendant must establish "[their] attorney's errors and omissions were of such significance as to undermine confidence in the outcome." State v. Echols, 398 N.J. Super. 192, 203 (App. Div. 2008).

To obtain an evidentiary hearing on an IAC claim, a defendant must "demonstrate a reasonable likelihood that [their] claim, viewing the facts alleged

in the light most favorable to the defendant, will ultimately succeed on the merits." State v. Peoples, 446 N.J. Super. 245, 254 (App. Div. 2016) (quoting State v. Porter, 216 N.J. 343, 355 (2013)). "[A] defendant is not entitled to an evidentiary hearing if the 'allegations are too vague, conclusory, or speculative.'" Porter, 216 N.J. at 355 (quoting State v. Marshall, 148 N.J. 89, 158 (1997)). Therefore, a defendant "must do more than make bald assertions that" his counsel's performance was substandard. Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)).

Here, because defendant's IAC claim rested on the bald assertion that plea counsel misinformed him about jail credits and that plea counsel was unaware of the holding in C.H., defendant did not present a prima facie case of IAC. Thus, no evidentiary hearing was required. As already discussed, the record reflects there was no reference to jail credits in defendant's plea agreement nor any mention of his entitlement to duplicate jail credits on his consecutive sentences either during the plea colloquy or at sentencing. Moreover, defendant testified at the plea hearing that he: reviewed every page of the plea agreement in detail with counsel; understood the terms of the plea agreement; appreciated the consequences of his pleas; and was satisfied with the services of plea counsel. Notably, this testimony preceded his brief sworn statement that he and

plea counsel discussed his entitlement to jail credits.

We also concur with the judge's determination that even if defendant established that plea counsel mistakenly advised him that he would receive duplicate jail credits on his consecutive state sentences, it is "highly unlikely that he would have rejected the plea offer tendered to him." That is because, as the judge aptly noted, defendant was afforded significant benefits under the plea agreement, including: the ability "to exonerate his wife"; dismissal of the bulk of his pending charges; termination of the State's investigation into "other known, uncharged criminal conduct"; and the ability to serve his state sentences concurrently with his federal sentence. The State also recommended that defendant be sentenced at the low end of the sentencing ranges for his first- and second-degree charges, and the judge followed this recommendation. Thus, defendant was able to substantially reduce his exposure for a much lengthier term of incarceration by entering into the plea agreement.

Under these circumstances, and aware the judge chose to – but was not obliged to – revisit defendant's aggregate sentence before directing defendant's state sentences to run concurrently, we perceive no reason to disturb the judge's finding that defendant failed to satisfy the modified two-prong test under Strickland.

Defendant's remaining contentions 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