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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3012-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GORDON ODIRA,

Defendant-Appellant,

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Argued September 13, 2023 – Decided October 12, 2023

Before Judges Firko and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Municipal Appeal No. MA-14-2021.

Randolph E. Mershon III, Assistant Prosecutor, argued the cause for appellant (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Erin M. Campbell, of counsel and on the brief).

Luke C. Kurzawa argued the cause for respondent (Reisig Criminal Defense & DWI Law, LLC, attorneys; Luke C. Kurzawa of counsel and on the brief).

PER CURIAM

Defendant, Gordon Odira, seeks to vacate his guilty plea convictions for driving while intoxicated (DWI), refusing to submit to a breath test, and careless driving. He did not file a direct appeal but instead petitioned the municipal court for post-conviction relief (PCR) almost two years after pleading guilty. That petition was denied by the municipal court judge who had taken the guilty pleas and imposed the sentence. Defendant subsequently sought de novo review by the Law Division. He now appeals from a December 6, 2021 order issued by Judge Robert J. Jones, denying PCR without a hearing. He also appeals from a May 10, 2022 order issued by Judge Jones denying his motion for reconsideration. After carefully reviewing the record in light of the arguments of the parties and the governing legal principles, we affirm.

I.

We discern the following pertinent facts and procedural history from the record. On December 31, 2018, defendant lost control of his vehicle and hit a sidewalk. When police arrived at the scene of the one-car crash, they detected the odor of alcohol and administered field sobriety tests, which defendant failed. Defendant was transported to the police station for blood alcohol testing but refused to provide a breath sample. Defendant was charged with DWI, N.J.S.A.

39:4-50; refusing to submit to a breath test, N.J.S.A. 39:4-50.2; reckless driving, N.J.S.A. 39:4-96, later amended to careless driving, N.J.S.A. 39:4-97; driving while intoxicated within one thousand feet of a school, N.J.S.A. 39:4-50(g)(1); failure to maintain lane, N.J.S.A. 39:4-88; and possessing an open container of alcohol in a motor vehicle, N.J.S.A. 39:4-51(b).

On March 28, 2019, defendant appeared in municipal court for a plea hearing. At the outset of the proceeding, the municipal prosecutor advised the judge that he had discussed the case with the officer who administered the standard refusal statement.[1] He reported that the officer had "sort of indicated that there could have been a little, you know, language barrier when he was reading in the standard form after [defendant] refused to take the Alcotest." The prosecutor then explained that defendant would be pleading guilty to the DWI charge, and that "[t]he other charges, except for the lane violation, are going to be dismissed." The record does not reflect the municipal prosecutor made a formal motion to dismiss the refusal complaint. Rather, the dismissal of that

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[1] N.J.S.A. 39:4-50.2(e) requires the reading of a uniform statement promulgated by the Attorney General to all persons before they submit to a breath test. The standard statement apprises drivers of the consequences of refusing to submit to a breath test and explains that a person arrested for DWI does not have the right to refuse to submit a breath sample. See State v. Marquez, 202 N.J. 485, 497-98 (2010).

charge was presented to the judge as part of the municipal prosecutor's explanation of the comprehensive plea arrangement that had been negotiated by the parties.

Defense counsel amplified the prosecutor's explanation of the plea agreement, advising the judge that "because of his language barrier—[defendant] is from the Country of Kenya—he didn't understand fully what was read to him. And we discussed that with [the police officer] and he's amenable to this downgrade as well considering everything that happened."

Defendant then entered guilty pleas to DWI and careless driving. Before imposing sentence, however, the judge took a brief recess and convened an off-the-record conference with the prosecutor and defense counsel. When the judge went back on the record, he stated:

> Mr. Odira, I've had an opportunity to conference this with your attorney, as you well know, and the [m]unicipal [p]rosecutor, and I—I just can't do it [dismiss the refusal charge]. I'll give you the mandatory minimums on the refusal and the DWI and run them concurrent and your attorney can—I'm sure has advised you why I feel this way.

Defendant then pled guilty to the refusal charge.

Defendant did not file a direct appeal. Instead, defendant filed a PCR with the municipal court, claiming that his plea counsel was ineffective; the record

was incomplete due to the off-the-record conference; and the judge imposed an illegal sentence because the fine was excessive. On May 27, 2021, the municipal court judge corrected the fine imposed on the refusal conviction,[2] but otherwise denied PCR.

Defendant sought de novo review in the Law Division, raising different arguments than the ones he had made in municipal court.[3] He argued for the first time in the Law Division that the municipal court judge improperly rejected the State's request to dismiss the refusal charge. Defendant argued that the municipal court judge's decision led him to believe he had "no choice but to plead guilty" to a charge that should have been dismissed, constituting a due process violation. Defendant further argued for the first time in the Law Division that the municipal court judge did not adequately advise him of his right to appeal, constituting a separate due process violation.

In a comprehensive written decision, Judge Jones found that defendant's petition was procedurally barred because PCR is not a substitute for direct

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[2] The judge at the plea/sentencing hearing had imposed a $605 fine on the refusal conviction. At the PCR hearing, the municipal court judge acknowledged he had made a mistake and reduced the fine to $505.

[3] Defendant has abandoned his ineffective assistance claim. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

appeal. Judge Jones nonetheless considered defendant's arguments on the merits and rejected them, concluding that defendant did not prove any of the four grounds for PCR listed in Rule 7:10-2(c)(1). This appeal follows.

Defendant raises the following contentions for our consideration:

> THE LAW DIVISION ERRED IN DENYING THE DE NOVO REVIEW OF DEFENDANT'S PCR BY NOT RECOGNIZING THE MUNICIPAL COURT'S REFUSAL TO ALLOW THE STATE TO DISMISS A REFUSAL CHARGE IN CONNECTION WITH A PLEA TO A FIRST OFFENSE DWI AS A DUE PROCESS VIOLATION.
>
> THE MUNICIPAL COURT'S INSUFFICIENT APPEAL ADVISEMENT WAS A DENIAL OF DUE PROCESS.
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> DFEENDANT SUFFERED ANOTHER DUE PROCESS VIOLATION WHEN THE MUNICIPAL COURT OVERSTEPPED ITS AUTHORITY AND INTRUDED UPON THE STATE'S AUTHORITY TO DISMISS A MOTOR VEHICLE VIOLATION.

II.

PCR serves the same function as a federal writ of habeas corpus. State v. Preciose, 129 N.J. 451, 459 (1992). As Judge Jones noted, it is not a substitute for a direct appeal. Ibid. When petitioning for PCR, defendants must establish by a preponderance of the credible evidence that they are entitled to the requested relief. Ibid. To sustain this burden, the petitioner must allege and

articulate specific facts, "which, if believed, would provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992). Rule 7:10-2(c)(1) provides in pertinent part that "[a] petition for post-conviction relief is cognizable if based on . . . [a] substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of New Jersey."

The scope of our review is limited. We defer to a PCR court's factual findings "'when supported by adequate, substantial and credible evidence.'" State v. Harris, 181 N.J. 391, 415-16 (2004) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)). For mixed questions of law and fact, we give deference to the supported factual findings of the PCR court but review de novo the application of the law to those facts. Id. at 416 (citing State v. Marshall, 148 N.J. 89, 185 (1997)). Purely legal conclusions are reviewed de novo. Ibid.

The scope of our review of a motion for reconsideration is also narrow. We will not disturb a trial judge's denial of a motion for reconsideration absent "a clear abuse of discretion." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Such circumstances arise "'when a decision is "made without a rational explanation, inexplicably

departed from established policies, or rested on an impermissible basis."'" Ibid. (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue a motion." Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010). Rather, "[r]econsideration should be utilized only for those cases which fall into that narrow corridor in which either (1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

III.

We first address defendant's contention that the municipal court judge deprived him of due process by declining to dismiss the refusal charge in accordance with the proposed plea agreement. In State v. Hessen, our Supreme Court confirmed that "[p]lea bargaining is not a right of a defendant or the prosecution. It is an accommodation which the judiciary system is free to institute or reject." 145 N.J. 441, 452 (1996) (quoting State v. Brimage, 271 N.J. Super. 369, 379 (App. Div. 1994)).

Rule 7:6-2 provides that "[a] defendant may plead not guilty or guilty, but the court may, in its discretion, refuse to accept a guilty plea." Guidelines promulgated by the Supreme Court to ensure uniform, statewide implementation of Rule 7:6-2 state unequivocally that "[n]o plea agreements whatsoever will be allowed in driving while under the influence of liquor or drug offenses." Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, Pressler & Verniero, Current N.J. Court Rules, Appendix to Part VII, Guideline 4, www.gannlaw.com (2023) (Guideline 4). Further, "[a] refusal charge in connection with a first offense N.J.S.A. 39:4-50 [DWI] charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible." Ibid. (emphasis added).

Defendant argues that Judge Jones misapplied the Court Rule and Guideline 4 by failing to acknowledge the difference between a dismissal and a plea agreement. The comment to Guideline 4 explains in this regard that "'[d]ismissals 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." Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, Pressler & Verniero, Appendix to Part VII, cmt. (Comment). The comment notes that "[p]lea

agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss . . . ." Ibid. It further explains, "[i]n discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges." Ibid.

We are unpersuaded by this argument as it fails to recognize that a dismissal may be a negotiated term of a plea agreement in contravention of the strict policy against plea bargaining drunk driving-related charges.

Although substantial deference must be accorded to prosecutors when they evaluate charges brought by police, we do not read the Court Rule, guideline, or comment to categorically prevent a municipal court from reviewing the cause cited by the prosecutor for dismissing a DWI-related charge. To the contrary, we believe municipal court judges are duty-bound to ensure that the policy banning bargained-for dismissal of DWI and refusal charges is strictly enforced. The parties may not circumvent that strict prohibition against plea bargaining under the guise of prosecutorial case screening. When that occurs, a municipal court judge has discretion—if not the responsibility—to refuse to accept a guilty plea under Rule 7:6-2(a)(1).

Without question, the State may move to dismiss a charge where the prosecutor announces that, based on an assessment of the proofs, the possibility of conviction is remote. Cf. Guideline 4 (providing with respect to drug offenses that carry a mandatory minimum penalty that a judge may "refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice require the acceptance of a plea to a lesser offense."). But here, the prosecutor did not represent that the refusal charge could not be proved in a bench trial, but rather only that the police officer had acknowledged that "there could have been a little . . .language barrier" when he read the standard refusal statement to defendant.

We reiterate and stress that a municipal prosecutor may not agree to dismiss a provable refusal charge as part of comprehensive plea negotiations to induce a defendant to plead guilty to one or more other charges. See ibid. ("A refusal charge in connection with a first offense N.J.S.A. 39:4-50 [DWI] charge shall not be dismissed by a plea agreement . . . .") (emphasis added). It follows that a municipal court judge may take steps to ensure that the dismissal of a DWI-related charge is appropriate and does not run afoul of the plea bargaining prohibition.

In this instance, the prosecutor suggested that the refusal charge was problematic because "there could have been a little . . . language barrier" that might have prevented defendant from understanding the standard refusal statement that was read to him in English at the police station. However, this is not a situation as in Marquez, where "it [was] undisputed that [the] defendant does not speak English." 202 N.J. at 514 (holding that the officer's reading of the standard statement in English "failed to 'inform' defendant of the consequences of refusal, as required"). As Judge Jones aptly noted, the plea hearing was conducted entirely in English and defendant did not ask for an interpreter. The record shows that defendant gave appropriate responses to the questions posed to him during both plea colloquies,[4] demonstrating that he understood the English language sufficiently to knowingly waive his constitutional rights.[5]

That suggests the "little language barrier" alluded to by the municipal prosecutor would not have categorically precluded a trial conviction for

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[4] As we have noted, the judge first entered the guilty plea on the DWI and careless driving charges. A separate plea colloquy with respect to the refusal charge was conducted following the off-the-record conference.

[5] Defendant has never claimed that his convictions should be vacated because he did not understand what was happening at the plea hearing.

violation of N.J.S.A. 39:4-50.4(a). Stated another way, this does not appear to be a situation where "the evidence does not support the State's charges" within the meaning of Guideline 4. See Comment ("It is well established, for example, that a prosecutor should not prosecute when the evidence does not support the State's charges.").

It also shows that the municipal court judge had become aware of the fact that defendant did not have a language barrier during the initial plea colloquy, after which the judge convened the off-the-record conference. We believe the municipal court judge was right to be concerned that the plea arrangement the parties worked out included dismissing the refusal charge, not because it could not be proved, but rather in exchange for defendant's agreement to plead guilty to DWI and careless driving—in contravention of the plea bargaining ban.[6]

The gravamen of defendant's argument is that a municipal prosecutor has the authority to unilaterally dismiss a charge, and that the trial judge ought not second-guess a prosecutor's assessment of trial proof issues. Specifically, defendant contends the municipal court "overstepped its authority and intruded

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[6] The comprehensive plea agreement called for the reckless driving charge to be downgraded to careless driving. That part of the agreement did not contravene Guideline 4, which prohibits plea bargaining of DWI, refusal, and certain drug charges, not other motor vehicle offenses.

upon the State's authority to dismiss a motor vehicle violation." It is noteworthy, however, that the municipal prosecutor did not object to what defendant characterizes as an "intrusion" by the judge. Furthermore, the county prosecutor's office, which now represents the State, does not argue that the municipal court judge improperly intruded upon prosecutorial prerogative by reviewing and ultimately rejecting the municipal prosecutor's request to dismiss the refusal charge. On the contrary, the State argues that the municipal court judge did not violate defendant's due process rights by rejecting the plea arrangement.[7]

We conclude the municipal court judge's unwillingness to dismiss the refusal charge does not constitute an abuse of discretion, much less a due process violation that would provide a basis for post-conviction relief. Importantly, after the judge declined to dismiss the refusal charge, defendant, with the assistance of counsel,[8] and voluntarily pled guilty to that offense and provided a factual

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[7] The Assistant Middlesex County Prosecutor argued at the PCR hearing, "[n]o, I think that – I think the [municipal court] judge was right. I mean, I think that the, you know, [G]uideline 4 is pretty clear that on a first DWI the [c]ourt can't dismiss the refusal as part of a plea."

[8] We reiterate that, in this appeal, defendant does not contend that his former counsel rendered ineffective assistance. <u>See</u> note 3.

basis for it.[9] Defendant was not forced to plead guilty to that or any charge, as both plea colloquies clearly show. Indeed, when defendant indicated after the brief recess that he would plead guilty to both the DWI and refusal charges, the judge inquired, "And no one is forcing you, correct?" Defendant replied, "Nobody's forcing me." Nor did defendant request more time to discuss his options with counsel after the judge announced on the record that he would not dismiss the refusal charge. In these circumstances, defendant is hard-pressed to establish that his due process rights were violated. See State v. Alexander, 310 N.J. Super. 348, 355 (App. Div. 1998) (quoting State v. Aquirre, 287 N.J. Super. 128, 133 (App. Div. 1996)) (confirming that it is "well-settled that actual prejudice, not possible or presumed prejudice, is required to support a due process claim.").

We likewise reject defendant's argument that the municipal court judge failed to adequately inform him of his right to appeal by only referring specifically to the right to appeal the sentence imposed. We see no basis for PCR based on the municipal court judge's failure to specifically mention the

[9] During the plea colloquy, defense counsel asked defendant, "[a]nd - - but before they administered the [breath] test, they told you you don't have the right to refuse this test, you have to take the test, [y]ou don't have a right to a lawyer, they told you all this, right?" Defendant replied, "[y]es, they did."

right to appeal any other aspect of the conviction, including the judge's decision not to dismiss the refusal charge. We have not relied on a procedural bar based on the principle that PCR is not a substitute for a direct appeal. Rather, we have considered defendant's PCR contentions on their merits. Thus, even assuming for the sake of argument the municipal court erred in advising defendant as to the scope of his right to appeal, defendant has suffered no prejudice for purposes of the PCR analysis from his failure to pursue a direct appeal. Even if he had filed a direct appeal and raised the issues he raises here, the end result would be the same because the municipal court judge's unwillingness to accept the dismissal of the refusal charge was not an error warranting appellate intervention.

In sum, defendant failed to prove by a preponderance of the evidence that he is entitled to post-conviction relief. See Preciose, 129 N.J. at 459. It follows that he also has failed to establish that Judge Jones erred in denying the motion for reconsideration. See Pitney Bowes Bank, Inc., 440 N.J. Super. at 382. To the extent we have not explicitly addressed them, any remaining contentions raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirm.

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

CLERK OF THE APPELLATE DIVISION