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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2149-04T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PATRICIA SOUL,

Defendant-Appellant.

Argued November 30, 2005 - Decided JAN 06 2006

Before Judges Stern and Lihotz.

On appeal from Superior Court of New Jersey
Law Division, Somerset County Municipal
Appeal No. 34-04.

Daniel E. Orr argued the cause for
appellant (Morgan, Lewis & Bockius,
attorneys); Mr. Orr on the brief.

Jamin Cooper, Assistant Prosecutor, argued
the cause for respondent (Wayne J. Forrest,
Somerset County Prosecutor, attorney; Ms.
Cooper on the brief).

PER CURIAM

Defendant appeals the denial of a motion to set aside her guilty plea to charges of driving while intoxicated and failure to maintain a lane. We conclude the municipal court, while

taking defendant's guilty plea, failed to properly advise defendant, who was indigent, of her right to the assignment of counsel and to secure a knowledgeable and intelligent waiver of that entitlement. We vacate the judgment of conviction and remand for a new trial in the municipal court.

In the early morning of June 22, 2003, defendant was arrested and charged with driving while intoxicated, N.J.S.A. 39:4-50, and failure to maintain a lane, N.J.S.A. 39:4-88. The following day she appeared in Bound Brook Municipal Court and entered her plea.

The court presented the penalties for a conviction of driving while intoxicated to defendant and two others who were similarly charged. Additionally, the court stated: "You have a right to be represented by an attorney on this charge. If you can prove that you cannot afford one, one would be appointed [by] the court to represent you."

Later defendant was individually questioned. The colloquy between the court and defendant when entering her plea must be reviewed to examine the issue presented on appeal.

> THE COURT: Ms. Soul, did you hear me explain the mandatory penalties for driving while, while intoxicated with which you were charged on June 22 of 2003?
>
> MS. SOUL: Yes.

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THE COURT: As well as failing to maintain a lane in violation of 39:488[a][?] And you're aware that you have the right to be represented [by an] attorney on these charges. If you can prove you could not afford one, one would be appointed by the court to represent you. Are you aware of that?

MS. SOUL: Yes.

THE COURT: Do you have an attorney representing you?

MS. SOUL: No.

THE COURT: Do you want to speak to an attorney?

MS. SOUL: No.

THE COURT: Knowing and understanding the penalties, as well as your right to be represented by an attorney, how do you plead to driving while intoxicated in the Borough of Bound Brook on June 22nd of 2003?

MS. SOUL: Guilty, I guess. Can I, can I --

THE COURT: I'm going to stop you right there. You can't make any state --

MS. SOUL: Oh. I --

THE COURT: I'll stop you right there. Hold on. I know you're a little bit nervous. Okay? So take your time. Take a deep breath. That's number [o]ne.

Number two: unfortunately I can't take any statements from you at the present time. You're not under oath and the State isn't here and hasn't yet proved its case against you, so we're here just for a first appearance where I explain the charges, I tell you about the penalties and I tell you

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you have a right to counsel and ask you how you wish to plead. So let's back up a little bit. Do you understand the penalties that I explained?

MS. SOUL: Yes.

THE COURT: You have to answer out loud. Okay?

MS. SOUL: Yes.

THE COURT: All right. Do you want time to speak to an attorney?

MS. SOUL: No.

THE COURT: Are you presently employed?

MS. SOUL: Yes.

THE COURT: Full time?

MS. SOUL: Yes.

THE COURT: How long have you been at your present place of employment?

MS. SOUL: Two years.

THE COURT: Do you have any children?

MS. SOUL: No.

THE COURT: Anyone else in your household who works?

MS. SOUL: Yes.

THE COURT: Do you have health insurance coverage?

MS. SOUL: Yes.

THE COURT: Okay. So you probably would not quali[f]y for a public defender.

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If you want to make an application I'll let you do that, but it doesn't really sound like it at this point in time. Okay[?]

Do you -- so you don't want time to speak to an attorney?

MS. SOUL: So you said it's mandatory six months?

THE COURT: What I told you, and I'll go over it again if I have to, but not right now because I want to keep moving. Okay? Because it's warm in here.

MS. SOUL: Okay. I plead guilty.

THE COURT: Now don't just plead guilty. Okay?

MS. SOUL: I'm sorry. I'm sorry. I'm pleading guilty.

THE COURT: When you say six months I think what you're probably saying to yourself is: is that the minimum license suspension for a first offense, because that's what I said. That's what the minimum would be for a first offense. Depending upon the circumstances, it could be up to one year. Does that answer your question?

MS. SOUL: Yes.

THE COURT: Okay. How do you plead at this time to the charge of driving while intoxicated?

MS. SOUL: Guilty.

THE COURT: Is anyone pressuring you to plead guilty?

MS. SOUL: No.

THE COURT: Are you entering the plea voluntarily and of your own free will?

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MS. SOUL: Yes.

THE COURT: Do you understand you're giving up your right to a trial, right to an attorney and right to make an application to be represented by the public defender?

MS. SOUL: Yes.

THE COURT: On that day and at that time were you operating a vehicle while you were under the influence of alcohol?

MS. SOUL: I was operating a vehicle and I did have a glass of (name) and I did--

THE COURT: Okay. I need to ask you this question, you need to answer it without giving me --

MS. SOUL: Oh. Yes, I --

THE COURT: -- without giving me something that can be subject to interpretation. If you do that, that's fine, but then we have to have a trial, and I'll be happy to schedule the matter for trial. Okay?

I have to ask you one more time. Were you operating a vehicle under the influence of alcohol in the Borough of Bound Brook on June 22nd of 2003?

MS. SOUL: Yes.

THE COURT: You laid a factual basis to enter the plea. You plead guilty to 5351. Is this a first offense?

MS. SOUL: Yes.

THE COURT: Was there any accident involved?

MS. SOUL: No.

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THE COURT: Did you take a Breathalyzer test?

MS. SOUL: At that time.

THE COURT: And do you know what the reading was?

MS. SOUL: 1.1, and I also was sick, so --

THE COURT: Okay. But you understand when I said mandatory penalty it doesn't matter if you were sick and it --

MS. SOUL: Yes.

. . .

THE COURT: . . . Okay. It would appear to be a first offense. Anything you want to tell me before I sentence you?

MS. SOUL: Well I don't believe that I did fail to --

THE COURT: Let me stop you there. If you're going to now tell me that you don't think that you either violated the law or committed the offense, that's fine, but you've already pled guilty and it would make no sense, and I can't change it anyway. Do you know what I'm saying?

MS. SOUL: Oh.

THE COURT: I mean I did ask you I think -- just let me, just let me thin[k]. Okay? I did ask you at least twice, maybe three times: are you sure you want to do this? Do you want to speak to an attorney? I went over it and over it, and finally you said, "No, I want to plead guilty." So we're at sentencing now. You've already pled guilty.

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Defendant received the minimum sentence for driving while intoxicated; the traffic offense was merged as a lesser included offense. Thereafter, defendant filed an application for post conviction relief to vacate her plea. Although she initially retained an attorney to file that motion, counsel withdrew because defendant could not satisfy his fee. A public defender, assigned to represent defendant on an unrelated municipal court matter because she was indigent, appeared on her behalf on the motion return date in this case. The application to set aside the guilty plea was denied by the municipal court on June 16, 2004.

The Law Division, upon its determination of indigency, assigned counsel to represent defendant on her appeal in this matter. After trial de novo, conducted on the record of the Municipal Court proceedings, the court denied the motion to withdraw the guilty plea stating: "she understood the consequences, she entered a plea of guilty indicating she was intoxicated when she was operating the vehicle, so I don't see any basis for the withdrawal of the plea of guilty." This appeal followed.

Defendant proffers her plea should be set aside because the Municipal Court failed to engage the proper colloquy prior to

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the acceptance of the plea and did not establish a sufficient factual basis to support a conviction. The Law Division then erred in denying the request to set aside the defective plea.

Defendant supports her position stating the court did not adequately explain her right to have counsel appointed without cost to represent her. According to defendant, she suffered from epilepsy and did not timely take her regular medication dosage due to her arrest. During her appearance she states she was tired and revealed anxiety and confusion. Her attempts to make inquiry of the court were stopped. She maintains that denying her the right to consult with an attorney impeded her ability to articulate her position.

Further defendant suggests the court did not properly determine her indigent status but instead, commented she "probably would not qualify for a public defender," which she contends dissuaded her from submitting a request for indigent representation.

Finally, defendant argues the plea submitted did not contain a sufficient factual basis to support the conviction of driving while intoxicated. Defendant affirmed she had one glass of wine and responded affirmatively to the conclusive statement "were you operating a vehicle while you were under the influence

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of alcohol?" However, she suggests this does not establish the elements to support conviction.

The State posits the defendant's appeal must be viewed as an appeal from the judgment of conviction. Arguing that not only was the application untimely, but also, it fails to meet the requisites of R. 7:10-2(c)(1) to (4); the State seeks affirmance. Additionally, the State suggests all procedural prerequisites were appropriately followed making defendant's plea voluntarily and knowingly made so it must be upheld.

Prior to accepting a defendant's guilty plea, a municipal court shall determine "by inquiry of the defendant ... that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea." R. 7:6-2(a)(1). State v. Paladino, 203 N.J. Super. 537, 544 (App. Div. 1985).

The explicit provisions of the Rules provide specific safeguards in keeping with the considerations of fairness and the sound administration of justice, which are "designed to protect unrepresented indigent defendants against injustices which may result from their inability to cope fairly with municipal court charges against them." Rodriguez v. Rosenblatt, 58 N.J. 281, 294 (1971). "[A]s a matter of simple justice, no indigent defendant should be subjected to a conviction entailing

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imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." Id. at 295; State v. Hrycak, 184 N.J. 351, 361 (2005); State v. Laurick, 120 N.J. 1, 8 (1990); State v. Ashford, 374 N.J. Super. 332, 337 (App. Div. 2005). Conviction of driving while intoxicated gives rise to a "consequence of magnitude" so an indigent defendant responding to that charge is entitled to appointed counsel. Hrycak, supra, 184 N.J. Super at 362.

The record reveals a busy municipal court calendar and an unsophisticated, apologetic and nervous defendant. The judge was hurried, would not allow defendant to ask questions and made an assumption of ineligibility for assigned counsel. More importantly, the court's presumption that defendant was not indigent was made after only a brief financial inquiry with no explanation of what constituted indigency for the purposes of the right to assigned counsel. That assumption proved to be incorrect. The facts support a finding that defendant was indigent at the time of her first appearance, when she entered her plea.

Approximately one week after this plea was entered, defendant was determined to be indigent in a subsequent municipal matter and counsel was assigned to represent her to

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defend a charge of driving while her license was suspension. Thereafter, the Law Division, conducted its independent review and found defendant was indigent, appointing counsel to present her appeal in this case.

The court, in matters where conviction involves "imprisonment or consequences of magnitude," must meaningfully explain the opportunity available for assigned counsel, without charge, to indigent defendants. A determination of whether a defendant is indigent should only be made upon ascertainment of all relevant facts. A prejudgment of qualification upon incomplete information must be avoided.

The procedures to be followed by municipal courts as outlined by the Supreme Court in Rodriguez and Laurick need not be repeated in detail. Suffice it to say that the municipal court must clearly explain these fundamental rights to a defendant and the indigent defendant who qualifies for assigned counsel must have that right safeguarded by the court. The failure to do so is error.

We have enunciated the ramifications of this error in State v. Hermanns when we held: "There can be no doubt that if defendant was entitled to assigned counsel in the municipal court, she would be entitled to a new trial." State v. Hermanns, 278 N.J. Super. 19, 27 (App. Div. 1994).

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Without understanding her rights this indigent defendant was not afforded the right to consult with assigned counsel on whether to enter a guilty plea to the charges. Because the colloquy was insufficient to ascertain defendant's status as an indigent and then advise of her entitlement to assigned counsel, it can not sustain a finding to secure a waiver of that right to assigned counsel. See Laurick, supra, 120 N.J. at 8; Ashford, supra, 374 N.J.Super. at 332; State v. Carey, 230 N.J. Super. 402, 408-10 (App. Div. 1989). Although a guilty plea may be accepted when the court is assured the defendant enters into the plea knowingly, intelligently and voluntarily, R. 7:6-2(a)(1), it is axiomatic that if defendant was not properly advised of the right to assigned counsel her guilty plea was not made knowingly.

The municipal court when addressing defendant failed to properly determine indigency and explain the right to receive appointed counsel at no cost. The plea of guilty and the judgment of conviction are therefore vacated. Based on our analysis we need not reach the other challenges raised by defendant in support of her motion to set aside her plea. The matter is remanded to the Bound Brook Municipal Court for trial. Jurisdiction is not retained.

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

ACTING CLERK OF THE APPELLATE DIVISION