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PRACTICE LIMITED TO:
CRIMINAL DEFENSE
DWI
MUNICIPAL COURT
JUVENILE CHARGES
APPELLATE PRACTICE

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April 11, 2025

Honorable Judges of the Appellate Division
New Jersey Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Respondent) v.
Kendal Donelson (Defendant-Appellant)
Docket No. A-000260-24
Appellate Division Appeal from the Cumberland County
Law Division-Criminal Part (Honorable Demetrica Todd, J.S.C.)

Dear Sir(s)/Madam(es):

Pursuant to New Jersey Court Rule 2:6-2(b), please accept the within Amended Letter Memorandum of Law in lieu of a more formal brief in support of the within Defendant-Appellant's appeal.

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TABLE OF JUDGEMENTS, ORDERS, & RULINGS

STATEMENT OF FACTS & PROCEDURAL HISTORY[1]

On April 20, 2021, Kendal Donelson, hereinafter referred to as Defendant, was allegedly operating his motor vehicle in Lawrence Township, Cumberland County when he was encountered by New Jersey State Trooper T.W. Spadafora. It should be noted that, according to Officer Spadafora's narrative, the Defendant was never observed to be actually driving his motor vehicle. Rather, according to the Narrative, Defendant was found asleep in the parking lot of a cemetery with the motor vehicle's engine running and the head lights on.

Trooper Spadafora approached Defendant's vehicle and began interacting with the Defendant. Although the Narrative indicates that the Trooper detected the odor of alcohol coming from Defendant's breath, it does not indicate that the Defendant was ever asked if he had consumed alcohol before the Trooper had him exit the vehicle. It should also be noted that the Defendant was allegedly found with "open containers of Miller Light beer in the center console." Yet, the Narrative does not provide any information as to whether the Defendant admitted to consuming alcohol either before or after he allegedly operated the motor vehicle.

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[1] Defense counsel has combined the Statement of Facts and Procedural History into one section in the within Letter Memorandum of Law in the interest of expediency and efficiency.

Ultimately, the Defendant was asked to exit the motor vehicle to perform a series of field sobriety tests. After completing same, Defendant place under arrest for a violation of N.J.S.A. 39:4-50 (DWI).

Defendant was then transported to the Port Norris State Police Station.

Once there, Defendant submitted samples of his breath into two different Alcotest 7110 breath testing instruments encompassing three separate Alcohol Influence Report (AIR) forms before an alleged B.A.C. was obtained.

Defendant was thereafter charged with alleged violations of N.J.S.A. 39:4-50 (DWI); N.J.S.A. 39:4-96 (Reckless Driving); and N.J.S.A. 39:4-51B (Open Container of Alcohol). (DA1).

Defendant ultimately appeared before the Honorable Lauren Van Embden, J.M.C. in the CS Regional Municipal Court on February 7, 2024[2]. Defendant was represented at the time by John Morris, Esq. (hereinafter referred to as predecessor Defense counsel). The Municipal Prosecutor for the CS Regional Municipal Court does not appear in the transcript of said proceedings. In all respects, the Municipal Prosecutor is absent from this record.

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[2] T1 refers to the Certified Transcript of Proceedings in the CS Regional Municipal Court on February 7, 2024.
T2 refers to the Certified Transcript of Proceedings in the Cumberland County Superior Court on September 18, 2024.

At the inception of the proceedings, the Municipal Court stated that it had been provided a plea slip indicating that the Defendant intended to plead guilty to the charge of DWI pursuant to N.J.S.A. 39:4-50. (T1:3-5 to 3-8). The Municipal Court then asked if there was "a reading in this case." Predecessor Defense counsel advised that there was and that he did not object to the Municipal Court considering the reading. (T1:3-13 to 3-19).

The Municipal Court then questioned the Defendant regarding the knowing and voluntary nature of the guilty plea he was about to enter. (T1:4-8 to 5-7).

Thereafter, the Municipal Court then stated that "the reading appears to be a .12" and predecessor Defense counsel agreed. (T1:5-8 to 5-10).

The Municipal Court then reviewed the Defendant's driving history, noting DWI convictions in 2019 and 2023, which meant that the Defendant would be treated as a third offender under the DWI statute. The Municipal Court then advised the Defendant of the penalties that he was facing were he to plead guilty to a third offense DWI. (T1:5-14 to 6-1). Defendant indicated to the Municipal Court that he understood those penalties. (T1:6-2 to 6-8).

It was at this point in the proceeding that predecessor Defense counsel first brought up the fact that Defendant had a pending DWI matter in Millville, New Jersey. (T1:5-17 to 5-20). The Municipal Court, apparently remembering a prior

discussion, stated, "Oh, we has [sic] this conversation. Yeah. About trying to do it together." (T1:5-24 to 5-25).

Prior Defense counsel then asserted the following, "**Because the contemplation is that with respect to both offenses, that there be a concurrent 180 days in the Millville matter.**" (T1:6-15 to 6-17, emphasis added).

The Municipal Court and predecessor Defense counsel then engaged in brief colloquy about how the Defendant's prospective participation in an inpatient treatment program, and the timing thereof, might affect the jail sentences of his DWI matters. However, at no point did the Municipal Court or predecessor Defense counsel ever tell the Defendant that the notion of receiving concurrent 180-day jail sentences for two separate DWI matters in two different municipalities was a legal impossibility.

Rather, the Municipal Court and predecessor Defense counsel allowed Defendant to continue with the entry of the DWI guilty plea under the clearly erroneous impression that he would be able to serve a single 180-day jail sentence for two separate and distinct DWI convictions.

Defendant was then sworn in by the Municipal Court. (T1:8-9 to 8-11).

The factual basis, which was ultimately elicited from the Defendant through a combination of questioning by predecessor Defense counsel and the Municipal Court, is set forth below:

Q Kendal, back in April of 2021, more specifically, the late hours of April 19, 2021, were you in Lawrence Township visiting at a friend's house?

A Yes.

Q And did you have an argument while you were there?

A Yes.

Q And had you been drinking alcohol when you were there?

A Yes.

Q And you left the argument and you went down the road a bit and sat in your car, didn't you, sir?

A Yes.

Q And in order to get to that location, you had to be operating the vehicle, correct?

A Yes.

Q And you understand that the state police were called, and eventually later on April 20, 2021, you submitted to the Breathalyzer, and there was an Alcotest result of .12 blood alcohol reading. You don't have any objection to that? That reflects your drinking leading up to the time you were tested, correct, sir?

A Yes.

Q And, of course, you understand that drinking and driving, which would impair your ability to drive the vehicle, is prohibited in New Jersey, correct?

A Yes.

Q And you are admitting to a violation of New Jersey Statute 39:4-50, driving while impaired or driving while intoxicated, correct, sir?

A Yes.

Q Thank you.

MR. MORRIS: I believe that's sufficient.

THE COURT: All right. Just a little more elaboration on that. What were you drinking?

THE WITNESS: Beer.

THE COURT: Okay. Just drinking beer. Do you remember how many you might have had?

THE WITNESS: No.

THE COURT: All right. So, there's no objection to the reading, so I'm going to mark the AIR, S-1 and calculation worksheet S-2. (Exhibits marked for identification.)

THE COURT: Defendant -- one other thing, were there any field sobriety tests conducted?

MR. MORRIS: I'm sorry, Judge.

BY MR. MORRIS:

Q There were field sobriety tests conducted out there at the cemetery site, correct, Kendal?

A Yes.

Q And frankly, you -- not only did you have the gaze test, but also the heel-to-toe test and the one-leg test, correct?

A Yes.

> Q And was the trooper's observations of you -- and he concluded that you had failed those tests, correct?
>
> A Yes.
>
> Q And you don't disagree with that, do you?
>
> A No.
>
> Q Okay.
>
> THE COURT: Okay. And then so then after that, they did take you down for your breath test, and you were cooperative with them at the station. So you have a breath test 1, EC result: 1.12. --(indiscernible) -- .12. And breath test 2 had a PC result of a .124 and an -- (indiscernible) -- result of a .12. When run through the calculator, they came back within acceptable tolerances of a .12, at one and a half times the legal limit, which is a .08. So this reading gives rise to the presumption that you were under the influence of whatever beer you had consumed prior to operating. It was still in your system at that time, and it is sufficient for the Court to consider with respect to a per se violation. (T1:8-22 to 11-21).

The Municipal Court then asked predecessor Defense counsel whether there was "anything else aggravating or mitigating [he'd] like to be heard on." (T1:11-24 to 11-25).

Prior Defense counsel then made brief argument on Defendant's behalf in advance of sentencing. (T1:12-1 to 12-6).

The Municipal Court then addressed the Defendant and indicated that it was satisfied that the plea was entered knowingly and voluntarily. (T1:13-3 to 13-22).

It was during this portion of the proceedings that the Municipal Court again referenced Defendant's pending Millville matter by stating:

> THE COURT: …Obviously this is of significant magnitude in terms of the penalties and I do believe you are entering this plea voluntarily understanding your rights **and having worked out a scenario with your attorney with this Court and another court to achieve the best outcome that you - - that you can achieve**. (T:13-5 to 13-12, emphasis added).

The Municipal Court then accepted Defendant's guilty plea. (T1:13-23 to 13-25).

Defendant was sentenced as follows: $1007 fine, $33 court costs, $50 VCCB, $75 Safe Neighborhood Fund, $225 DWI surcharges, 8 years loss of driving privileges, 2 years ignition interlock requirement, 12 hours IDRC, and 180 days in jail. (T1:14-1 to 14-13).

Defendant was ultimately given eight days of jail credit for being detained on warrants during the pendency of the matter. (T1:16-22 to 17-2).

Defendant was then advised of the penalties for driving while suspended during his period of DWI license suspension as well as the penalties for another conviction for DWI. (T1:17-8 to 18-9).

Thereafter, the matter was concluded. (T1:19-25).

Defendant was then taken into custody and transported to the Cumberland County Jail.

Current Defense counsel filed a Notice of Appeal to the Cumberland County Law Division on February 27, 2024. (DA4)

On February 29, 2024, current Defense counsel filed a Notice of Motion for Bail/Stay Pending Appeal to the Cumberland County Law Division. The Cumberland County Prosecutor's Office did not oppose this Motion.

On March 1, 2024, the Honorable Demetrica Todd, J.S.C. granted Defendant's Motion and stayed the Defendant's jail sentence pending his appeal to the Cumberland County Law Division. Defendant spent 23 days in jail between the date of his plea on February 7, 2024 and when he was released on a stay on March 1, 2024.

On Wednesday, September 18, 2024, Judge Todd, appearing in the Cumberland County Law Division – Criminal Part, presided over Defendant's trial de novo. (T2)

At the inception of the proceedings, the Law Division dispensed with what had been an attempt by the State to supplement the record in advance of the trial de novo, ruling that the supplementation would not be permitted. (T2:3-17 to 4-6).

Current Defense counsel then made argument to the Law Division in support of Defendant's trial de novo. (T2:4-17 to 18-22). In the argument, current Defense counsel argued that the Defendant's guilty plea from February 7, 2024 in the CS Regional Municipal Court should be vacated/withdrawn due to the fact that the

Defendant relied on the impermissible notion that he would be permitted to serve one jail sentence for two separate DWI convictions in two different municipalities. Current Defense counsel also advance argument to the Law Division that the factual basis in the within matter was insufficient as a matter of law.

The State then argued in opposition to the Defendant's legal arguments. (T2:18-24 to 23-10).

Thereafter, current Defense counsel and the State offered additional commentary and responses to the opposing party's arguments. (T2:23-12 to 27-7).

The Law Division thereafter issued its oral decision denying Defendant's trial de novo and imposing the same penalties that had been assessed by the Municipal Court. (T2:27-8 to 35-8).

Current Defense counsel formally requested a stay of Defendant's 180-day jail term, which was denied by the Criminal Part. (T2:35-9 to 51-5).

Most significantly, it is emphasized that the Law Division stated into the record during its decision regarding the Defendant's request for a stay that "Maybe that's a 50/50, not sure," regarding Defendant's chances of prevailing on appeal to the Appellate Division. (T2: 50-21 to 50-2).

Following the proceedings in the Cumberland County Law Division, an Order memorializing the Law Division's decision was executed. (DA5).

A Notice of Appeal of the foregoing decision was filed on Defendant's behalf on September 26, 2024. (DA6).

LEGAL ARGUMENT

POINT I

DEFENDANT SHOULD HAVE BEEN PERMITTED TO WITHDRAW HIS GUILTY PLEA ENTERED ON FEBRUARY 7, 2024 IN THE CS REGIONAL MUNICIPAL PURSUANT TO RULE 7:6-2 DUE TO THE FUNDAMENTIAL DEPRIVATION OF DUE PROCESS ACCORDED TO DEFENDANT WHEN THE MUNICIPAL COURT ACCEPTED A THIRD OFFENSE DWI GUILTY PLEA FROM DEFENDANT AFTER PREDECESSOR DEFENSE COUNSEL SET FORTH HIS "CONTEMPLATION" THAT DEFENDANT WOULD RECEIVE A CONCURRENT 180-DAY JAIL TERM FOR TWO SEPARATE AND DISTINCT DWI MATTERS, WHICH IS IMPROVIDENT AS A MATTER OF LAW. (T2:27-8 to 35-8, DA6)

New Jersey Court Rule 7:6-2(a)(1) states, in pertinent part, as follows:

> (1) Generally. A defendant may plead not guilty or guilty, but the court may, in its discretion, refuse to accept a guilty plea. Except as otherwise provided by Rule 7:6-2, 7:6-3, and 7:12-3, the court shall not, however, accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant, and in the court's discretion, of others, **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**. (Emphasis added.)

Subsection (b)(1) of the foregoing Court Rule, entitled Withdrawal of Plea, sets forth that "A Motion to withdraw a guilty plea shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice."

The manifest injustice in the within matter that warrants the withdrawal of the Defendant's guilty plea is the fundamental deprivation of due process that Defendant suffered when the Municipal Court accepted the plea even though it was clear that the Defendant did not understand the consequences of doing so. The record clearly shows that Defendant had been improperly advised that he would be able to serve a singular 180-day jail sentence for two separate DWI convictions. Furthermore, the manifest injustice standard is satisfied by the fact that predecessor Defense counsel rendered ineffective assistance of counsel by advising the Defendant that such an impermissible "two for one" sentencing arrangement could be effectuated.

In State v. Slater, 198 N.J. 145 (2009), the New Jersey Supreme Court set forth four factors to be considered in evaluating a Defendant's request to withdraw a guilty plea: (1) colorable claim of innocence; (2) nature and strength of reasons for withdrawal; (3) was the plea entered as part of a plea bargain; and (4) would the withdrawal of the plea result in unfair prejudice to the State or unfair advantage to the accused. Slater at 157-158.

While Defendant maintains that he has satisfied all of the foregoing factors in the within Letter Memorandum of Law, a Slater analysis is unnecessary when the specific legal challenge concerns whether an adequate factual basis was obtained to support the plea. State v. Tate, 220 N.J. 393, 404-405 (2015).

A defendant cannot enter a guilty plea in any New Jersey criminal or quasi-criminal court unless the duly appointed judge presiding over said plea proceeding is satisfied that the given defendant is doing so freely, voluntarily, and intelligently with full knowledge of the allowable range of penalties.

Here, predecessor Defense counsel specifically stated on the record during Defendant's plea proceeding the following:

> MR. MORRIS: **Because the contemplation is that with respect to both offenses, that there be a concurrent 180 days in the Millville matter.** (T:7-15 to 7-17, emphasis added).

There is no court rule, statute, or any caselaw that would permit another municipal court to sentence any defendant to a concurrent 180-day jail term based on a guilty plea to a third or subsequent offense DWI which entails two separate and distinct offenses. As a result, predecessor Defense counsel's 'contemplation" does not exist as a matter of law.

Some six pages later in the certified transcript, the Municipal Court finally addresses the foregoing impermissible concurrent sentencing by stating:

> THE COURT: …Obviously this is of significant magnitude in terms of the penalties and I do believe you are entering this plea voluntarily understanding your rights **and having worked out a scenario with your attorney with this Court and another court to achieve the best outcome that you - - that you can achieve.**" (T1:13-5 to 13-12, emphasis added).

However, and as stated with emphasis, the Municipal Court's "scenario" is wholly impermissible as a matter of New Jersey law.

It was the express duty of the Municipal Court below to afford due process to the Defendant at all stages of the within matter. Yet, it failed to advise the record, predecessor Defense counsel, the missing-in-action Municipal Prosecutor, and the Defendant himself that there is no "scenario" to provide for a concurrent 180-day jail term in two separate and distinct DWI matters in different courts altogether.

The plea in the within matter was not entered knowingly and voluntarily and with an understanding of the full consequences of the plea because this Defendant had been erroneously counseled that by entering the plea, he would be taking the first step toward serving one 180-day jail sentence for two separate DWI matters in two separate municipalities.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to establish ineffective assistance of counsel, the

Defendant must demonstrate that 1.) the attorney's performance was deficient and that the deficiencies were of such significance that the attorney was not functioning as counsel guaranteed by the Sixth Amendment; and 2.) the defendant must demonstrate by a preponderance of the evidence that but for the attorney's errors, the result of the prior proceeding would have been different. State v. Fritz, 105 N.J. 42 (1987).

Obviously, predecessor Defense counsel failed to provide Defendant with the constitutionally mandated effective assistance of counsel pursuant to Federal dictates, New Jersey dictates, and both Federal and State law regarding the constitutional predicate of Right to Counsel.

Although it would not be necessary to prevail on the foregoing unequivocal statement of law, Paragraph #3 of Defendant's Certification submitted to the Law Division (DA8) makes clear that Defendant would never have entered a guilty plea in the municipal court below unless he relied on the assertions by predecessor Defense counsel that he would achieve a single 180-day jail term for both of Defendant's separate and unrelated pending DWI matters.

POINT II

THE WITHIN DEFENDANT'S MOTION TO VACATE GUILTY PLEA SHOULD HAVE BEEN GRANTED, AND NECESSARILY HIS GUILTY PLEA VACATED, PREDICATED UPON THE

MUNICIPAL COURT'S FAILURE TO OBTAIN A SUFFICIENT FACTUAL BASIS FOR THE ENTRY OF DEFENDANT'S GUILTY PLEA ON FEBRUARY 7, 2024 IN ACCORDANCE WITH R. 7:6-2(A)(1). (T2:27-8 to 35-8, DA6)

Any examination of the sufficiency of a factual basis must begin with New Jersey Court Rule 7:6-2(a)(1), which states as follows:

> "Generally. A defendant may plead not guilty or guilty, but the court may, in its discretion, refuse to accept a guilty plea. Except as otherwise provided by Rules 7:6-2, 7:6-3, and 7:12-3, the court shall not, however, accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant and, in the court's discretion, of others, 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**." (emphasis added).

Rule 7:6-2(a)(1) mandates that the court not accept a guilty plea without first addressing the defendant personally. The court must determine by inquiry of the defendant and others that the plea is being made voluntarily, with a full understanding of the nature of the charge and the consequences of the plea. Moreover, the court must be satisfied that there exists a factual basis for the guilty plea. The defendant must admit to the violation of the law and all of its elements.

In State v. Barboza, 115 N.J. 415 (1989), the Supreme Court acknowledged that a defendant who pleads guilty waives important constitutional rights. This is why the Rules of Court have been designed to assure that a guilty plea be entered voluntarily, with a full understanding of the nature of the charges and the penal

consequences of the sentence to be imposed. The recitation of the factual basis for the plea allows the court to ascertain whether the defendant is actually guilty of the offense charged. A plea of guilty that is entered under circumstances that are not voluntary and knowing violates the due process clause of the Fourteenth Amendment. McCarthy v. U.S., 394 U.S. 459 (1969). It is for this reason that New Jersey law permits a defendant who has entered a plea of guilty without a sufficient factual basis to support it to vacate the plea through a post-conviction relief (PCR) application. Rodriguez v. Rosenblatt, 58 N.J. 281 (1971).

N.J.S.A. 39:4-50 defines someone driving under the influence as "a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic, or habit-producing drug, or operates a motor vehicle with a blood alcohol content of 0.08% or more by weight of alcohol in the defendant's blood."

Here, the Defendant's factual basis in support of the guilty plea is plainly insufficient, to say the least. Both predecessor Defense counsel and the Municipal Court conducted Defendant's allocution. Predecessor Defense counsel elicited the following from Defendant during his attempt at obtaining a factual basis:

> Q And, of course, you understand that drinking and driving, which would impair your ability to drive the vehicle, is prohibited in New Jersey, correct?
>
> A Yes. (T1: 9-21 to 9-24).

The foregoing portion of Defendant's allocution was insufficient as a matter of law. It merely set forth that Defendant was 'impaired after drinking and driving.' Drinking and driving is a legal act in New Jersey. And impairment is not an element of DWI as set forth at N.J.S.A. 39:4-50.

The second attempt at obtaining a factual basis below was conducted by the Municipal Court. Apparently, it was prompted by the Municipal Court's emphasis on admissions of alcohol consumption by Defendant:

> THE COURT: All right. Just a little more elaboration on that. What were you drinking?
>
> THE WITNESS: Beer.
>
> THE COURT: Okay. Just drinking beer. Do you remember how many you might have had?
>
> THE WITNESS: No. (T1:10-6 to 10-11).

The sum total that this exchange reveals is that Defendant consumed some amount of beer at some point relative to his date of offense.

Current Defense counsel argued the insufficiency of this factual basis during the trial de novo on September 18, 2024:

> MR. REISIG: So let's take that piece by piece. "And, of course, you understand that drinking and driving" -- well, drinking and driving is legal. There's nothing illegal about drinking and driving. People do it every day in New Jersey, because -- of course, they do, because there are many restaurants, taverns, bars, who have liquor licenses and serve food. I dare guess, - -dare -- dare say rather or dare suggest rather that there's probably such establishments

> around here, because this is a Superior Court and people have to eat lunch. Drinking and driving is legal.
>
> But he goes on, "which would impair your ability to drive the vehicle" -- well, impair is an interesting word, but it's not an element of DWI. The statute for drunk driving is N.J.S.A. 39:4-50. It's not that long a statute, although they keep adding to it. They added to it on December 1st, 2019 and now February 28th of 2024. At some point the Legislature, if they keep going in the trend they're going, is actually going to make drunk driving legal, but that's a different aside. They're clearly reducing the penalties. We know that from the two recent amendments.
>
> But here's the point. Impairment has nothing to do with New Jersey drunk driving. New Jersey drunk driving is based on a theory of being under the influence of either alcohol or drugs. So those are two theories of intoxication in the same statute, but the term is "under the influence." This predecessor defense counsel is using impairment as, I guess, a synonym for being under the influence. But that's dangerous, because the word impairment is not in the drunk driving statute. I don't know what the definition of impairment is in New Jersey because the Legislature has not defined it. And the Legislature has not defined it because it's not in the statute. (T2:15-5 to 16-15).

As stated, the factual basis in the within matter was insufficient as a matter of law, and as a result, the Defendant's guilty plea should be vacated/withdrawn.

CONCLUSION

Defendant should have been permitted to withdraw his DWI guilty plea given the fact that Defendant entered the plea without knowing the consequences of doing so. He had been advised by predecessor Defense counsel that he would

be eligible to serve a singular 180-day jail term for two separate DWI matters in two different municipalities. The record shows that the Municipal Court never advised Defendant that such an arrangement was legally impermissible. Indeed, the Municipal Court essentially reinforced the Defendant's incorrect understanding that he would be able to serve only one 180-day jail term for two different DWI convictions.

In addition to the foregoing, the factual basis obtained by the Municipal Court was plainly insufficient as a matter of law.

Based upon all of the foregoing, Defendant asks the Appellate Division to vacate the DWI guilty plea from February 7, 2024 and remand the matter to a conflict municipal court since the Municipal Court below already accepted his allocution to DWI.

Respectfully submitted,

Luke C. Kurzawa

Luke C. Kurzawa, Esq.

Cc: Robert Polis III, Cumberland County Assistant Prosecutor
Mr. Kendal Donelson

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-000260-24T2

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

		Municipal Appeal No. 3-24
STATE OF NEW JERSEY,	:	Summons No.:0613-E21-002627
	:	0613-E21-002628
Plaintiff-Respondent,	:	0613-E21-002629
	:	
	:	Quasi-Criminal Action
	:	
v.	:	
	:	
KENDAL DONELSON,	:	
	:	SAT BELOW:
Defendant-Appellant.	:	Hon. Demetrica Todd, J.S.C.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Jennifer Webb-McRae
Cumberland County Prosecutor

Robert A. Polis II
Attorney No. 008842004
Assistant Prosecutor
Of Counsel and on the Brief
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DEFENDANT IS NOT CONFINED

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COUNTER-STATEMENT OF FACTUAL HISTORY

On April 19, 2021, the Appellant-Defendant, Kendal Donelson (hereinafter referred to as "Defendant" or "the Defendant") was stopped by New Jersey State Police Trooper Spadafora at 11:33 P.M. (1T 12:7-17).[1] New Jersey State Police were called in response to an argument that the Defendant was having at another person's house in Lawrence Township. (1T 8:22-9:19). The Defendant had previously left the house, drove his car down the road and parked in a cemetery, and was found by Trooper Spadafora sitting in his car. (Db1, 1T 9:1-11). Prior to leaving the house, the Defendant was drinking beer. (Db1, 1T 9:4-6, 1T 10:6-11).

When Trooper Spadafora first made contact with the Defendant, the Defendant was found asleep in the car with the engine running and head lights on. (Db1). Trooper Spadafora observed there were open beer cans in the vehicle and he detected an odor of alcohol from the Defendant. (Db1). The Defendant was asked to perform field sobriety tests, which he failed. (Db2, 1T 10:15-11:7). The Defendant was arrested and brought to the State Police barracks to provide a breath sample for the Alcotest machine. The Defendant's breath sample was 0.12 BAL. The Defendant was issued ticket 0613-E21-002627 for operating under influence of

[1] The following abbreviations are used:
Db: Defendant's Brief;
Da: Defendant's Appendix;
1T: Transcript of Plea and Sentencing of February 7, 2024; and
2T: Transcript of De Novo Municipal Appeal in the Superior Court of September 18, 2024.

liquor or drugs under N.J.S.A. 39:4-50, ticket 0613-E21-002628 for reckless driving under N.J.S.A. 39:4-96, and ticket 0613-E21-002629 for having an open container under N.J.S.A. 39:4-51B. (Da1-Da3).

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On February 7, 2024, the Defendant plead guilty to the charge of Driving Under the Influence under N.J.S.A. 39:4-50. (Db2). At the time of the Defendant's guilty plea, he had previous convictions pursuant to N.J.S.A. 39:4-50 from 2019 and 2023. (1T 5:14-6:1). The Defendant also failed to appear for court on the matter in 2022 and again in 2023, which resulted in the forfeiture of bail. (2T 48:24-49:13).

The Defendant specifically admitted that he drank alcohol prior to driving the motor vehicle while at the house and before driving to the location where he parked his motor vehicle. (1T 8:22-9:9). The Defendant further acknowledged that the Alcotest reading was 0.12% BAL and above the legal limit. (1T 9:12-20).

Additionally, during the plea colloquy (1T 8:12-12:17), the Defendant admitted on the record that he was entering the plea voluntarily (1T 4:15-5:7), and he was made aware of the consequences of a guilty plea to these charges. The Municipal Court clearly stated to the Defendant that "this will be sentenced as a third [DUI]. So, you're looking at an eight-year suspension, two to four years with the interlock device, fines in the range of 1,300 to $1,400, 12 hours in the IDRC program and a mandatory 180 day jail sentence." (1T 5:21-25). When asked if he understood this, the defendant responded, "Yes." (1T 6:2).

The Municipal Court, finding that the Defendant was credible, entering the plea knowingly, and a sufficient factual basis was established, accepted the

Defendant's guilty plea. (1T 13:1-25). The Municipal Court thereafter sentenced the Defendant as a third time offender of N.J.S.A. 39:4-50 with a sentence of eight (8) year suspension of his driver's license, a two-year period of an interlock device, and a jail term of 180 days. (1T 14:1-13).

After sentencing, the Defendant moved to withdraw his guilty plea and filed a notice of appeal on or about February 27, 2024. (Da4). The Defendant further submitted a Certification on or about June 25, 2024, attesting to certain facts to warrant the withdrawal of the guilty plea (Da8-Da9).

The Defendant's de novo appeal was heard on September 18, 2024. (2T). After consideration of the pre-hearing briefs and oral arguments, Judge Demetrica Todd (hereinafter "Judge Todd") issued her ruling and made very specific findings regarding the Defendant's motion. Judge Todd took notice of the transcript indicating a voluntary plea that was knowing of the consequences. (2T 27:8-22). Judge Todd took notice of the part of the Defendant's plea where he was asked by Municipal Court whether he understood that he had a right to a trial and was waiving the same, which the Defendant answered in the affirmative. (2T 28:3-29:1).

Judge Todd concluded that all of the elements necessary for the guilty plea to a violation of N.J.S.A. 39:4-50 were present as there was operation of a motor vehicle, consumption of alcohol, prior to the operation, the failed field sobriety tests, jurisdiction, a 0.12 BAL reading, the waiver of trial, the waiving of the right to

remain silent, and the Municipal Court judge found the Defendant to be a credible witness. (2T 34:5-22). Judge Todd specifically observed that the question by plea counsel regarding the Defendant's ability to drive was impaired was answered "yes" by the Defendant. Judge Todd also noted that plea counsel's follow-up question was whether the Defendant was admitting to a violation of N.J.S.A. 39:4-50 and the Defendant answered "yes". (2T 30:24-31:12). Judge Todd specifically noted that plea counsel was addressing the applicable statute so that there was no confusion that the Defendant was pleading to an illegal act of driving while impaired, not just merely "drinking and driving". (2T 31:9-12). Judge Todd made this specific factual finding in an apparent response to Mr. Reisig's earlier statement during the motion that this part of the colloquy did not constitute an admission as "drinking and driving is legal". (See Db19, 2T 15:5-15).

Judge Todd further noted that the Defendant's factual allocution included the Municipal Court seeking clarification on what the Defendant drank prior to driving the car, to which the Defendant answered "beer". (2T 31:13-18). Judge Todd found that the Defendant confirmed field sobriety tests were performed and that he failed those tests. (2T 31:19-32:8). Judge Todd made a further factual finding that there was a discussion about a per se violation of N.J.S.A. 39:4-50 due to the Alcotest being 0.12 BAL. (2T 32:9-15).

Judge Todd, when making her ruling and in reviewing that specific portion of the transcript of the plea, noted that the Municipal Court did not reference anything else about a concurrent sentence or a contemplation of another plea agreement in a different municipality. (2T 29:20-24). Judge Todd also observed that, when the plea counsel referenced a contemplation of a concurrent sentence, the Municipal Court is simply stating that the statute allows for inpatient treatment up to ninety (90) days on the back end of the prison term. (2T 29:20-30:10). In Judge Todd's factual finding, she found that the discussion between the Municipal Court and plea counsel and the discussion plea counsel had with the Defendant was not clear or specific regarding a concurrent sentence. (2T 30:11-18). Judge Todd further noted that the Municipal Court stated that she found the Defendant "to be a credible witness standing before me and answering questions of your attorney." (2T 32:16-19). Judge Todd gave great weight to the Municipal Court's findings that the witness was credible and entered into an knowing and voluntary plea and understood the consequences of the same. (2T 32:20-33-11).

Judge Todd thereafter sentenced the Defendant to a jail term of 180 days, with credit for time already served and denied a stay of sentence. The Defendant subsequently filed the instant appeal.

LEGAL ARGUMENT

Standard of Review

An appellate court reviewing a motion to withdraw a guilty plea must affirm a trial court's decision unless there is "an abuse of discretion which renders the lower court's decision clearly erroneous." State v. Simon, 161 N.J. 416, 444 (1999). A denial of a motion to vacate a plea is "clearly erroneous" if the evidence presented on the motion, considered in light of the controlling legal standards, warrants a grant of that relief. See State v. Slater, 198 N.J. 145, 164 (2009).

Additionally, the review of a de novo decision in the Law Division is limited. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005). The Appellate Division does not independently assess the evidence as if it were the court of first instance. State v. Locurto, 157 N.J. 463, 471 (1999). Rather, the Appellate Division focuses its review 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) (alteration in original) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). Deference is especially appropriate when two separate courts have examined the facts and reached the same conclusion. Under the two-court rule, the Appellate Division does not ordinarily alter concurrent findings of fact and credibility determinations made by two prior courts absent a very obvious and exceptional showing of error. Locurto, 157 N.J. at 474 (citation omitted).

The trial court's legal rulings, however, are considered de novo. Robertson, 228 N.J. at 148. A "trial court's interpretation of the law and the consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

In the present matter, the Honorable Demetrica Todd, J.S.C., heard the Defendant's motion to withdraw his plea of guilt to driving while impaired under N.J.S.A. 39:4-50. The Trial Court made a specific finding that the Defendant's plea before the municipal court was done knowingly and voluntarily. This was subsequent to the Municipal Court making findings of fact that the Defendant's plea was knowing and voluntarily done and providing a knowing factual allocution that he was drinking alcohol, operated a motor vehicle after consuming alcohol, and the Alcotest readings were accurate with a result of 0.12 BAL. The State submits that, on appeal, the Defendant does not present any sufficient evidence demonstrating that the Defendant did not in fact operate a motor vehicle while intoxicated nor that he did not understand the legal consequences of the guilty plea to disturb the findings of the Municipal Court and the Superior Court.

POINT I:

THE DEFENDANT IS NOT ENTITLED TO A WITHDRAWAL OF HIS GUILTY PLEA BECAUSE THE PLEA WAS MADE KNOWINGLY AND VOLUNTARILY AND SET FORTH A FACTUAL BASIS FOR THE PLEA NOR DOES THE DEFENDANT DEMONSTRATE A MANIFEST INJUSTICE BECAUSE THE DEFENDANT DOES NOT PROFFER A COLORABLE CLAIM OF INNOCENCE.

The Appellate Court is presented with the issue whether the Municipal Court and Superior Court erred in finding that the Defendant's plea of guilt to violating N.J.S.A. 39:4-50 was done knowingly, voluntarily, and that there was a sufficient factual basis for the plea. Rule 7:6-2(a)(1) states in relevant part:

> [A] court shall not accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant and, in the court's discretion, of others, 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.

The factual basis for a guilty plea can be established by defendant's explicit admission of guilt or by a defendant's acknowledgement of the underlying facts constituting the essential elements of the crime. State v. Gregory, 220 N.J. 413, 419, (2015) (citing State v. Campfield, 213 N.J. 218, 231 (2013)). Such procedural safeguards ensure that courts can be "satisfied from the lips of the defendant that he committed the acts which constitute the crime." Slater, supra, 198 N.J. at 156.

In the instant matter, the Defendant clearly was made aware of the consequences of pleading guilty and he did so knowingly. The Defendant further admitting to consuming alcohol, operating a motor vehicle after consuming alcohol,

failing field sobriety tests, and providing a breath sample that produced a 0.12 BAL reading clearly established a factual basis for the plea. Accordingly, there was no error by either the Municipal Court or Superior Court in accepting the Defendant's guilty plea.

A. The Defendant's Plea Was Made Knowingly and Voluntarily and Establishes a Factual Basis For a Conviction Under N.J.S.A. 39:4-50.

The Defendant's guilty plea to violating N.J.S.A. 39:4-50 was valid because the Defendant provided a sufficient factual basis during the colloquy (1T 8:12-12:17), he admitted on the record that he was entering the plea voluntarily (1T 4:15-5:7), and he was made aware of the consequences of a guilty plea to these charges. The Defendant now contests that the elements pertaining to the factual basis that he understood the nature of charge and the consequences of the plea were insufficient and is the subject of the present appeal.

The Municipal Court made a direct point to ask the Defendant of his awareness of the consequences of the plea and clearly stated on the record, "this will be sentenced as a third [DUI]. So, you're looking at an eight-year suspension, two to four years with the interlock device, fines in the range of 1,300 to $1,400, 12 hours in the IDRC program and a mandatory 180 day jail sentence." (1T 5:21 to 5:25). When asked if he understood this, the defendant responded, "Yes." (1T 6:2).

Judge Todd, after consideration and review of the oral arguments and record of the plea and sentencing, found that the Defendant did make a knowing plea and

represented that it was knowing and voluntary. Judge Todd did not find a factual basis in the transcript to conclude that the Defendant was not aware of the consequences of the plea.

While the Defendant claims that he only made a guilty plea because he expected to be sentenced concurrently with his other pending violation under N.J.S.A. 39:4-50 in the Municipal Court of the City of Millville, (Da8-Da9), this assertion relies on the transcript containing vague language of "contemplation" during the proceedings before the Municipal Court and additionally vague statements by the Municipal Court when noting the Defendant "having worked out a scenario with your attorney with this Court and another Court to achieve the best outcome that you - - that you can achieve." (1T 13:5-23). Judge Todd, when making her factual findings and rulings, determined that the plea counsel's usage of the term "contemplation" was not clear of any definitive consequences or arrangements or promises or plea agreements. Judge Todd further found that the Municipal Court's comments regarding "having worked out a scenario" followed the parties discussion about reducing the sentence by enrolling in an inpatient treatment facility and pertained to the same. Accordingly, the fails to demonstrate that the plea was unknowing.

While the Defendant emphasizes that a concurrent sentence for a third and fourth conviction under N.J.S.A. 39:4-50 is a legal impossibility and, thus, the plea

could not have been done knowingly, the Defendant has not attested to cognizable facts that demonstrate a colorable claim of innocence. The more likely scenario is that, given the Defendant's guilt due to the 0.12 BAL reading being a per se violation of N.J.S.A. 39:4-50 and a likely conviction in a bench trial before the Municipal Court, plea counsel reasonably saw that the Defendant's best path forward was to attempt a "Hail Mary" effort to negotiate on sentencing in a different municipality for a guilty plea and to utilize the statutory right to lessen the duration of the sentence through enrollment of an in-patient treatment facility. The mere consequence that plea counsel's strategic gambit was unfavorable to the Defendant does not equate to the Defendant's guilty plea being unknowing and unvoluntary.

Furthermore, given that the plea counsel referred to a possible future plea deal in a different municipality in the terms of "contemplation" and not that the subject guilty plea was conditioned on the same, the Municipal Court did not have an obligation to comment on the outcome of the Defendant's as-yet-unsentenced offense in another municipal court under R. 7:6-2(a)(1). There was never language spoken by the court indicating that defense counsel's concurrent-sentence plan would work, nor did the defendant or his attorney make any implication that the plea was contingent on this outcome. It was only ever communicated that this was something the attorney was trying to effectuate and, since the other offense had not yet been sentenced, this court could not speculate on what or would not or could or

could not happen at that later proceeding in a different municipality. Indeed, plea counsel stated that, "Because the contemplation is that with respect to both offenses, that there be a concurrent 180 days in the Millville matter." (1T 7:15-17, emphasis added). There is no Rule of Court that requires the court to sua sponte put an end to any contemplation on the part of attorneys or their clients. Requiring the same would require a municipal court judge to improperly usurp the role of defense counsel and give prospective legal advice to defendants. The court's role under R. 7:6-2 is simply ensuring the defendant is making a plea knowingly and voluntary and there is a factual basis; it is not the role of the court to give legal advice.

The Municipal Court and Judge Todd clearly found that the Defendant's plea was made knowingly and voluntarily and that there was a factual basis for the same. Clearly, the Defendant entered the guilty plea knowingly and voluntarily. Two courts, the Municipal Court and the Superior Court, were clearly satisfied that the Defendant knew the consequences of pleading guilty and that it was done knowingly. When Judge Todd reviewed the transcript of the plea, Judge Todd made a clear factual finding that the record below was not indicative of the instant guilty plea being made because it was definitely going to be concurrent with a guilty plea in another municipality. While plea counsel used the term "contemplation", there was nothing in the record indicative that the Defendant's instant guilty plea was made solely on the premise that he would in fact be a concurrent sentence. Accordingly,

deference should be given to the factual findings of Judge Todd and the Municipal Court in finding that the Defendant's plea was knowingly made and not done for any other promises or conditions.

Furthermore, the Defendant clearly admitted to relevant facts on the record that demonstrated his intoxication and operation of a motor vehicle. The Defendant specifically admitted that he drank alcohol prior to driving the motor vehicle while at the house and before driving to the location where he parked his motor vehicle. (1T 8:22-9:9). The Defendant further acknowledged that the Alcotest reading was 0.12% BAL and above the legal limit. (1T 9:12-20). Judge Todd also found the plea contained the factual predicate for operation, consumption, and the breathalyzer results. (2T 34:5-22). Judge Todd also found that the Defendant's acknowledgment to impairment was in a specific question referencing N.J.S.A. 39:4-50 so there was a specific acknowledgment to an illegal act of driving while impaired. (2T 30:24-31:12). Judge Todd was further satisfied that the plea colloquy confirmed the Defendant drank beer prior to driving the car. (2T 31:13-18). Judge Todd also found the Defendant confirmed that he failed field sobriety tests (2T 31:19-32:8) and the Alcotest result being 0.12 BAL. (2T 32:9-15).

Taken together, both the Municipal Court and Judge Todd made specific factual findings that determined that the Defendant's original guilty plea set forth a complete and knowingly factual basis for a violation of N.J.S.A. 39:4-50. The

Defendant, while raising innuendos of insufficiency regarding his guilty plea, fails to present material facts that demonstrate that Judge Todd's findings constituted "an abuse of discretion which renders the lower court's decision clearly erroneous". State v. Simon, 161 N.J. 416, 444 (1999). Based on both the records before the Municipal Court and Judge Todd, Judge Todd had ample factual justification to find that the Defendant's guilty plea provided for the Defendant's operation of the motor vehicle, consumed alcohol before said operation, there was a 0.12 BAL reading within the acceptable tolerance, failed field sobriety tests, and necessary jurisdiction. (2T 34:5-22). Accordingly, the Defendant fails to establish a claim for relief as the plea was in compliance with the applicable Rules of Court.

B. The Defendant Fails to Demonstrate a Colorable Claim of Innocence to Warrant a Withdraw of the Guilty Plea.

Because the Defendant fails to demonstrate that Judge Todd's determination that the Defendant entered constituted an abuse of discretion that renders her opinion as clearly erroneous, the Defendant has to demonstrate that he suffers a manifest injustice if he is not permitted to withdraw from a guilty plea.

The New Jersey Supreme Court, in State v. Slater, 198 N.J. 145 (2009), established a four-pronged test when determining whether a defendant could withdraw a guilty plea. In evaluating a motion to withdraw a guilty plea, the trial court must consider (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of the defendant's reasons for withdrawal; (3)

the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the defendant. These factors apply to motions filed either before or after sentencing, but pre-sentence motions are governed by "interest of justice" standard, while post-sentence motions are subject to the "manifest injustice" standard. Slater, supra, 157-158. Here, given the timing of defendant's attempt to withdraw his plea, the Slater factors are evaluated under the "manifest injustice" standard. Additionally, no single Slater factor is dispositive; "if one is missing, that does not automatically disqualify or dictate relief." Slater, supra, 198 N.J. at 162; see also State v. Mustaro, 411 N.J. Super. 91, 100 (App. Div. 2009).

The State contends that the overwhelming factor present in the instant matter is that the Defendant fails to present a colorable claim of innocence to warrant the withdrawal of his guilty plea. The Defendant's plea allocution confirmed specific facts set forth in the Narrative indicating the Defendant's involvement in a domestic disturbance, police being called as a result of the disturbance, his consumption of alcohol prior to the operation of the motor vehicle, the operation of the motor vehicle, the police locating the Defendant after being called, the inability to perform field sobriety tests, and a BAL reading of 0.12, which is a per se violation of N.J.S.A. 39:4-50. To contravene these basic facts, the Defendant attempts to contend that the State cannot demonstrate the Defendant's guilt because the factual allocution only

had an admission of the Defendant being "impaired after drinking and driving" and that drinking and driving is a legal act while ignoring all other aspects of the record. (Db17-Db19). However, the findings of fact made by the Municipal Court and Judge Todd clearly discern the factual predicate of the plea.,

Moreover, the Defendant further fails to proffer any tangible or certified facts that would demonstrate a colorable claim of innocence and refute the factual allocution made on the record and demonstrate that the determination of Judge Todd and the Municipal Court was clearly erroneous. The Defendant's certification to withdraw the guilty plea relies on bald assertions that he did not know the concurrent 180-day jail sentences were impermissible and he would not have entered a guilty plea if he had known the same and that he did not have the opportunity to review video discovery. (Da8-Da9).[2] What the Defendant has failed to attest is whether there would be any exculpatory evidence on the video discovery that would be pertinent to withdrawing his guilty plea. As the Defendant was the subject on the

[2] While not presently stated in the Defendant's Appellate Brief or on the record during the de novo hearing, the Defendant's initial brief submitted to Judge Todd contended that video discovery was necessary for the State to obtain a conviction. However, there is no evidence that the State has lost or destroyed videotape discovery. If there is an allegation of a due process violation, the Defendant has to demonstrate that there was bad faith by the prosecution, the lost evidence is sufficiently material, and the Defendant was prejudiced by the loss of the same. See State v. Mustaro, 411 N.J. Super. 91 (App. Div. 2009). Additionally, in Mustaro, supra, where a defendant was attempting to withdraw a guilty plea because police destroyed in-car video evidence of his arrest, the Appellate Division found that the evidence before the court was insufficient that in only included the defendant's speculation that the recording had potentially exculpatory value and was utterly devoid of any suggestion that the police had acted in bad faith. Furthermore, the exculpatory nature of video evidence is limited when there was a 0.12 BAL reading as a defendant cannot use video evidence to assert non-impairment when there is a breathalyzer or Alcotest reading. See State v. Allex, 257 N.J. Super. 16, 17 (App. Div. 1992), holding that the decision in State v. Ghegan, 213 N.J. Super. 383 (App. Div. 1986) allowing flawless psycho-physical tests to rebut 0.25 BAL reading was overruled by implication in State v. Tischio, 107 N.J. 504 (1987).

video and the individual who could attest to the facts of the evening, the Defendant should be able to articulate what would be evidentiary relevant. However, no such proffer was ever made to justify the withdrawal of the guilty plea.

Furthermore, the Defendant has failed to proffer any information that would contradict the 0.12 BAL Alcotest reading, that the reading was unreliable, or that the level of intoxication. The Defendant possessed as part of his paper discovery the CAD and Narrative that would provide the timeline between when the call for police was made due to the domestic disturbance and when he was found by police and when the Defendant provided a breath sample for the Alcotest machine. The Defendant cannot even proffer an extrapolation defense that would be indicative that his BAL was under 0.08 when operating the motor vehicle. In order to withdraw from a guilty plea after sentencing, the Defendant cannot simply make bald assertions regarding his innocence or possible defenses, but must point to articulable facts that demonstrate a colorable claim of innocence.

Moreover, the State further contends that the mere fact that Defendant was found sitting in the car with engine running and headlights out and immediately failed field sobriety tests and provided a 0.12 BAL sample within a reasonable time is sufficient to establish the Defendant's guilt. The New Jersey Supreme Court has interpreted "operation" liberally in the context of a finding of guilt under N.J.S.A. 39:4-50(a). See State v. Tischio, 107 N.J. 504, 513-14(1987); State v. Mulcahy, 107

N.J. 467, 478 (1987); State v. Wright, 107 N.J. 488, 494-503 (1987); State v. Sweeney, 40 N.J. 359, 360-61, (1963). Although a violation of N.J.S.A. 39:4-50(a) is commonly referred to as a DWI violation ("driving while intoxicated"), the statute actually makes no mention of "driving" as a fact that must be proven in order to convict an individual of this offense. The statute instead prohibits "operat[ion]" of a vehicle while under the influence. "Operation" has been interpreted broadly and encompasses more than just "driving" a vehicle. Operation, for example, includes sitting or sleeping in a vehicle, with the engine running, even when the vehicle isn't in motion. Indeed, the Supreme Court has recognized that "operation" may be found from evidence that would reveal "a defendant's intent to operate a motor vehicle." Tischio, 107 N.J. at 513. Thus, an intoxicated person could be found guilty of violating N.J.S.A. 39:4-50(a), when running the engine without moving the vehicle, as here, or by moving or attempting to move the vehicle without running its engine, see State v. Stiene, 203 N.J. Super. 275, 279 (App. Div. 1985). The Supreme Court has held that an individual who staggers out of a tavern but is arrested before he is able to insert a key into his vehicle's ignition may be convicted of N.J.S.A. 39:4-50(a). Mulcahy, 107 N.J. at 470, 483.

In short, operation not only includes the aforementioned acts or behaviors, but may also be established "by observation of the defendant in or out of the vehicle under circumstances indicating that the defendant had been driving while

intoxicated." State v. Ebert, 377 N.J. Super. 1, 11(App. Div. 2005)(sustaining a DWI conviction where the defendant was not in her vehicle but was looking for her car in a parking lot in an intoxicated state).

In State v. Thompson, 462 N.J. Super. 370 (App. Div. 2020), the police were called to a 7-Eleven in response to a suspect sleeping in his car in the parking lot. Id., at 373. The police observed that the engine was still running and there were prescription medication bottles on the front seat. Id. The suspect said he was asleep for approximately a half-hour and admitted to consuming a couple of drinks. Id. Although there was no Alcotest reading as the suspect refused to provide a breath sample, the Defendant failed the field sobriety tests. The trial court found there was ample evidence of the suspect's intoxication for a violation of 39:4-50(a). The Appellate Division upheld the trial court and concluded that there was no doubt that an intoxicated and sleeping defendant behind the wheel of a motor vehicle with the engine running is operating the vehicle within the meaning of N.J.S.A. 39:4-50(a), even if the vehicle was not observed in motion; it is "the possibility of motion" that is relevant. Id., citing Stiene, supra, 203 N.J. Super. at 279.

As the Supreme Court held in Tischio "[w]e are thus strongly impelled to construe [the statute] flexibly, pragmatically and purposefully to effectuate the legislative goals of the drunk-driving laws," 107 N.J. at 514, which, of course, are to rid our roadways of the scourge of drunk drivers, Id., at 512. See also Mulcahy,

107 N.J. at 479, (recognizing, in quoting State v. Grant, 196 N.J. Super. 470, 476, (App. Div. 1984), that the drunk driver remains "one of the chief instrumentalities of human catastrophe"). As the New Jersey Superior Courts have broadly defined "operation" to consist of instances of an intoxicated individual sitting in a motor vehicle with the engine running, the well-established legislative objectives of N.J.S.A. 39:4-50(a) would clearly be frustrated if the Defendant was found to have a colorable claim of innocence by asserting a defense to operation. [3]

In the present matter, the Defendant admitted that he was found sitting in his motor vehicle after New Jersey State Police were called following a domestic disturbance. (1T 8:22-T9:9). The Defendant admitted that he drank alcohol prior to driving the motor vehicle. Additionally, the Defendant could not adequately perform field sobriety tests and had a BAL of 0.12%. (1T 10:16-T11:7). Moreover, like State v. Thompson, supra, it was acknowledged on the record that the initial State Trooper's interaction with the Defendant was on April 19, 2021 and the vehicle was still running with the headlights on. (1T 12:7-17).

The Defendant's guilt is clearly further demonstrated by the fact the Defendant was intoxicated and the engine was running with the headlights on at the

[3] During oral arguments, Defendant attempted to emphasize the question whether the Defendant had the intent to operate the motor vehicle by citing State v. Daly, 64 N.J. 122 (1973). (2T 26:15-24). However, Daly, supra, appears inconsistent with Mulcahy, supra, and Tischio, supra, and is highly distinguishable as the defendant arrived at the tavern sober and, after the tavern closed, slept in the car with only the heater on and did not have headlights on. Here, the Defendant had both the engine and headlights running and drove the car to a cemetery. The Defendant's motor vehicle in the instant was fully ready to be operational as in Thompson, supra.

time the State Police interacted with the Defendant. The Defendant has acknowledged on the record and gave a factual allocution that clearly establishes the Defendant's guilt under N.J.S.A. 39:4-50(a). As noted in Point I(A) above, when revieing the matter de novo at the Superior Court, Judge Todd considered the allocution by the Defendant and clearly found that all of the elements of N.J.S.A. 39:4-50 were satisfied. The Defendant has not made a sufficient factual proffer to demonstrate that Judge Todd's findings constituted "an abuse of discretion which renders the lower court's decision clearly erroneous" to otherwise permit a withdrawal of the guilty plea. State v. Simon, 161 N.J. 416, 444 (1999). Based on both the records before the Municipal Court and Judge Todd, Judge Todd had ample factual justification to find that the Defendant's guilty plea provided for the Defendant's operation of the motor vehicle, consumed alcohol before said operation, there was a 0.12 BAL reading within the acceptable tolerance, failed field sobriety tests, and necessary jurisdiction. (2T 34:5-22).

Accordingly, since the Defendant fails to articulate a tangible and colorable claim of innocence, the Municipal Court did not err in accepting the Defendant's guilty plea nor did Judge Todd err in denying the Defendant's appeal and affirming the guilty plea.

CONCLUSION

For the reasons stated above, the Appellate Division should uphold the ruling of the Superior Court's de novo review denying the Defendant's Application to Withdraw a Guilty Plea and affirm the Defendant's conviction for a violation of N.J.S.A. 39:4-50.

Respectfully submitted,

By: *Robert A. Polis II /s/*
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DATED: May 12, 2025.