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	: **SUPERIOR COURT OF NEW JERSEY**
STATE OF NEW JERSEY,	: **APPELLATE DIVISION**
	:
	: Docket No. A-000274-23 Team 02
Plaintiff,	:
	: On Appeal From:
	: Superior Court, Law Division, Monmouth
v.	: County
	: Docket No. Below: MA 23-004
	:
VICTOR BAVEROV,	: Sat Below:
	: Hon. Michael A. Guadagno, J.S.C. (r/r)
	: Hon. Jill G. O'Malley, P.J.Cr.
Defendant.	:
	: **DEFENDANT'S BRIEF**

TO: Honorable Judges
Superior Court of New Jersey, Appellate Division
25 Market Street, Box 971
Trenton, New Jersey 08625-0971

–

TO: Raymond S. Santiago, Monmouth County Prosecutor
Attention: Monica do Oteiro, Assistant Prosecutor
132 Jerseyville Avenue
Freehold, New Jersey 07728

–

Date submitted: May 13, 2024
Date returnable: To be set.
On the Brief: John Menzel, J.D.

CONTENTS

Judgments, Orders, and Rulings:

Authorities:

Cases:

Statutes:

Court Rules:

PRELIMINARY STATEMENT

Defendant Victor Baverov was charged with operating a motor vehicle while under the influence of alcohol ["DWI"]. He wanted to raise a defense, but trial counsel denigrated, undermined, and dismissed it without any consideration, investigation, or preparation. Both the municipal court and Law Division judges followed defense counsel's lead and convicted Baverov as a third or subsequent offender. Baverov now serves a jail sentence and faces other significant penalties, having been denied an opportunity to raise a defense at trial.

PROCEDURAL HISTORY

On November 19, 2021, police charged Baverov on complaints 1352-E21-001944, E21-001945, and E21-001946 (*see* Da1a-3a[1]) in Upper Freehold Township Municipal Court with DWI, unsafe lane change, and reckless driving in violation of *N.J.S.A.* 39:4-50, *N.J.S.A.* 39:4-88(a), and *N.J.S.A.* 39:4-96, respectively. By letter dated December 7, 2021, Robert Ramsey appeared as defense counsel and requested discovery. Da4a.

After court appearances on April 7 (1T), June 16 (2T), August 4 (3T), and September 15 (4T), trial commenced before the Hon. Paul H, Capotorto, J.M.C., on November 17, 2022, with testimony from Trooper Thomas Gram (5T4-12/42-

25[2]), submission of a video flash drive (*J-1*, 5T3-11/4-2), and three exhibits: (*S-1*) Miranda warning, Da5a, 5T16-1/15; (*S-2*) Attorney General's Standard Statement, Da6a, 5T16-15/17-2; and (*S-3*) Drinking Driver/Operator Questionnaire, Da7a, 5T18-12/21. When the State moved to adjourn to produce the Alcotest witness, the defense objected, and the State "submit[ted] on the observations." 5T43-5/44-5.

Defense counsel proffered to have Baverov "testify not substantively [to] pursue a line of defense which...is improper and inadmissible...," citing *State v. Inglis*, 304 *N.J.Super.* 207 (Law Div. 1997). 5T44-12/23. While the court received Baverov's testimony (5T48-4/52-2), it ultimately disregarded it, noting that defense counsel "was adamant that that was not part of the case" (6T5-9/13).

On January 26, 2023, Judge Capotorto held, "[b]ased upon this Court's review of the body cam and the flash drive and the testimony of the trooper it is clear beyond a reasonable doubt that the defendant was under the influence of alcohol. 6T6-8/11. Judge Capotorto dismissed the remaining charges. 6T6-14/19, 7-12/13. He sentenced Baverov to pay a $1,007 fine, $33 court costs, and $350 in various assessments, to forfeit his driving privilege for eight years with an

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[1] Citation to defendant's appendix is made as suggested by *R.*2:6-8 -- *e.g.*, page one of the appendix is cited as "Da1a."

[2] Citations to transcripts are made by page and line in the format as suggested by *R.*2:6-8 -- *e.g.*, "5T3-11/4-2" would refer to transcript volume 5, from page 3, line 11 to page 4, line 2, and "5T4-12/25" would refer to transcript volume 5, from page 4, line 12 to line 25. *See* Table of Contents for transcript designations.

interlock restriction for four years thereafter, and to serve a 180-day jail term. 6T7-8/12. Execution of sentence was stayed pending appeal to Superior Court, Law Division, Monmouth County, subject to continued installation of an interlock. 6T9-13/17, 11-23/12-3. Baverov appealed. *See* Da8a-9a.

Argument took place before the Hon. Michael A. Guadagno, J.A.D. (retired, on recall) on August 14, 2023. 7T3-18/13-2. By Order entered on August 30, 2023, Judge Guadagno found Baverov guilty of DWI, sentenced him as he was in the municipal court, and vacated the stay. Da10a; *see* Da11a-19a.

Baverov timely filed a Notice of Appeal (Da20a-22a) and Criminal Case Information Statement (Da23a-26a) with this Court. When Judge Guadagno entered an Order for Bench Warrant and Bail Forfeiture (Da27a), Baverov moved this Court for either a stay of execution of sentence pending further appeal or vacation of his sentence and a remand to Law Division to permit allocution. *See* Da28a-29a. This Court denied the stay but remanded the matter for resentencing before a different judge. Da30a.

On December 7, 2023, the parties appeared before the Hon. Jill Grace O'Malley, P.J.Cr., who denied Baverov's stay request and sentenced him as before. 8T21-21/22-3. Baverov was jailed that day.

FACTS

On November 19, 2021, Trooper Thomas Gram, a four-and-one-half year veteran of the New Jersey State Police, was dispatched to a motor vehicle accident at Emleys Hill and Jonathan Holmes Roads in Upper Freehold Township, where he met Defendant Victor Baverov. 5T4-15/5-25. The trooper was dispatched at 10:48 p.m. and arrived on scene at 11:15 p.m. 5T23-15/25. A white Toyota was against a tree about 20 feet off of the roadway. 5T6-2/7. It had heavy disabling damage. 5T24-23/25-17. This was a serious accident. 5T27-5/7.

Baverov was the only person on the rural scene before the arrival of other troopers and emergency medical personnel. 5T6-12/22. During conversation, Baverov said he was driving too quickly and went into the tree after drinking five or six beers a few hours ago at the Happy Apple just down the street. 5T6-23/7-17. The trooper smelled a strong odor of an alcoholic beverage on Baverov's breath, saw that his eyes were bloodshot, believed his speech to be slurred, and determined to administer horizontal gaze nystagmus, walk-and-turn, and one-leg-stand tests. 5T7-20/8-22. After walk-and-turn and one-leg-stand tests (5T10-20/12-11, 34-22/36-5), Baverov was arrested, handcuffed, searched, placed in the rear of a troop car, and Mirandized (5T14-1/2).

At the station, Baverov was placed in a cell. 5T32-14. The trooper Mirandized Baverov again and read him a standard statement. 5T15-7/17-6; *see*

Da5a-6a. Baverov agreed to submit breath samples. 5T17-7/11. The trooper completed his investigation (5T20-15/17), questioning Baverov, who admitted drinking six beers at the Happy Apple between 5:00 p.m. and 10:00 p.m. with pork chops around 7:30 p.m. 5T19-1/25; *see* Da7a.

LEGAL ARGUMENT

I.
BECAUSE DEFENSE COUNSEL NOT ONLY FAILED TO PRESENT BUT ALSO UNDERMINED HIS CLIENT'S DEFENSE, THIS COURT SHOULD VACATE THE CONVICTION AND REMAND FOR A NEW TRIAL
(Da13a, 16a-18a)

Baverov sought to introduce "a psychiatric defense" of "persecutory paranoia...." 5T48-8/13. According to Baverov, "I've been to a few psychiatrists. They've given me multiple diagnoses, and I for a fact know I suffer from amnesia, and it occurs under a few beers, one beer, no beer. It's an abnormality that I have no control over." 5T49-10/14. Rather than develop or present this defense, trial counsel for Baverov undermined it, saying,

> Your Honor doesn't have to put him under oath because...it has nothing to do with the case, so to speak, but he wants to pursue a line of defense which [in] my understanding of the law is improper and inadmissible. I'm certain the prosecutor would object, and I'm a hundred percent positive Your Honor would sustain the objection.
>
> [5T44-12/19.]

Citing *State v. Inglis, supra*, trial counsel stated that, "if you're going to raise a psychiatric defense in a drunk driving case, that evidence is inadmissible and

should not be heard by the Court." 5T45-17/20; *see* 5T46-5/18. This colloquy followed:

> MR. RAMSEY: **** I've made a determination based on my understanding of the law that Your Honor would not admit it, the prosecutor would object, it's improper testimony and just can't be part of the case based upon the case law.
>
> If I thought it was going to help my client and be admissible, I'd take a different position, and my client disagrees with me on that, and he wanted Your Honor to know about that, not as substantive evidence, only just for the purpose of building a record, and *I would ask Your Honor not to consider it as evidence.* Is that okay with the Court?
>
> THE COURT: That's fine.
>
> MR. RAMSEY: All right. Let me stand up.
>
> THE COURT: But I can tell you, Mr. Ramsey, this is a first.
>
> MR. RAMSEY: I'm sorry, Your Honor?
>
> THE COURT: This is a first.
>
> MR. RAMSEY: Well, I hope it's the last for Your Honor, but I know my client wanted to make a statement about this, so.
>
> **** And, Mr. Baverov, you have a psychiatric defense that you wanted the Court to listen to, is that correct?
>
> MR. BAVEROV: Yes.
>
> [5T46-8/47-12 (emphasis added).]

Before the municipal court swore Baverov in, trial counsel stated, "I don't want the Court to consider this as evidence because it's not." 5T47-24/25. During Baverov's testimony, trial counsel said, "I don't want the Court to consider this evidence at all." 5T49-5/6. After the testimony concluded, trial counsel said,

"Judge, I just don't think that this is the type of evidence that would be admissible in a New Jersey courtroom at this point." 5T52-8/11.

Trial counsel relied heavily on the Law Division case of *State v. Inglis, id.* *See* 5T44-20/45-21, 52-7/11. *Inglis* holds "that the insanity defense is unavailable to a defendant being prosecuted under the provisions of *N.J.S.A.* 39:4-50." *Id.* at 209. In support of this conclusion, as defense counsel at trial stated, "Defenses based on a particular driver's subjective state of intoxication had a high potential of being pretextual, thus prolonging trials and obscuring the truth." *Id.* at 211. "As with involuntary intoxication, entrapment, and duress, the insanity defense has a high potential for serving as an instrument of pretext. When evaluating whether a particular defense has a high potential for pretext, the focus should be on the ease with which a defendant can allege a frivolous defense." *Id.* at 212; *see State v, Hammond*, 118 *N.J.* 306 (1990) (involuntary intoxication precluded as "pretextual" as a matter of law where trial court weighed and rejected the defense on factual evidence), and *State v. Fogarty*, 128 *N.J.* 59 (1992) (a divided Supreme Court precludes quasi-entrapment and duress defenses as a matter of law).

In the context of post-conviction relief ["PCR"], Justice Verniero, in his concurrence with the unanimous New Jersey Supreme Court opinion in *State v. Rue*, 175 *N.J.* 1 (2002), spoke of "the Hobson's choice faced by a defense lawyer who honestly views a client's PCR petition to be so lacking in merit that it

constitutes the functional equivalent of a fraud on the court." *Id.* at 20. This Hobson's choice arose from an apparent conflict between the *Rules of Professional Conduct* and *New Jersey Court Rules*:

> As a practical matter, the Court Rules are the equivalent of the New Jersey Rules of Professional Conduct in terms of the weight of their authority. In other words, neither is entitled to primacy as a matter of law or practice, and they may from time to time require harmonization.
>
> [*Id.* at 14.]

R.P.C. 3.1 enunciates one general standard of ethical behavior for lawyers:

> A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

In the PCR context, *R.* 3:22-6(c) set forth another ethical rule for assigned counsel. This rule provides, in relevant part:

> **** Assigned counsel may not seek to withdraw on the ground of lack of merit of the petition. Counsel should advance all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference....

Rule 3:22–6, and not *R.P.C.* 3.1, "governs the performance of PCR counsel and that if the standard of conduct imposed by that rule is violated, a new PCR proceeding will be required." *State v. Rue, supra* at 4. "It goes without saying that

a trial court should never put PCR counsel in the position of having to assess the merits of his client's petition." *Id.* at 19.

Defense counsel at trial in the present case faced the same Hobson's choice Justice Verniero described. Unfortunately, counsel made the wrong one. The constitution requires defense counsel to provide "robust representation" of his client. *Id.* at 18. Just as in PCR matters, "the record will give PCR counsel a wealth of grist for his or her mill, in some cases, not." *Id.* at 19. "At the very least, where communication and investigation have yielded little or nothing, counsel must advance the claims the client desires to forward...and make the best available arguments in support of them." *Ibid.* "It goes without saying that a trial court should never put PCR counsel in the position of having to assess the merits of his client's petition." *Ibid.*

The same must be true of trial counsel. A trial court should never put trial counsel to make such an assessment. But in the present case, the trial court did not do this. Rather, trial counsel volunteered it over and over again.

"In no event...is counsel empowered to denigrate or dismiss the client's claims, to negatively evaluate them, or to render aid and support to the state's opposition." *Ibid.* By doing so, trial counsel in the present case, like the Law Division judge in *Inglis*, short-circuited due process and shortchanged the ability of

trial judges to distinguish between pretextual and sincere defenses, to separate the wheat from the chaff, and weigh affirmative defenses at trial.

For example, necessity has been recognized as a viable defense in DWI cases. *State v. Romano*, 355 *N.J.Super.* 21 (App.Div. 2002). This was because

> once in a great while a DWI case comes along that presents facts so bizarre and remote from the public policy underlying the law that even a Court as committed as this one to the strict enforcement of the drunk-driving statutes can pause to make certain that no injustice has been done.
>
> [*State v. Fogarty, supra* at 74 (Stein, dissenting).]

In *Fogarty*, a case turning on whether a police officer's direction to an intoxicated motorist to move his car, our Supreme Court was deeply divided. The four-justice majority precluded a defense, characterized as quasi-entrapment or duress, as a matter of law because of its fear that "hordes of intoxicated drivers being dispersed by police outside of numerous bars, restaurants, and stadiums [would assert] as a defense to DWI charges that they drove in response to police directives." *Id.* at 82 (Stein, dissenting). The three-justice dissent suggested that the majority "goes to such lengths to justify its refusal to permit Fogarty to present his defense is ample indication of its discomfort with its own rationale." *Ibid.* As the dissent noted:

> We should all recognize that our cases may occasionally turn up freakish factual contexts in which the rigid, mechanistic application of a sound, well-established, respected principle of law will produce a result that is plainly at odds with substantial justice. This is such a

> case. When, as here, there is a collision between law and common sense, this Court should exert its best effort to vindicate good sense. Our institutional legitimacy depends on our succeeding in that endeavor.
>
> [*Id.* at 85, quoting *State v. Vick,* 117 *N.J.* 288, 294-95 (1989) (Clifford & Stein, JJ., dissenting).]

Not only did we see that counsel dismissed presenting his client's defense at trial, but we can easily infer that he also failed to meaningfully discuss and develop the defense before trial.

For Baverov, "[d]espite what might have been honorable intentions and a thorough investigation of defendant's claims, [trial counsel in the present case] breached the rule's clear mandate" to advocate for a claim to which his client was committed but with which counsel disagreed. *State v. Rue, supra* at 19-20 (Verniero concurring). "As a result, defendant is entitled to the relief sought." *Id.* at 20. In *Rue*, the Supreme Court vacated the denial of the defendant's PCR petition and remanded his case for a new hearing. Here, this Court should vacate Baverov's conviction and remand his case for a new municipal court trial.

II.
GIVEN CHANGES IN DOUBLE JEOPARDY JURISPRUDENCE AND THE SEVERITY OF THE PENALTIES TO WHICH DEFENDANT IS EXPOSED, THIS COURT SHOULD REMAND THIS MATTER FOR A JURY TRIAL
(Da18a-19a)

If sentenced as a third or subsequent DWI offender, Baverov faces six months in jail. In addition, with the other traffic offenses, he faced additional jail

time which, if added to the 180-day DWI jail term, would have exposed him to a jail term greater than six months. *See N.J.S.A.* 39:4-104. This is so, even putting aside the many additional consequences faced by persons accused of a third or subsequent DWI offense. *See State v. Denelsbeck*, 225 *N.J.* 103, 117-19 (2016), *cert.den.* 580 *U.S.* 1113 (2017).

In *State v. Denelsbeck*, our Supreme Court held that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.*, 225 *N.J.* at 111, quoting *Baldwin v. New York*, 399 *U.S.* 66, 69 (1970). "On the other hand, if the offense is punishable by six months or less, it is 'appropriate to presume...that society views such an offense as '"petty."'" *State v. Denelsbeck, supra*, 225 *N.J.* at 120, quoting *Blanton v. North Las Vegas,* 489 *U.S.* 538, 543-44 (1989).

Under this view, a DWI charge, by itself, would be a petty offense, and Baverov would not be entitled to a jury trial. But when *Denelsbeck* was decided, New Jersey courts applied the so-called "same evidence" test to multiple charges filed against a defendant. That is, "a second prosecution could be barred if it relied on the same evidence used to prove an earlier charge." *State v. Miles*, 229 *N.J.* 83, 93 (2017), citing *Illinois v. Vitale*, 447 *U.S.* 410, 421 (1980); *see State v. Dively*, 92 *N.J.* 573 (1973), and *State v. DeLuca*, 108 *N.J.* 98, *cert.den.* 484 *U.S.* 944 (1987).

Thus, multiple traffic offenses relying on common evidence of motor vehicle operation would lead to merger of penalties imposed.

After *Denelsbeck*, our Supreme Court "adopt[ed] the same-elements test as the sole double-jeopardy analysis...." *State v. Miles, supra* at 96. The U.S. Supreme Court defined the same-elements test this way: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 *U.S.* 299, 304 (1932). Now, in New Jersey, "the same-elements test will serve as the singular framework for determining whether two charges are in fact the same offense for purposes of double-jeopardy analysis." *State v. Miles, supra* at 101. As a consequence, Baverov was exposed to more than 180 days in jail if convicted of DWI and one additional traffic offense.

CONCLUSION

Whether done by defense counsel at trial, trial courts, or appellate courts, characterizing any defense as "pretextual" is an affront to due process. It insults defendants, stripping them of the presumption of innocence and branding them as liars. It insults judges, deeming them incapable of weighing evidence or assessing credibility. It insults society, enshrining prejudice to the exclusion of fairness, equanimity, and sober judgment.

Defendant Victor Baverov asks this Court to vacate his conviction and remand this matter for a jury trial.

Respectfully,

/s/ *John Menzel*

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May 24, 2024

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Honorable Judges of the
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Re State of New Jersey (Plaintiff-Respondent)
v. Victor Baverov (Defendant-Appellant)
Appellate Division Docket No. A-0274-23T2
Municipal Appeal No. MA-23-004; Misc. Case No. ML 23-02-00019
Criminal Action: On Appeal from a Final Judgment of Conviction in the Superior Court of New Jersey, Law Division (Criminal), Monmouth County
Sat Below: Honorable Michael A. Guadagno, J.A.D. (ret. & t/a)

Honorable Judges:

Please accept this letter memorandum, pursuant to R. 2:6-2(b), in lieu of a more formal brief submitted on behalf of the State of New Jersey.

TABLE OF CONTENTS

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On November 19, 2021, the defendant, Victor Baverov, was charged with Driving While Intoxicated ("DWI"), N.J.S.A. 39:4-50; Reckless Driving, N.J.S.A. 39:4-96; and Failure to Maintain Lane, N.J.S.A. 39:4-88. Da1-3. On November 17, 2022, the defendant appeared before the Honorable Paul H. Capotorto, J.M.C., in the Upper Freehold Township Municipal Court for trial on these charges. See generally (1T).[1] The State presented testimony from Trooper Thomas Gram of the New Jersey State Police, see (1T:4-12 to 42-2), and moved into evidence a flash drive containing video recordings from Trooper Gram's dashboard camera and body worn camera ("BWC") (J-1), see (1T:3-22 to 3-24); a Miranda warning form (S-1), see (1T:16-1 to 16-2), Da5; the Attorney General's Standard Statement (S-2), see (1T:16-19 to 16-21), Da6; and the Drinking Driver/Operator Questionnaire (S-3), see (1T:18-15 to 18-17), Da7. Trial continued and concluded on January 26, 2023, with the testimony from the defendant. (1T:48-4 to 52-3).

Relying upon the BWC video and the trooper's testimony, Judge Capotorto found defendant's guilty of DWI beyond a reasonable doubt. (2T:6-7 to 6-13). Judge Capotorto sentenced the defendant on this, his fifth DWI, to the fines and penalties required by N.J.S.A. 39:4-50(a)(3): a $1,007 fine; $33 court costs; $50 VCCB; $225 DWI assessment; $75 SNSF; an eight-year driver's license suspension; four-year ignition interlock installation thereafter; and 180 days jail. (2T:7-8 to 7-13). The State dismissed the remaining charges.

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[1] 1T refers to Transcript of Hearing, November 17, 2022.
2T refers to Transcript of Hearing, January 26, 2023.
3T refers to Transcript of Municipal Court Appeal, August 14, 2023.
4T refers to Transcript of Municipal Court Appeal, December 7, 2023.

(2T:6-16). Defendant requested and Judge Capotorto granted defendant a stay of sentence pending appeal. (2T:11-23 to 11-25).

Defendant thereafter filed an appeal of his municipal court conviction with the Superior Court, Law Division. Da8-9. The State opposed the defendant's appeal. (3T:9-4 to 12-13). Argument on defendant's appeal was heard by the Honorable Michael A. Guadagno, J.A.D. (ret. & t/a) on August 14, 2023. (3T:3-17 to 14-6). At the conclusion of argument, Judge Guadagno reversed decision. (3T:16-6 to 16-8). On August 30, 2023, Judge Guadagno issued a judgment of conviction re-finding defendant guilty of DWI, re-imposing the sentence entered in the municipal court, and vacating the stay of sentence. Da10, 27. This order was accompanied by a written opinion in which Judge Guadagno rejected defendant's three-fold attack on his DWI conviction. Da11-19.

Defendant thereafter filed a Notice of Appeal with this Court, which in part challenged the lower court's failure to comply with R. 3:21-4(b) with regard to sentencing. Da20-26. By way of November 2, 2023 order, this Court granted defendant a stay of sentence and remanded the matter for re-sentencing, specifically to allow defendant to be present at sentencing and "offer a statement or present any information in mitigation of punishment." Da28. Re-sentencing took place before the Honorable Jill Grace O'Malley, P.J.Cr. on December 7, 2023. (4T). After hearing from counsel and the defendant, see (4T:4-1 to 14-25), Judge O'Malley re-imposed "the sentence previously imposed by Judge Capotorto and Judge Guadagno." (4T:28-24 to 28-25); Da29-32 Judge O'Malley also denied defendant's request for a stay of sentence pending appeal to this Court. (4T:15-1 to 28-25); Da29-32.

This appeal now follows. The State maintains its opposition to defendant's appeal.

COUNTERSTATEMENT OF FACTS

At approximately 10:48 p.m. on November 19, 2021, Trooper Gram was dispatched to a motor vehicle collision at Emleys Hill and Jonathan Holmes Roads in Upper Freehold Township. (1T:5-17 to 5-21). Upon arriving at the scene, Trooper Gram met with the defendant and observed that defendant's white Toyota had collided into a tree approximately 20 feet off the road. (1T:5-24 to 6-7). Defendant was the only person associated with and within the vicinity of the Toyota upon Trooper Gram's arrival. (1T:6-12 to 6-15).

Defendant explained to Trooper Gram that he had driving too quickly and had driven off of the road when he crashed into the tree. (1T:7-5 to 7-10). Trooper Gram immediately noticed defendant exhibiting well-known signs of intoxication, including a strong odor of alcoholic beverage on the defendant's breath, see (1T:7-20 to 7-24); bloodshot and watery eyes, see (1T:8-5); and slurred speech, see (1T:8-8). Defendant admitted to having consumed approximately five or six alcoholic beverages at the Happy Apple Bar prior to the collision. (1T:7-6 to 7-10). The Happy Apple Bar is located just down the road from where the collision had occurred; the collision location was in the direction of travel one would be going if leaving the bar. (1T:7-13 to 7:14).

As a result of these observations of intoxication, Trooper Gram had defendant perform the Standard Field Sobriety Tests (SFSTs). (1T:9-17 to 9-22). Trooper Gram is trained in the administration of field sobriety tests (1T:8-13 to 8-15). With regard to the walk-and-turn test, Trooper Gram provided defendant instructions and also performed a demonstration prior to testing.

(1T:10-1 to 10-12). During testing, Trooper Gram observed that defendant stepped off the line multiple times, did not maintain heel toe contact, and kept his hands and arms out for balance. (1T:11-1 to 11-3). Defendant was given a second opportunity to perform the test, which he performed in a similarly poor manner and during which he was staggering and almost fell over. (1T:11-4 to 11-8). According to Trooper Gram, defendant had failed the walk-and-turn test (1T:11-11).

Trooper Gram also administered the one-leg stand test. (1T:11-13). Trooper Gram informed defendant the instructions of the test and also performed a demonstration (1T:11-17 to 11-23). Defendant failed this test by putting his foot down on multiple attempts, not looking down at his foot for the entirety of the test, and swayed while standing. (1T:12-8 to 12-11). As a result of the totality of these observations, Trooper Gram concluded defendant could not operate the vehicle safely due to intoxication. (1T:13-24). The trooper arrested defendant for DWI and transported him to police barracks (1T:14-1 to 14-2; 15-8; 32-16).

LEGAL ARGUMENT

Because an "appellate court ... do[es] not make independent findings of fact," on appeal this Court "must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record." State v. Locurto, 157 N.J. 463, 471 (1999); State v. Elders, 192 N.J. 224, 243 (2007); State v. Robinson, 200 N.J. 1, 15 (2009). Appellate deference to a lower court's fact finding is more marked following a trial de novo: "appellate courts ordinarily should not undertake to

alter concurrent findings of facts and credibility determination made by two lower courts absent a very obvious and exceptional showing of error." Locurto, 157 N.J. at 474; Robertson, 228 N.J. at 148.

This high level of deference does not extend a lower court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Township Comm. Of Twp. Of Manalapan, 140 N.J. 366, 378 (1995); State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div.), certif. denied, 182 N.J. 148 (2004); State v. Watts, 223 N.J. 503, 516 (2015). "Whether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." Cleveland, 371 N.J. Super. at 295 (citing State v. Sailor, 355 N.J. Super. 315, 320 (App. Div. 2001)); State v. Gandhi, 201 N.J. 161, 176 (2010).

POINT I

DEFENDANT'S ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL DO NOT A BASIS FOR APPELLATE RELIEF

As he did below, defendant again faults trial counsel for not introducing as a defense to his DWI prosecution the psychiatric defense of "persecutory paranoia" and/or "amnesia" occurring "under a few beers, one beer, no beer." Db9. Defendant again argues that trial counsel's failure was twofold in that counsel both erred in not presenting such a defense, but also erred making clear on the record that not presenting this defense was in keeping with New Jersey case precedent. Defendant again contends that either or both error warrants the grant of relief in the form of the vacation of his conviction and "remand … for a new municipal court trial." Db15.

Defendant's request for relief is still premised upon a legally unsound belief that even if trial counsel was correct with regard to the unavailability of a psychiatric defense to DWI, counsel was nonetheless obligated to present that defense in order to provide robust representation. Defendant created this obligation on trial counsel by borrowing law, and the accompanying obligation, applicable to post-conviction relief (PCR) counsel. Because trial counsel was not obligated under any applicable New Jersey law to raise on defendant's behalf a legally inapplicable defense, Judge Guadagno correctly determined defendant was entitled to no relief. Da16-18. Judge Guadagno's factually and legally correct determination of this issue should be affirmed by this Court.

As correctly noted by trial counsel, the common law defense of insanity under the M'Naghten test "is unavailable to defendants charged with driving under the influence." State v. Inglis, 304 N.J. Super. 207, 214 (Law Div. 1997); see also State v. Romano, 355 N.J. Super. 21, 30 (App. Div. 2002). The inapplicability of insanity to DWI was found to be twofold. First, application of the defense of insanity to DWI would be contrary to "a strong legislative policy of precluding defenses that have a high potential for being pretextual." Inglis, 304 N.J. Super. at 211-13. Second, DWI being "an absolute liability offense … militates against permitting a defense that focuses on a defendant's lack of mental culpability." Id. at 211, 213-14.

In the face of this clear precedent, trial counsel was correct in asserting that presentation of an insanity defense at defendant's trial was not possible. Doing so would have violated trial counsel's ethical obligations, as set forth in RPC 3.1, which states,

> A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding … may nevertheless so defend the proceedings as to require that every element of the case be established.

See also State v. Rue, 175 N.J. 1, 18 (2002). The record makes clear that trial counsel complied with this RPC by not presenting a legally unviable defense of insanity, while at the same time holding the State to its proofs and its obligation to establish the defendant's guilt beyond a reasonable doubt.

Defendant presented nothing to Judge Guadagno or this Court establishing an exception to this ethical obligation. Defendant presented no basis in law or fact that would suggest reversal of Inglis, a well-reasoned, well-supported opinion authored by a well-respected jurist, the Honorable Jose L. Fuentes, J.A.D. (ret.). Da17-18. Instead, defendant unsuccessfully attempts to import onto trial counsel a duty only ever applied to PCR counsel – the obligation to act contrary to RPC 3.1 and raise frivolous claims. Even the law upon which defendant relies – Rue, 175 N.J. at 1 – does not support such an extension. Db11-13.

R. 3:22-6(d) imposes special obligations on PCR counsel:

> Assigned counsel may not seek to withdraw on the ground of lack merit of the petition. Counsel should advance all of the legitimate arguments requested by the defendant that the record will support. If defendant insists upon the assertion of any ground for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference.

See also State v. Webster, 187 N.J. 254, 257 (2006). This "choice" to create an exception to the ethical obligations of RPC 3.1 for PCR counsel "was obviously motivated by [the Court's] view of the critical nature of faithful and robust representation of a defendant at a PCR proceeding. PCR is a defendant's last chance to raise constitutional error that may have affected the reliability of his or her criminal conviction." Rue, 175 N.J. at 18 (emphasis added); compare with Db11-13.

Thus, the robust representation defendant was entitled to at trial is not equivalent to the robust representation on PCR. Unlike PCR counsel, trial counsel was prohibited by the Rules of Professional Conduct from raising clearly meritless, unsupported factual or legal claims simply because his client was committed to it. Trial counsel was not faced with "the same Hobson's choice" that is presented to PCR counsel. Db13. Trial counsel had only one rule which he was obligated to follow – RPC 3.1 – and follow it he did. Judge Guadagno correctly determined no relief could flow from trial counsel's ethically, legally and factually supported choice.

Moreover, to the extent that defendant suggested before the lower court, and continues to claim before this Court, that he is entitled to relief based on the inference that trial counsel "also failed to meaningfully discuss and develop the defense before trial," such a claim is not properly before this Court on direct appeal. Db15. While not terming it as such, a claim of failure to consult and/or investigate is clearly one of ineffective assistance of counsel and clearly a claim for which the evidence in support is outside of the trial record. Defendant would not have to "infer" if such evidence was contained in the record. Ibid. "Generally, a claim of ineffective assistance of counsel cannot

be raised on direct appeal;" "defendant must develop a record at a hearing at which counsel can explain the reasons for his conduct and inaction and at which the trial judge can rule upon the claims including the issue of prejudice." State v. Sparano, 249 N.J. Super. 411, 419-20 (App. Div. 1991). As such, defendant's inference can afford him no relief on direct appeal. Like Judge Guadagno, this Court should reject defendant's attacks on trial counsel as providing a basis for the reversal of his conviction and should affirm.

POINT II

DEFENDANT IS NOT ENTITLED TO A TRIAL BY JURY FOR DWI

In 2015, our Supreme Court "consider[ed] whether a defendant is entitled to a jury trial when facing a third or subsequent driving while intoxicated (DWI) charge pursuant to N.J.S.A. 39:4-50." State v. Denelsbeck, 225 N.J. 103, 106 (2015). Our Court answered in the negative:

> we are satisfied that the current penalty scheme is within the confines of Sixth Amendment precedent and that the Legislature has managed to strike a minimally acceptable balance in weighing the interests at play. As such, third or subsequent DWI offenders are not entitled to a jury trial, and defendant's conviction procured by a bench trial did not violate his Sixth Amendment right to a jury trial.

Id. at 128.

The Court also addressed what would have to change for a right to trial by jury to attach to a recidivist DWI:

> we believe that the Legislature has increased the severity of penalties associated with repeat DWI offenses to the point where any additional direct penalties, whether involving incarceration,

> fees, or driving limitations, will render third or subsequent DWI offenses "serious" offenses for the purpose of triggering the right to a jury trial. At that point, the balance will shift and the State's interest in efficiency will be outweighed by the magnitude of the consequences facing the defendant. In such an event, the constitutional right to a jury trial will apply, regardless of how the offense is categorized or labeled by the Legislature.

Ibid. (emphasis added).

The event envisioned by our Court that would trigger the right to trial by jury for DWI has not yet occurred. Our Legislature has not added or increased the direct penalties for a third or subsequent DWI since 2015. Defendant does not allege that to have occurred. See Db15-17. Without the trigger envisioned by Denelsbeck, the remedy envisioned by Denelsbeck is not yet available. Defendant is not entitled to a jury trial. Defendant's request for a vacation of his conviction and remand for a jury trial, therefore, should be denied as contrary to Denelsbeck.

CONCLUSION

For the above-mentioned reasons and authorities cited in support thereof, the State respectfully requests that defendant's conviction and sentence be re-imposed.

Respectfully submitted,

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