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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0450-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEPHEN A. MCMAHON,

Defendant-Appellant.

Argued November 15, 2017 – Decided December 27, 2017

Before Judges Fuentes, Koblitiz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Morris County, Indictment No.
15-10-0976.

John C. Grey, Jr. argued the cause for
appellant.

Paula Jordao, Assistant Prosecutor, argued the
cause for respondent (Fredric M. Knapp, Morris
County Prosecutor, attorney; Paula Jordao, on
the brief).

PER CURIAM

On October 15, 2015, a Morris County grand jury returned an
indictment against defendant Stephen McMahon charging him with one

count of the fourth degree offense of operating a motor vehicle while his driver's license was suspended or revoked for a second or subsequent conviction of driving while intoxicated (DWI)¹ or refusal to submit to a breath test.² N.J.S.A. 2C:40-26(b). Defendant was also charged with two related Title 39 offenses of DWI and driving while suspended.³ After arraignment, the trial court denied defendant's motion to dismiss the indictment and upheld the prosecutor's rejection of defendant's application for admission into the Pretrial Intervention (PTI) Program. See N.J.S.A. 2C:43-12; R. 3:28.

Defendant thereafter pled guilty to the fourth degree offense under N.J.S.A. 2C:40-26(b) and to the two Title 39 charges of driving while suspended and DWI. On September 23, 2016, the court sentenced defendant on the fourth degree offense to a mandatory term of 180 days without parole, to be served in the Morris County Correctional Facility, and merged the Title 39 conviction of driving while suspended. With respect to the DWI conviction, the court ordered defendant to serve 180 days of incarceration, to run concurrent to the mandatory term imposed under N.J.S.A. 2C:40-26(b). The court also imposed a \$1000 fine and other mandatory

¹ N.J.S.A. 39:4-50.

² N.J.S.A. 39:4-50.4a.

³ N.J.S.A. 39:3-40.

monetary penalties, and revoked defendant's driver license for a period of ten years to run consecutive to any preexisting period of suspension.⁴

Defendant argues the trial court erred in failing to dismiss the indictment. Alternatively, defendant argues that based on post-conviction relief he obtained while the charges in this case were pending, some of the Title 39 convictions involving DWI and refusal to submit to breath tests were vacated. In this light, defendant maintains the trial court erred in ruling the prosecutor's decision to deny defendant's PTI application did not constitute a gross abuse of discretion.

The State argues the trial court correctly found the prosecutor presented sufficient evidence to the grand jury to establish a prima facie case under N.J.S.A. 2C:40-26(b). Relying on this court's decision in State v. Sylvester, 437 N.J. Super. 1 (App. Div. 2014), the State also argues that post-conviction relief cannot retroactively vitiate convictions that were legally viable

⁴ In an order dated September 23, 2016, the trial court denied defendant's application to stay the execution of the incarceration part of the sentence or alternatively to be released on bail pending appeal. This court denied defendant's emergent application to reverse the trial court's decision. However, on November 3, 2016, we granted defendant's motion to be released on bail pending appeal, provided he posted a \$5000 bond with a 10% alternative.

at the time defendant engaged in the conduct prohibited by N.J.S.A. 2C:40-26(b).

After reviewing the record before us and mindful of prevailing legal standards, we affirm. The following facts will inform our legal analysis.

At approximately one o'clock in the morning on April 5, 2014, Town of Dover Police Officer Joseph Delaney noticed a dark colored 2008 BMW X5 on East Blackwell Street traveling at a speed of fifty-eight miles per hour. The posted speed limit for this area is twenty-five miles per hour. As he followed the car, Delaney observed the car twice cross over the double yellow lines separating the lanes of traffic. Delaney decided to stop the car. Defendant was the driver and sole occupant of the car. Defendant has not challenged the propriety of the stop nor the legal basis for the officer's decision to charge him with DWI and driving with a suspended license.

A subsequent review of defendant's MVC certified abstract revealed that at the time of his encounter with Officer Delaney, defendant had two prior DWI convictions, April 24, 2008 and November 7, 2011, and three prior convictions for refusal to submit to a breath test, November 7, 2011, February 26, 2013, and October 10, 2013. Defendant was thus charged with the fourth degree offense of driving while his license was revoked for a second or

subsequent conviction for refusal to submit to a breath test under N.J.S.A. 2C:40-26(b). A Morris County grand jury subsequently indicted defendant of this offense.

Defendant initially moved to dismiss the indictment on the ground that it misidentified the date of defendant's motor vehicle encounter with Officer Delaney as March 4, 2014. In denying defendant's motion, Judge Stephen J. Taylor cited Rule 3:7-4, which authorizes the court to amend an indictment to correct an error in form. Judge Taylor corrected the date in the indictment to read April 5, 2014, noting that such an approach was expressly sanctioned by the Supreme Court in State v. Stefanelli, 78 N.J. 418, 429 (1979), ("Where . . . time is not crucial either to the defense to or prosecution of a charged offense, an amendment changing or correcting a date is not objectionable.")

Judge Taylor next addressed defendant's argument attacking the viability of the indictment based on a lack of evidence. In rejecting defendant's argument, Judge Taylor noted that an agent from the Morris County Prosecutor's Office "testified in detail" concerning the dates and nature of defendant's prior DWI convictions and his record of suspension related to his convictions for refusal to submit to the breath test in violation of N.J.S.A. 39:4-50.4a. The judge concluded: "In looking at the overall presentation, this court is satisfied . . . that the State

presented sufficient evidence to establish a prima facie case of driving while suspended in violation of N.J.S.A. 2C:40-26(b) and the defendant's motion in that regard is therefore denied."

Judge Taylor also rejected defendant's argument based on a collateral attack of the evidence underpinning the indictment. He framed the issue as follows:

Defendant argues that because of post[-]conviction relief, two of the matters that serve as the basis for the current indictment are no longer valid and should not be counted. And because of that, as I understand the defendant's argument . . . from the defense viewpoint [he] is left with only two convictions, one for a DWI from 2008, and the other for the refusal out of Denville in 2013. And the defense position is that according to their review of the statute[,] it requires two DWIs or two refusals and not one of each.

Judge Taylor began his analysis by acknowledging that his discretionary authority to dismiss an indictment is circumscribed to determining whether the indictment is "manifestly deficient or palpably defective." State v. Hogan, 144 N.J. 216, 229 (1996). Thus, an indictment must be upheld as long as the State presents "some evidence establishing each element of the crime to make out a prima facie case." State v. Saavedra, 222 N.J. 39, 57 (2015) (quoting State v. Morrison, 188 N.J. 2, 12 (2006)). Guided by these principles, Judge Taylor found the State "has sufficiently alleged the elements of driving while suspended before the Grand

Jury and therefore the superseding indictment is not palpably defective."

In reaching this conclusion, Judge Taylor acknowledged that in an order dated January 29, 2016, a Superior Court Judge granted defendant's petition for post-conviction relief (PCR) and vacated defendant's "plea on September 21, 2012 in the Hanover Township Municipal Court[.]" The PCR judge remanded the matter for further proceedings and reinstated all of the original charges, including but not limited to the following:

1. Driving While Intoxicated in violation of N.J.S.A. 39:4-50;
2. Refusal to Submit to Breath Testing, in violation of N.J.S.A. 39:4-50.2;
3. Reckless Driving, in violation of N.J.S.A. 39:4-96;
4. Driving While Suspended, in violation of N.J.S.A. 39:3-40;
5. Unregistered, in violation of N.J.S.A. 39:3-4;
6. Uninsured, in violation of N.J.S.A. 39:6B-2;
7. No Driver's License in Possession, in violation of N.J.S.A. 39:3-29;
8. No Registration or Insurance Card, in violation of N.J.S.A. 39:3-29; and
9. Harassment, in violation of N.J.S.A. 2C:33-4(a) (downgraded from Terroristic Threats, N.J.S.A. 2C:12-3(a)).

Defendant also submitted an order entered by the Fort Lee Municipal Court on February 4, 2016, which vacated defendant's February 26, 2013 conviction for refusal to submit to a breath test. The municipal court also remanded that matter for further proceedings. In the brief submitted to this court in this appeal, defense counsel asserts that "[b]oth of the guilty pleas were vacated on procedural grounds including an unconstitutional factual basis and failure to advise defendant of penalties for subsequent convictions." However, defendant has not included the transcripts of the post-conviction relief hearings that resulted in these orders. Defendant has not even provided us with the statement of reasons given by the judges who entered these orders. We therefore decline to consider these unsupported factual assertions. See R. 2:6-2(a)(5).

Judge Taylor ultimately rejected defendant's collateral attack on the sufficiency of the indictment substantially for the same reasons this court articulated in State v. Sylvester.

I don't find that the defendant's collateral attack on the underlying convictions vitiates his criminal culpability under N.J.S.A. 2C:40-26(b) based mainly on the Appellate Division's finding in State [v.] Sylvester, [437 N.J. Super. at 6] . . . In that case the Appellate Division upheld the findings of Judge Reed out of Somerset County, who rejected a similar argument posed by the defendant in that case. The Appellate Division found in its opinion that the defendant's argument was without

merit when the defendant argued that post[-] conviction relief granted by the municipal court vacating an underlying DWI conviction voided the defendant's conviction under N.J.S.A. 2C:40-26(b).

As we did in Sylvester, Judge Taylor emphasized our Supreme Court's admonition in State v. Gandhi,

We insist on compliance with judicial orders to promote order and respect for the judicial process. Compliance is required, under pain of penalty, unless and until an individual is excused from the order's requirements. Thus, as long as a court order exists and a defendant has knowledge of it, the defendant may be prosecuted for a violation thereof, regardless of its deficiencies.

[Sylvester, 437 N.J. Super. at 6 (quoting State v. Gandhi, 201 N.J. 161, 190 (2010)).]

As was the case with the defendant in Sylvester, Judge Taylor concluded that permitting defendant here to evade criminal culpability "would frustrate the legitimacy of legislation and the reliability of court orders." Sylvester, 437 N.J. Super. at 7. Judge Taylor noted that defendant "acknowledges the legitimacy of the court order suspending his license out of Denville in 2013."

Finally, in a separate hearing conducted on June 8, 2016, Judge Taylor also upheld the prosecutor's rejection of defendant's application to be admitted into PTI. Judge Taylor found that the prosecutor's July 6, 2015 letter addressed to defense counsel made

"abundantly clear that the prosecutor did consider all of the factors listed in N.J.S.A. 2C[:]43-12(b)."

Against this record, defendant raises the following arguments which we recite here verbatim in the interest of clarity.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THE ELEMENTS OF THE CHARGE WERE SUFFICIENTLY ALLEGED TO THE GRAND JURY.

POINT II

THE TRIAL COURT ERRED BY ALLOWING THE AMENDMENT OF THE INDICTMENT.

POINT III

DEFENDANT'S POST CONVICTION RELIEF OBTAINED INVALIDATES THE STATE'S INDICTMENT UNDER N.J.S.A. 2C:40-26(b).

POINT IV

THE TRIAL COURT ERRED BY NOT REQUIRING THE STATE TO CONSIDER THE POST CONVICTION RELIEF OBTAINED IN DENYING MR. MCMAHON'S ENTRY INTO THE PRE-TRIAL INTERVENTION PROGRAM.

We reject these arguments and affirm substantially for the reasons expressed by Judge Taylor as reflected in the transcripts of the hearings held on April 7, 2016 and June 8, 2016. We add only the following brief comments. With respect to defendant's application for admission into PTI, we agree with Judge Taylor that the prosecutor carefully considered the Guidelines provided in Rule 3:28 as well as the factors listed in N.J.S.A. 2C:43-

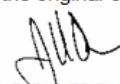
12(e). As our Supreme Court has recently reaffirmed, "PTI is essentially an extension of the charging decision, therefore the decision to grant or deny PTI is a 'quintessentially prosecutorial function.'" State v. Roseman, 221 N.J. 611, 624 (2015) (quoting State v. Wallace, 146 N.J. 576, 582 (1996)). Judge Taylor correctly found no basis to conclude the prosecutor's rejection of defendant's PTI application constituted a patent and gross abuse of discretion. Roseman, 221 N.J. at 625.

Finally, as we recently noted, "[t]he primary purpose behind New Jersey's drunk-driving statutes is to curb the senseless havoc and destruction caused by intoxicated drivers." State v. Rizzitello, 447 N.J. Super. 301, 315 (App. Div. 2016), (quoting State v. Tischio, 107 N.J. 504, 512 (1987)). Here, defendant's driving history is replete with Title 39 violations. Indeed, defendant pleaded guilty to his third DWI, while serving a ten-year suspension of his driving privileges for a previous DWI.

We thus vacate our November 3, 2016 order allowing defendant to post bail and staying the execution of the term of incarceration imposed by trial court. Defendant has ten days from the date of this opinion to surrender himself to the Morris County Sheriff's Department to begin serving the 180 days term of incarceration ordered by the trial court.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION