

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0971-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANWAR H. BELTON, a/k/a HASON
BELTON, a/k/a HASON LYON,
a/k/a ANWAR BELTON, a/k/a
ANWAR BELTRON,

Defendant-Appellant.

APPROVED FOR PUBLICATION

December 26, 2017

APPELLATE DIVISION

Submitted November 13, 2017 – Decided December 26, 2017

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment
No. 10-09-2272.

Joseph E. Krakora, Public Defender, attorney
for appellant (Karen A. Lodeserto, Designated
Counsel, on the brief).

Damon G. Tyner, Atlantic County Prosecutor,
attorney for respondent (John J. Santoliquido,
Assistant Prosecutor, of counsel and on the
brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

Defendant Anwar H. Belton appeals from a September 14, 2016
order denying, without an evidentiary hearing, his petition for

post-conviction relief (PCR). Defendant collaterally challenges his conviction, after a plea, of first-degree aggravated manslaughter.

We reverse. We conclude that defendant, in the course of his plea allocution, suggested a defense of others that was inconsistent with guilt; his waiver of that defense was not knowingly made; therefore, he did not present a sufficient factual basis of guilt. In reaching this conclusion, we apply the principles set forth in State v. Urbina, 221 N.J. 509 (2015), although that case involved a claim of self-defense, rather than the defense of others, suggested in the course of a guilty plea. In view of defendant's contemporaneous claim of innocence, the failure to elicit a sufficient factual basis was of constitutional dimension and warrants PCR. See State v. D.D.M., 140 N.J. 83, 95 (1995); State v. Mitchell, 126 N.J. 565, 577-78 (1992).

I.

Defendant was indicted and charged, along with a woman named Erika Pugh, also known as "Sparkles," with murder, theft from the victim, and endangering an injured victim. Pugh was also charged with prostitution. Defendant was offered an agreement to plead to an amended charge of first-degree aggravated manslaughter, in return for a recommended twelve-year

prison term subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, and dismissal of the remaining charges.

In his allocution, defendant contended that he was roused from his sleep in an Atlantic City motel by frantic requests for help by Pugh and another woman. Both women were involved in an altercation with a man. When the man began biting down on Pugh's hand, refusing to let go, defendant said he put the man in a headlock to get him to release Pugh's hand. The man relented only after he began "snoring." The man died soon thereafter.

In the plea colloquy, defense counsel first established that Pugh woke defendant, who admitted he had only met Pugh that night. We quote the colloquy at length:

[DEFENSE COUNSEL:] Okay. So she [Pugh] came knocking on your door sometime in the middle of the night, correct?

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] And Miss Pugh was actually not dressed at the time that she came knocking on your door.

[DEFENDANT:] Yes, Your Honor. I mean —

[DEFENSE COUNSEL:] That's okay. . . . And she indicated to you something about somebody took my money, come help me, somebody took my money; is that correct?

[DEFENDANT:] No, she didn't say that yet. She just came screaming help.

[DEFENSE COUNSEL:] Help, okay. So you went outside and tell the judge primarily in your own words what happened after you went outside, and if there's some questions that I'll have to ask you, I'll ask you.

[DEFENDANT:] When I came to the door and I seen Miss Pugh, she was in the nude and she was screaming help, help, help! And I came to the door, first I was looking at her, then I looked down the hallway because there was some more noise coming, well not the hallway but down the corridor of the top floor. And I seen the girl, the young lady that I did come down with, Candy, and the victim. And he was like, he was a little, he had his shirt off, he was a little hysterical.

So I just went over there and told him to calm down and be quiet, to go back in and find out what was going on. And when we got on the inside, she's saying he took her money. He's saying they robbed him. Then he got real agitated and I told him relax, I didn't come for that. Then Sparkle[s] is screaming, beat him up, get my money. And I says to her shut up, because I didn't even know her.

And in the process of that Candy says, is there some more money around here? And she wants to touch the guy, and when she touches the guy, he gets real belligerent and starts assaulting her. And I tried to stop it and me and him got into an altercation.¹

¹ The record before us does not include reports of the police or medical examiner, or statements of the victim's wife. However, we surmise, from references to these documents, that there was evidence that the victim had visited a casino hotel with his wife; he had consumed cocaine and alcohol; and after his wife went to their room, the victim departed in the company of two women and went to the motel where he ultimately died.

Defendant then described his effort to defend Pugh, as the victim bit her hand:

[DEFENDANT:] [cont'd] And in between that altercation Sparkles got in, intervened, and he starts biting Sparkles, and when he's biting Sparkles, I'm trying to get him off of Sparkles, he's biting and she's screaming and doing whatever she can to get him off of her. And by the time I get ready to let go was when I heard like, I heard him snoring.

[DEFENSE COUNSEL:] Okay. Now prior to you, when you say let go, you actually had your arm, or your had his head in a headlock, correct?

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] Okay. And during that time period when you had [the victim's] head in a headlock, you held him for a period of time until he let her go.

[DEFENDANT:] Let go of her hand.

[DEFENSE COUNSEL:] Okay.

[DEFENDANT:] I let go of him when he let go of her hand.

Defense counsel then attempted to elicit defendant's admission that he acted with indifference to human life. Defendant insisted that he was "trying to stop [the victim] from hurting" Pugh.

[DEFENSE COUNSEL:] . . . What I'm asking you is, when the gentleman was down on the ground and he wasn't responding, you, Sparkle[s] and Candy left the room.

[DEFENDANT:] Yes.

[DEFENSE COUNSEL:] Okay. And would you agree that by leaving the room and not offering him any aid, that you actually, that action alone showed indifference to his life.

[DEFENDANT:] No, I don't believe in that, to be honest.

[DEFENSE COUNSEL:] You don't. Well then we're not going to have a plea.

[DEFENDANT:] Well I did everything I can do, but I'm not going to say I showed indifference, because I was trying to stop him from hurting her.

[DEFENSE COUNSEL:] I understand that. That's not the question. The question is after the fact when he was down on the ground you didn't offer him any medical aid.

[DEFENDANT:] No. I said I left him there.

[DEFENSE COUNSEL:] Okay. What I'm saying to you is the fact of you leaving him there and not assisting him is extreme indifference because you didn't assist him when you knew he needed assistance.

[DEFENDANT:] Yeah, but the ambulance was there.

The prosecutor elicited that defendant disregarded the risk that he might cause the victim's death:

[PROSECUTOR:] . . . [Y]ou agree what you were doing was affecting his ability to breathe?

[DEFENDANT:] I might have contribute [sic].

[PROSECUTOR:] Okay. And you agree based on your actions and everything that occurred

there was a conscious disregard of the probability of death of . . . the victim?

[DEFENDANT:] No, I wouldn't say that because then I would thought that he would die at that moment.

THE COURT: Well the question was probability, not a certainty.

THE DEFENDANT: Oh, probability? Oh yes, well I can't, yeah, okay.

[PROSECUTOR:] And you disregarded that risk when you were doing what happened, what you described, right?

[DEFENDANT:] Yes.

As the judge began to say he was satisfied with the allocution, the prosecutor interrupted to express his concern that defendant may have expressed a defense of others:

[PROSECUTOR:] Judge, maybe the court - I mean from what he is saying there's the possibility that there's a defense of others. As long as he understands he's waiving that possible defense in order to take the benefits of this plea agreement. So I don't know if the court can maybe inquire about that.

The judge then asked defense counsel if she had talked to her client about that defense. She admitted she had not. The judge conducted an off-the-record conference at the bench. After a break of unknown duration, the court went back on the record, whereupon defendant purported to waive the defense.

[DEFENSE COUNSEL:] Judge, I did discuss with Mr. Belton any defenses that could have

been brought up as a result of what his colloquy is today and we are after discussing it giving up any rights to any defenses that may have been presented in exchange for the plea agreement.

THE COURT: All right. That's correct, Mr. Belton?

THE DEFENDANT: Yes, Your Honor.

The judge found that defendant's plea was freely and voluntarily entered and satisfied the elements of aggravated manslaughter. Notably, at the subsequent sentencing hearing, defendant stated he was reluctant to enter the plea agreement, and reiterated that he acted in Pugh's defense. The court sentenced defendant in accord with the plea agreement. On direct appeal, we affirmed the sentence on an Excessive Sentence Oral Argument calendar, but remanded for a correction of jail credits. State v. Belton, No. A-0389-14 (App. Div. May 6, 2015).

II.

Defendant thereafter filed a "motion for post-conviction relief" and a motion to withdraw his plea, pursuant to Rule 3:21-1. He contended:

POINT I

THE TRIAL COURT ERRED WHEN IT SENTENCED DEFENDANT TO A TERM GREATER THAN THE CO-DEFENDANT WHEN THE CO-DEFENDANT CONTRIBUTED TO VICTIM[']S DEATH FAR MORE THAN DEFENDANT IN VIOLATION OF THE EQUAL PROTECTIONS UNDER STATE AND FEDERAL CONSTITUTIONS.

POINT II

COUNSEL WAS INEFFECTIVE FOR WITHHOLDING THE DEFENSE OF OTHERS AND NOT DISCUSSING THIS DEFENSE IN DETAIL TO DEFENDANT IN VIOLATION OF NEW JERSEY CONST. ART. I PAR. X.

POINT III

THE DEFENDANT[']S PLEA OF GUILT DOES NOT SUPPORT A FIRST DEGREE AGGRAVATED MANSLAUGHTER CONVICTION.

In a counseled brief, defendant contended:

POINT I

BECAUSE TRIAL AND [sic] PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL, AND BECAUSE THE PETITIONER WAS PREJUDICED THEREBY, THE COURT SHOULD GRANT PETITIONER'S MOTION FOR POST-CONVICTION RELIEF. IN THE ALTERNATIVE, BECAUSE THE PETITIONER HAS PRESENTED AT LEAST PRIMA FACIE PROOF THAT HE HAD BEEN DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, THE COURT SHOULD GRANT HIM AN EVIDENTIARY HEARING ON THIS ISSUE.

A. TRIAL COUNSEL FAILED TO PROPERLY INVESTIGATE THE MERITS OF THE STATE'S CASE AGAINST PETITIONER AND EFFECTIVELY ADVISE PETITIONER OF HIS LEGAL DEFENSES.

POINT II

THE SENTENCE IS EXCESSIVE.

POINT III

CUMULATIVE ERRORS BY COUNSEL AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIED PETITIONER A FAIR TRIAL.

In a supporting certification, defendant contended that had his attorney explored the defense of others in advance of the plea

hearing, she could have negotiated a more favorable plea agreement.

During oral argument on the petition, PCR counsel invoked Urbina for the first time, suggesting that defendant did not sufficiently understand the defense of others, just as Urbina did not sufficiently understand and knowingly waive self-defense. The prosecutor contended Urbina did not apply because it pertained to a claim of self-defense, not defense of others. The court agreed.

The PCR court denied relief after applying the two-pronged Strickland test and determining plea counsel was not constitutionally deficient, and defendant did not suffer resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). The court accepted defendant's version of the facts, at least for purposes of considering the petition. In particular, the court recited:

Candy and the victim . . . began fighting, so petitioner and Pugh attempted to intervene. The victim then bit Pugh's hand and would not release it. Petitioner then grabbed the victim in a headlock and released him only after the victim released Pugh's hand. The victim had lost consciousness as a result to the headlock and petitioner, Candy, and Pugh then left the area. . . . The victim was pronounced dead at the scene.

However, the court held that defendant did not have a meritorious defense of others defense, and it was not ineffective to fail to pursue a meritless defense. The court reviewed the elements of the defense of others, drawing from the elements of self-defense. The court noted that "deadly force is authorized only when an individual is at risk of serious bodily harm," which is harm that "creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ," citing N.J.S.A. 2C:3-11(d). The court concluded:

It cannot be seriously argued that biting someone's hand would or could cause serious permanent disfiguration or protracted loss or impairment of the function of any bodily member or organ. As such, to argue this defense would be a frivolous pursuit. Counsel is not required to pursue frivolous arguments in order to be effective.

The court denied PCR without addressing defendant's pro se motion to withdraw his plea, or his contention that he failed to present a sufficient factual basis.

III.

This appeal followed. In his initial merits brief, defendant contends:

DEFENDANT SHOULD BE ENTITLED TO AN EVIDENTIARY HEARING BECAUSE HIS PLEA ATTORNEY WAS INEFFECTIVE IN FAILING TO ARGUE THAT DEFENDANT WAS DEFENDING OTHERS.

After the parties' initial briefing, we requested supplemental briefs to comment on whether Urbina, which addressed a suggested claim of self-defense in the course of a guilty plea, should apply to a defense of others defense; whether defendant's waiver satisfied Urbina's standard for waiver; and, if the waiver was inadequate, whether the plea should be set aside because defendant made a contemporaneous claim of innocence. Defendant responded affirmatively, contending:

DEFENDANT DID ASSERT A DEFENSE OF OTHERS DEFENSE AND THE SUPREME COURT'S DECISION IN STATE V. URBINA, 221 N.J. 509 (2015) IS APPLICABLE.

The State, on the other hand, contended that defendant did not articulate a defense of others, and, therefore, Urbina did not apply.

IV.

We review the trial court's denial of PCR de novo. State v. Harris, 181 N.J. 391, 421 (2004) (stating appellate court conducts de novo review when PCR court does not hold an evidentiary hearing). We also review de novo a decision whether a defendant has provided an adequate factual basis for a guilty plea. State v. Tate, 220 N.J. 393, 403-04 (2015).

Our decision is largely guided by Urbina. In that case, the defendant – a juvenile waived up to adult court – attempted

to plead guilty to aggravated manslaughter. But, in the course of his allocution, he asserted that he reached for his firearm only after the victim began to reach for his own. Urbina "just wanted to have [the victim] back up," but his automatic weapon "just went off." Urbina, 221 N.J. at 516. Defense counsel then stated that he had discussed a potential self-defense claim with his client, and advised him that it was not "particularly viable." Id. at 517. In response to the prosecutor's request, defendant's plea form was amended to state that he was waiving self-defense. Ibid. Without reviewing the nature of a self-defense claim, or the State's burden to disprove self-defense, the court then asked Urbina, "And you do know . . . by pleading today, you've waived any potential utilization of self-defense, correct?" Ibid. Defendant answered yes, and the court accepted the plea as providing an adequate factual basis. Id. at 517-18. Our court affirmed the conviction on direct appeal by a divided panel, State v. Urbina, No. A-1761-11 (App. Div. July 19, 2003), and the Supreme Court reversed. Urbina, 221 N.J. 509.

The Urbina Court reviewed New Jersey's adherence to the principle that a defendant must provide a comprehensive factual basis for a plea, addressing each element of the offense. Id. at 526-27. "[I]n New Jersey, '[e]ven if a defendant wished to plead guilty to a crime he or she did not commit, he or she may

not do so.'" Id. at 527 (quoting State v. Smullen, 118 N.J. 408, 415 (1990)). A factual basis may be challenged by a petition for post-conviction relief, as well as by a motion to withdraw a plea,² or by direct appeal. Id. at 528.

The Court also reviewed principles of self-defense, noting that it exonerates a defendant; a defendant must have an actual, honest, and reasonable belief – but not necessarily an accurate belief – in the need to use reasonable force to protect oneself against unlawful force; and the State bears the burden to disprove self-defense once it has been raised. Id. at 525-26.

The Court held that a court is obliged to inquire of a defendant who suggests he acted in self-defense. Id. at 528.

[I]f a suggestion of self-defense is raised in the plea colloquy, then the trial court must inquire whether the defendant is factually asserting self-defense. If the defendant states that he is not claiming self-defense, then the plea can be accepted. On the other hand, if the defendant claims that he used deadly force against the victim in the reasonable belief that his life was in danger, then the defendant is asserting that he did not commit the crime.

² However, the Supreme Court stated in Tate, 220 N.J. at 404, that a challenge to the sufficiency of a factual basis does not implicate the four-part standard under State v. Slater, 198 N.J. 145 (2009). The defendant appealed from the denial of his motion to withdraw his plea on the grounds of an inadequate factual basis. The Court stated, "In short, if a factual basis has not been given to support a guilty plea, the analysis ends and the plea must be vacated." Tate, 220 N.J. at 404.

[Ibid.]

Only if the defendant abandons his factual claim of self-defense, may the defendant then waive the defense. Ibid. However, the waiver must be secured after "'a thorough and searching inquiry' into 'his or her understanding of the nature of the right being waived and the implications that flow from that choice.'" Ibid. (quoting State v. Handy, 215 N.J. 334, 362 (2013)). In particular, "the plea judge and defense counsel should ensure that the defendant has an understanding of self-defense in relation to the facts of his case, and should inform the defendant that the State has the burden to disprove the defense if asserted." Id. at 529.

Consistent with those principles, the Court held that Urbina's allocution was inadequate because the trial court failed to inquire further after Urbina's suggestion of self-defense. Ibid. Furthermore, the Court was "not satisfied that [the] defendant's waiver of self-defense" sufficed. Ibid.

[T]he plea judge did not ensure that [the] defendant truly understood the law of self-defense, including the requirement of a reasonable and honest belief in the necessity of using force, or that he understood that the State had the burden to disprove self-defense once asserted. Absent such inquiry on the record, it is unclear whether defendant's plea was truly knowing, intelligent and voluntary.

[Ibid. (citations omitted).]

The Court concluded that the factual basis was insufficient, and vacated the plea. Id. at 530.

We discern no reason why the principles set forth in Urbina would not apply with equal force to a suggested claim of a defense of others. Like self-defense, it is an affirmative defense that exonerates a defendant; it depends on an honest, actual, and reasonable – but not necessarily accurate – belief that force is necessary; and, once raised, imposes on the State the burden to disprove it. N.J.S.A. 2C:3-5. We recognize that the defense includes additional elements. A defendant must establish: he would be justified in using such force to protect himself against the injury threatened to the other person, N.J.S.A. 2C:3-5(a)(1); he reasonably believed the protected person would be justified in using such protective force, N.J.S.A. 2C:3-5(a)(2); and he reasonably believed his intervention was necessary to protect the other person, N.J.S.A. 2C:3-5(a)(3). Also, a person may resort to the use of deadly force – in self-defense or defense of others – only if the person reasonably believes it necessary to protect against "death or serious bodily harm." N.J.S.A. 2C:3-4(b)(2).

Applying Urbina, we are persuaded that defendant suggested a defense of others. He contended he was asked to come to the aid of two women. In particular, defendant said he applied

force to the victim's neck to get him to stop biting Pugh's hand. Thus, he suggested he did so to protect against "serious bodily harm" – that is, "bodily harm which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ" N.J.S.A. 2C:3-11(d).

The trial court minimized the threat of harm the victim posed to Pugh. We disagree. Serious bodily harm could certainly result from the victim biting Pugh's hand so firmly that Pugh could not extricate it; and so stubbornly that the victim would not relent despite defendant's placement of a headlock. The jaw is a powerful instrument. See The Craniomandibular Mechanics of Being Human, Proceedings of the Royal Society of Biol. Sciences 3579 (2010). It can sever another's digits. See State v. Strickland, 91 So.3d 411, 416 (La. Ct. App. 2012) (holding it was not error for the jury to find defendant guilty of second-degree battery involving "serious bodily injury" under La. Stat. Ann. 14:34-1³ for biting off the tip of victim's finger). Defendant was not obliged to demonstrate that such harm actually occurred. It would suffice

³ La. Stat. Ann. 14:34-1 defines "serious bodily injury" as "bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death."

if he reasonably believed applying deadly force was necessary to protect against such serious bodily harm. N.J.S.A. 2C:3-4(b)(2).⁴

As defendant suggested a defense of defense of others, the trial court was obliged to inquire as to the facts underlying the claimed defense. As in Urbina, the court did not do so. Also, as in Urbina, the court elicited a waiver of the defense without informing defendant that: the defense of others was a complete defense; the fact that only a reasonable and honest belief, not an accurate belief, in the use of the force was required; and the State would bear the burden to disprove the defense beyond a reasonable doubt. Thus, as in Urbina, defendant did not knowingly and intelligently waive the defense. Therefore, he did not present a sufficient factual basis for his plea.

We recognize that an inadequate factual basis does not necessarily entitle a defendant to relief upon a collateral attack of a conviction. "As long as a guilty plea is knowing

⁴ In recognizing defendant's suggestion of a defense of others, we do not intend to indicate any view as to the potential success of such a defense. We note, for example, that defendant may not avail himself of the defense if he did not reasonably believe that the amount of force he used was needed to repel the attack, see State v. Bryant, 288 N.J. Super. 27, 36-37 (1996); or if defendant "with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter." N.J.S.A. 2C:3-4(b)(2)(a).

and voluntary . . . a court's failure to elicit a factual basis for the plea is not necessarily of constitutional dimension and thus does not render illegal a sentence imposed without such basis." See Mitchell, 126 N.J. at 577.⁵

However, a contemporaneous claim of innocence alters the legal significance of the lack of factual basis. "A factual basis is constitutionally required . . . when there are indicia, such as a contemporaneous claim of innocence, that the defendant does not understand enough about the nature of the law as it applies to the facts of the case to make a truly 'voluntary' decision on his own." Id. at 577 (citing McCarthy v. United States, 394 U.S. 459, 467 (1969)); see also State v. Barboza, 115 N.J. 415, 421 n. 1 (1989) ("A factual basis is not constitutionally required unless the defendant accompanies the plea with a claim of innocence.").

Defendant's suggested defense of others constituted a contemporaneous claim of innocence that negated his guilt. See State v. Munroe, 210 N.J. 429, 445 (2012) (holding that the defendant presented "a colorable claim of innocence" in her assertion of self-defense). Inasmuch as the trial court failed

⁵ Moreover, the defendant in Mitchell challenged the factual basis of his plea in a PCR petition over six-and-a-half years after entry of the judgement, leading the Court to find the petition "was both time-barred and procedurally barred." Tate, 220 N.J. at 407 (citing Mitchell, 126 N.J. at 572).

to explore defendant's claimed defense, and failed to secure a knowing and intelligent waiver after an appropriate explication of applicable law, it cannot be said his plea was voluntary and knowing, and violated due process. See Barboza, 115 N.J. at 415 n.1 ("A guilty plea violates due process and is, thus, constitutionally defective if it is not voluntary and knowing.").

Therefore, without the necessity of reaching defendant's remaining arguments, we reverse the denial of PCR. Defendant's plea and conviction shall be vacated. His prior pre-conviction bail status shall be restored, pending trial court review within thirty days. The matter is remanded for trial.

Reversed and remanded. We do not retain jurisdiction.

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



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