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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-2191-14T1  
A-0726-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT SCHWARTZ,

Defendant-Appellant.

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Argued February 14, 2017 – Decided March 9, 2017

Before Judges Ostrer, Leone and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Indictment No. 12-10-1069.

Saul J. Steinberg argued the cause for appellant (Zucker, Steinberg & Wixted, P.A., attorneys; Mr. Steinberg, on the briefs).

Monica Bullock, Legal Intern, argued the cause for respondent (Sean F. Dalton, Gloucester County Prosecutor, attorney; Ms. Bullock and Joseph H. Enos, Jr., Senior Assistant Prosecutor, on the brief).

PER CURIAM

In these two appeals, which were scheduled back-to-back and consolidated for purposes of this opinion, defendant Robert Schwartz challenges a December 1, 2014 order denying his motion to withdraw his guilty plea and a September 29, 2015 order denying his motion to dismiss the indictment based on statute of limitations grounds. Based upon our review of the record under the applicable law, we reverse the order denying his request to withdraw his guilty plea and affirm the court's order denying his motion to dismiss the indictment.

I.

Defendant was charged in an indictment with one count of second-degree theft by deception, N.J.S.A. 2C:20-4. The indictment alleged that between March 19, 2007, and April 2009, defendant obtained in excess of \$75,000 belonging to Frank Giosa by creating or reinforcing the false impression that defendant would use the money to pay off Giosa's mortgage, and failing to do so.

Defendant pled guilty to an amended charge of third-degree theft by deception, N.J.S.A. 2C:20-4, pursuant to a plea agreement with the State. In exchange for defendant's plea, the State agreed to recommend that defendant be sentenced to non-custodial probation with the requirement that he pay \$138,352 in

restitution.<sup>1</sup> Defendant was sentenced in accordance with the plea agreement.

Seven months later, defendant filed a motion to vacate his guilty plea pursuant to Rule 3:9-2 and Rule 3:21-1. Defendant argued his plea was not supported by an adequate factual basis and even if it was, he was entitled to withdraw it under the standard set forth in State v. Slater, 198 N.J. 145, 150 (2009). The court rejected defendant's arguments in an oral opinion and entered an order denying the motion.

Defendant subsequently filed a motion to vacate his conviction on statute of limitations grounds. The court rejected defendant's arguments and entered an order denying the motion.

Defendant appealed the court's orders. On appeal, defendant argues:

I. THE COURT MUST VACATE THE DEFENDANT'S  
CONVICTION AND GUILTY PLEA[.]

a. The Elements Set Forth By The Prosecution  
Are Not Factually Sufficient to Establish A  
Guilty Plea[.]

b. In The Alternative, Defendant Has Asserted  
A Colorable Defense Under The [ ] State v.  
Slater Factors[.]

II. THE COURT MUST VACATE THE CONVICTION  
BECAUSE [ ] DEFENDANT'S OFFENSE FALLS OUTSIDE  
OF THE STATUTE OF LIMITATIONS[.]

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<sup>1</sup> The restitution amount was subject to reduction based on defendant's presentation of proof of mitigation at sentencing.

## II.

Defendant claims the court erred by denying his motion to withdraw his guilty plea because there was an inadequate factual basis supporting his conviction for theft by deception, N.J.S.A. 2C:20-4. "The standard of review of a trial court's denial of a motion to vacate a guilty plea for lack of an adequate factual basis is de novo." State v. Tate, 220 N.J. 393, 403-04 (2015). We "owe no deference to the trial court," because we are "in the same position as the trial court in assessing whether the factual admissions during a plea colloquy satisfy the elements of an offense." State v. Urbina, 221 N.J. 509, 528 (2015) (quoting Tate, supra, 220 N.J. at 404).

A court shall not accept a guilty plea without "determining by inquiry of the defendant and others, in the court's direction, that there is a factual basis for the plea." Rule 3:9-2. The factual basis must "address[] each element of a given offense in substantial detail." Urbina, supra, 221 N.J. at 526 (quoting State v. Campfield, 213 N.J. 218, 236 (2013)). The court must be satisfied there is a factual basis supporting "every element of the crime charged." Ibid.

A proper factual basis permits the court to ascertain whether a defendant is pleading voluntarily to a charge the defendant understands, and ensures the defendant's conduct falls within the

crime charged. Id. at 526-27. "The factual-basis requirement also affords the court an opportunity to observe the conditions under which the plea is made, provides a better record for appellate review if the plea is subsequently challenged, increases the visibility of charge-reduction practices, and aids correctional agencies in the performance of their functions." State v. Barboza, 115 N.J. 415, 421 (1989). Requiring a factual basis "is the best means of ensuring that innocent people are not punished for crimes they did not commit. It is an approach that is essential to the very integrity of our criminal justice system." State v. Taccetta, 200 N.J. 183, 198 (2009).

Here, defendant entered a plea to theft by deception under N.J.S.A. 2C:20-4. Theft by deception occurs where a person "purposely obtains property of another by deception." one obtains the property of another by purposely creating a false impression." N.J.S.A. 2C:20-4. To "obtain" property means "to bring about a transfer or purported transfer of a legal interest in the property." N.J.S.A. 2C:20-1(f).

Under N.J.S.A. 2C:20-4, a person deceives another by "[c]reat[ing] or reinforc[ing] a false impression, including false impressions as to . . . intention or other state of mind." N.J.S.A. 2C:20-4(a). It must be proven the victim turned over the property in reliance on the deception. State v. Mann, 244 N.J. Super. 622,

626-27 (App. Div. 1990). However, "deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform a promise." N.J.S.A. 2C:20-4(a).

Defendant provided the factual basis for his guilty plea during the following colloquy:

[DEFENSE COUNSEL]: [ ] Mr. Schwartz, on various dates between May 19, 2007 and April 2009, were you in the Township of Washington?

[ ]DEFENDANT: Yes, I was.

. . .

[DEFENSE COUNSEL]: And is it true that during that time Frank Giosa, who's your brother-in-law, [ ] transferred from his bank account to your bank account \$175,000, is that correct?

[ ]DEFENDANT: Yes, it is.

[DEFENSE COUNSEL]: And is it true that when he did that it was with the idea in mind that some . . . or all of that money would be paid to pay off his mortgage, correct?

[ ]DEFENDANT: Correct at that time, yes.

[DEFENSE COUNSEL]: Yes. And then is it true that you started making payments on the mortgage, is that correct?

[ ]DEFENDANT: That is correct.

[DEFENSE COUNSEL]: And is it true that at some point you stopped making payments, correct?

[ ]DEFENDANT: Yes, it is.

[DEFENSE COUNSEL]: And then at that point, the money that was left over you kept and was not given back to Mr. Giosa, correct?

[ ]DEFENDANT: Yes.

[DEFENSE COUNSEL]: And that the amount was more than \$5,000, correct?

[ ]DEFENDANT: Yes.

[ASSISTANT PROSECUTOR]: The State is satisfied with that factual [basis], Your Honor.

Based on our review, we are convinced the factual basis for defendant's guilty plea was inadequate to support his conviction for theft by deception under N.J.S.A. 2C:20-4(a). Defendant's testimony failed to establish an essential element of the crime: that he obtained the victim's money "by purposely creating a false impression." State v. Talley, 184 N.J. Super. 167, 169 (App. Div. 1982), rev'd on other grounds, 94 N.J. 385 (1983); N.J.S.A. 2C:20-4(a).

"The factual basis for a guilty plea can be established by a defendant's explicit admission of guilt or by a defendant's acknowledgment of the underlying facts constituting essential

elements of the crime." State v. Gregory, 220 N.J. 413, 419 (2015). Defendant admitted he obtained Giosa's money with the idea he would make payments to pay off Giosa's mortgage, but did not expressly state he was purposely creating a false impression at that time. Notably, he did not admit that at the time he received Giosa's money, he did not intend to pay off the mortgage, or intended to keep the money for himself.

Moreover, defendant's testimony did not establish facts suggesting he obtained Giosa's money by purposely creating a false impression at that time. Defendant testified he obtained the money to use "some" or "all of that money . . . to pay off [Giosa's] mortgage." He further admitted that he started making the mortgage payments but then stopped and kept the remaining money for himself. Even if defendant obtained the money by agreeing to make "all" of the mortgage payments, and failed to do so, as a matter of law it cannot be inferred he purposely created a false impression at that time simply because "he did not subsequently perform the promise" to make the payments. N.J.S.A. 2C:20-4(a).

Because defendant failed to admit, and the admitted facts failed to show, that he deceived or created a false impression at the time he obtained Giosa's money, he did not give an adequate factual basis for theft by deception. If he later formed a criminal intent, and purposely retained the money for himself rather than



pay off the mortgage, that might constitute theft by failure to make required disposition of property received, N.J.S.A. 2C:20-9, but that crime was neither admitted nor charged.<sup>2</sup>

It was "essential" that defendant provide "a comprehensive factual basis, addressing each element of [theft by deception] in substantial detail," Campfield, supra, 213 N.J. at 236, but he failed to do so. "The remedy for an inadequate factual basis is an order vacating the guilty plea and restoring both parties to their positions prior to the trial court's acceptance of the plea." Id. at 232. Where we "determine[] that 'a plea has been accepted without an adequate factual basis, the plea, the judgment of conviction, and the sentence must be vacated, the dismissed charges reinstated, and defendant allowed to re-plead or to proceed to trial.'" Ibid. (quoting Barboza, supra, 115 N.J. at 420); see also State v. Stackhouse, 194 N.J. Super. 371, 376 (App. Div. 1984) (permitting defendant whose plea was vacated because of an inadequate factual basis the option of providing a sufficient factual basis, renegotiating the plea agreement, or proceeding to

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<sup>2</sup> We express no opinion on whether that crime may or should be charged.

trial). We are therefore constrained to reverse the court's denial of defendant's motion to withdraw his plea.<sup>3</sup>

Defendant also argues the court erred by denying his motion to dismiss the indictment on statute of limitations grounds. "[T]he decision whether to dismiss an indictment lies within the discretion of the trial court, and that exercise of discretionary authority ordinarily will not be disturbed on appeal unless it has been clearly abused." State v. Hoqan, 144 N.J. 216, 229 (1996) (citation omitted). "However, if a trial court's discretionary decision is based upon a misconception of the law, a reviewing court owes that decision no particular deference." State v. Lyons, 417 N.J. Super. 251, 258 (App. Div. 2010).

Defendant argues that because the State alleges he obtained Giosa's money on March 9, 2007, it was required that he be charged in an indictment within five years of that date under the statute of limitations. N.J.S.A. 2C:6-1(b)(1). He contends that as a matter of law the theft by deception alleged in the indictment involved a single discrete act that "must [have] occur[red] before, or simultaneous with, the receipt of [Giosa's] money" on March 9,

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<sup>3</sup> Because there was an inadequate factual basis for defendant's plea, it is unnecessary to address defendant's claim he was entitled to withdraw his plea under the standard set forth in Slater, supra, 198 N.J. at 150.

2007, and as a result, the court should have dismissed the indictment.

Defendant's argument is based on the incorrect premise that theft by deception is only committed by a discrete act. In State v. Diorio, 216 N.J. 598, 618 (2014), the Court rejected that premise and recognized theft by deception is a continuing offense where the facts show a defendant engaged in a scheme or course of behavior to obtain funds by deception. The Court held "that when property is transferred from one to another on a promise to pay at a designated later date, the person supplying that [property] has not been harmed until the date for payment has passed. The statute of limitations commences to run the day following the date payment is due." Id. at 621-22.

The indictment here alleges defendant engaged in a scheme that began on March 9, 2007, when he accepted Giosa's money based on a promise to pay the mortgage, and ended in April 2009, when he first failed to make the mortgage payment when due. Based on these facts, the indictment charged a continuing offense that was not complete until April 2009, on the day after defendant allegedly first failed to make the mortgage payment. See ibid. Thus, the statute of limitations did not run until April 2014, and the court correctly denied defendant's motion to dismiss the indictment.

Affirmed in part, reversed in part. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION