

RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." 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-2559-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BOBBY PETTY,

Defendant-Appellant.

Submitted December 4, 2017 – Decided December 20, 2017

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 11-
08-1445.

Joseph E. Krakora, Public Defender, attorney
for appellant (Laura B. Lasota, Assistant
Deputy Public Defender, of counsel and on the
brief).

Joseph D. Coronato, Ocean County Prosecutor,
attorney for respondent (Samuel Marzarella,
Chief Appellate Attorney, of counsel; Roberta
DiBiase, Supervising Assistant Prosecutor, on
the brief).

PER CURIAM

An Ocean County grand jury returned a six-count indictment charging defendant Bobby Petty with: second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4) (count one); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4a (count two); two counts of third-degree unlawful possession a handgun, N.J.S.A. 2C:39-5b (counts three and four); third-degree unlawful possession of a shotgun, N.J.S.A. 2C:39-5c(1) (count five); and second-degree possession of a firearm by a convicted person, N.J.S.A. 2C:39-7b (count six). Following an evidentiary hearing on November 6, 2013, the judge concluded defendant was incompetent to stand trial and entered a conforming order on November 20, 2013.

In the detailed written opinion that accompanied the order, the judge considered the testimony of the State's psychiatric expert, who opined defendant was malingering and was competent to stand trial. He also considered the opinion of defendant's psychiatric expert, who concluded defendant was not competent to stand trial and would not be competent in the reasonably foreseeable future. The judge concluded the State failed to demonstrate defendant was competent and determined defendant was "unfit to proceed."

On January 15, 2015, defendant appeared before a different judge and pled guilty to counts one and six of the indictment. Pursuant to the plea agreement, the State intended to recommend

consecutive seven-year sentences with a five-year period of parole ineligibility on the certain persons count.¹

On March 26, 2015, before sentencing, the first judge entered an order sua sponte vacating the guilty plea and conducted a second competency hearing on September 9. A different psychiatric expert, Dr. Raymond Terranova, testified on behalf of the State, in addition to two corrections officers familiar with defendant from the jail. The expert concluded defendant was malingering and was competent to stand trial. After listening to a recording of the prior guilty plea proceedings, the doctor opined that defendant was competent at the time he pled guilty. The officers described the conversations they had with defendant at the jail, during which he was lucid.

Defense counsel posed no questions to the doctor, called no witnesses and, without objection, permitted the judge to pose a series of questions to defendant, which elicited answers that were

¹ After the plea was entered and accepted, the attorneys advised the judge of the prior incompetency finding, and that defendant had not been reevaluated since. The judge engaged in extended questioning of defendant regarding, among other things, awareness of his surroundings and the role of the prosecutor and defense counsel. The judge also told defendant that, if after reviewing defendant's presentence report the judge could not "sentence [defendant] at six years with five years of parole ineligibility," defendant could retract his guilty plea. See R. 3:9-3(c) (permitting the judge, upon the request of the prosecutor and defense counsel, to indicate a maximum sentence he or she would impose, conditioned upon the contents of the presentence report).

non sequiturs. The judge gave both attorneys a chance to argue. Defense counsel only said: "There had been a previous plea. So, I would just ask that . . . the Court would stand by what had been done previously."

In a written decision that followed, the judge noted that he had vacated defendant's guilty plea because "th[e] court had previously determined that [defendant] was not fit to proceed," and ordered a new evaluation. Based upon Dr. Terranova's opinion, the judge concluded defendant was "malingering," and further found that "during [defendant's] plea, he was competent and understood the court proceedings." The judge then "reinstate[d] [defendant's] plea from January 15, 2015."

On January 5, 2016, defendant appeared for sentencing. Defendant indicated he was dissatisfied with the services of his attorney but was ready to proceed to sentencing. Defendant's subsequent criticisms of defense counsel caused the judge to take a short recess during the proceedings, after which counsel urged the judge to consider imposing concurrent sentences. The judge imposed concurrent seven-year sentences, with a mandatory minimum five-year period of parole ineligibility on the certain persons offense.

Before us, defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT HAVING VACATED THE PLEA ON THE GROUND THAT DEFENDANT HAD BEEN INCOMPETENT TO ENTER IT, ERRED IN REINSTATING IT AFTER FINDING THAT DEFENDANT WAS, SUBSEQUENTLY, COMPETENT TO PROCEED. THE COURT SHOULD HAVE PROVIDED DEFENDANT WITH THE OPPORTUNITY TO DECIDE WHETHER TO PROCEED UNDER THE VACATED AGREEMENT OR MOVE TO WITHDRAW HIS GUILTY PLEA AND PROCEED TO TRIAL. (Not Raised Below)

POINT II

IF THE PLEA AGREEMENT IS UPHELD, THE MATTER SHOULD BE REMANDED FOR RESENTENCING AS THE SENTENCE IMPOSED — AN AGGREGATE SEVEN-YEAR TERM SUBJECT TO A FIVE-YEAR PAROLE DISQUALIFIER — EXCEEDED THAT WHICH WAS CONTEMPLATED BY THE PLEA COURT, WHICH REPEATEDLY TOLD DEFENDANT THAT HE COULD EXPECT TO BE SENTENCED TO A BASE TERM OF NO MORE THAN SIX YEARS.

We reverse, vacate defendant's guilty plea and judgment of conviction, and remand the matter for further proceedings.

Defendant correctly posits the narrow issue before us — whether after determining defendant was incompetent to plead guilty in January 2015 and vacating the guilty plea entered at that time, the judge could conclude otherwise and accept the plea based on evidence adduced eight months later. The State contends our review of the judge's competency determination is highly deferential, see, e.g., State v. Moya, 329 N.J. Super. 499, 506 (App. Div.) ("Our review of [competency] determinations is typically, and properly, highly deferential."), certif. denied,

165 N.J. 529 (2000), and because defendant never raised this issue in the trial court, we must review the claim as one of plain error. R. 2:10-2.

"A defendant tried or convicted while incompetent to stand trial has been deprived of his or her due process right to a fair trial." State v. Purnell, 394 N.J. Super. 28, 47 (App. Div. 2007) (citing Pate v. Robinson, 383 U.S. 375, 378 (1966)). "In a competency proceeding, the State has the burden to prove by a preponderance of the evidence that the defendant's mental condition at the time of trial does not render him or her incompetent to stand trial." State v. Gorthy, 226 N.J. 516, 530 (2016) (citations omitted). N.J.S.A. 2C:4-4(b) "sets forth findings that the court must make in order to find the defendant mentally competent." Id. at 531 (emphasis added).

The problem in this case is that Dr. Terranova never interviewed defendant until April 2015. He opined defendant was competent to plead guilty in January 2015 by simply listening to the tape of those proceedings. However, when he vacated the guilty plea in March 2015, the judge reasoned that there was no proof defendant had been restored to competency. Moreover, when the judge concluded defendant was malingering at the time of his guilty plea in January, 2015, he failed to make the requisite findings under N.J.S.A. 2C:4-4(b) necessary to support the conclusion that

defendant had been restored to competency. We owe no deference under these circumstances.

Defendant contends he should be given a choice whether to avail himself of the same plea bargain or "pursue a trial instead." He cites no authority for such a proposition. We have recognized that absent a showing of detrimental reliance, a defendant has no right to compel enforcement of a plea bargain. State v. Rosario, 391 N.J. Super. 1, 14 (App. Div. 2007).

Having decided the judge erred by retroactively accepting defendant's guilty plea made during a time when the judge had concluded defendant was incompetent to stand trial, the only remedy is to vacate the guilty plea and defendant's judgment of conviction. In light of our decision, we need not address defendant's second point on appeal.

Reversed. We vacate defendant's guilty plea and the resulting judgment of conviction and remand the matter to the Law Division for further proceedings.

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


CLERK OF THE APPELLATE DIVISION