NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3629-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEON FAISON,

Defendant-Appellant.

APPROVED FOR PUBLICATION

November 29, 2017

APPELLATE DIVISION

Submitted October 17, 2017 – Decided November 29, 2017

Before Judges Reisner, Hoffman and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-11-2820.

Fusco & Macaluso Partners, LLC, attorneys for appellant (Amie E. DiCola, on the brief).

Robert D. Laurino, Acting Essex County Prosecutor, attorney for respondent (Stephen A. Pogany, Special Deputy Attorney General/Acting Assistant Prosecutor, on the brief).

The opinion of the court was delivered by

HOFFMAN, J.A.D.

Defendant Leon Faison appeals from a March 18, 2016 judgment of conviction for operating a motor vehicle while his license was suspended for a second or subsequent driving while

intoxicated (DWI) conviction, N.J.S.A. 2C:40-26(b). He also appeals from a June 19, 2015 order denying his motion to dismiss the indictment. For the reasons that follow, we reverse and remand for further proceedings consistent with this opinion.

I

In 2010, police charged defendant with DWI on two separate dates, September 26 and October 16, both times in Bloomfield Township. Defendant retained the services of an attorney who failed to appear in court multiple times. This attorney filed a motion to withdraw as counsel on May 11, 2011; however, on May 24, 2011, when defendant appeared to enter a plea to each charge, the court instructed the withdrawing attorney[1] to represent defendant, against the wishes of both defendant and the attorney. According to defendant, the attorney advised him to plead guilty to both DWI charges and he reluctantly complied. Accordingly, the municipal court suspended defendant's license for two years on the second conviction.

On August 25, 2012, police charged defendant with DWI and driving with a suspended license. Regarding the same incident, a grand jury indicted defendant in November 2013, charging him

[1] It appears the withdrawing attorney was in the courtroom for another case; in light of his pending motion to withdraw, it further appears he was not prepared to represent defendant on either charge.

with fourth-degree driving during a period of license suspension for a second or subsequent DWI conviction, N.J.S.A. 2C:40-26(b).

On April 3, 2014, defendant filed a petition for post-conviction relief (PCR) for the two DWI convictions entered on May 24, 2011. Ultimately, on November 14, 2014, the Law Division vacated both DWI convictions after the Bloomfield Municipal Court could not produce a transcript of the May 24, 2011 proceedings, "due to technical errors," and an attempt to recreate the record proved unsuccessful. The same order remanded both charges to the municipal court for trial.

On February 3, 2015, defendant appeared in municipal court for trial on the remanded charges. After the court dismissed the September 26, 2010 DWI charge, defendant entered a guilty plea to the October 16, 2010 DWI charge.

Thereafter, defendant filed a motion to dismiss the indictment charging him with violating N.J.S.A. 2C:40-26(b). After the Law Division denied his motion, defendant stipulated to a bench trial and the judge found him guilty as charged. Pursuant to N.J.S.A. 2C:40-26(c), the judge sentenced defendant to the mandatory minimum 180 days in the county jail, but stayed his sentence pending this appeal.

Defendant presents the following argument in support of his appeal:

THE COURT SHOULD REVERSE MR. FAISON'S FINAL JUDGMENT OF CONVICTION, AND FURTHER REVERSE THE DENIAL OF MR. FAISON'S MOTION TO DISMISS OR REMAND, AS THE HOLDING OF STATE V. SYLVESTER IS INAPPLICABLE TO THE MATTER AT HAND AS THAT HOLDING DICTATES AN UNCONSTITUTIONAL AND UNJUST RESULT WHEN APPLIED TO THE FACTS OF THIS MATTER.

II

"A trial court . . . should not disturb an indictment if there is some evidence establishing each element of the crime to make out a prima facie case." State v. Morrison, 188 N.J. 2, 12 (2006). However, the absence of evidence to establish an element of the charged offense renders an indictment "'palpably defective' and subject to dismissal." Ibid. (citing State v. Hogan, 144 N.J. 216, 228-29, (1996)). "[O]ur review of a trial judge's legal interpretations is de novo." State v. Eldakroury, 439 N.J. Super. 304, 309 (App. Div.) (citing State v. Grate, 220 N.J. 317, 329-30 (2015); State v. Drury, 190 N.J. 197, 209 (2007)), certif. denied, 222 N.J. 16 (2015).

The sole issue on appeal is the trial court's interpretation of the applicable provisions of N.J.S.A. 2C:40-26, which state:

> b. It shall be a crime of the fourth degree to operate a motor vehicle during the period of license suspension in violation of [N.J.S.A. 39:3-40], if the actor's license was suspended or revoked for a second or subsequent violation of [N.J.S.A. 39:4-50 or N.J.S.A. 39:4-50.4(a)]. A person convicted

> of an offense under this subsection shall be sentenced by the court to a term of imprisonment.
>
> c. Notwithstanding the term of imprisonment provided under [N.J.S.A. 2C:43-6] and the provisions of subsection e. of [N.J.S.A. 2C:44-1], if a person is convicted of a crime under this section the sentence imposed shall include a fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole.

The Law Division judge relied on State v. Sylvester, 437 N.J. Super. 1 (App. Div. 2014), in finding defendant guilty of driving while his license was suspended for a second or subsequent DWI conviction. However, we hold the case under review distinguishable from Sylvester. We therefore reverse and remand for further proceedings.

In Sylvester, the defendant had three prior DWI convictions. Id. at 3. Upon her third DWI conviction in 2011, the court suspended the defendant's license for two years.[2] Ibid. In 2012, while the defendant's license remained suspended, she operated a motor vehicle and was indicted for violating N.J.S.A. 2C:40-26(b). Ibid. The defendant then successfully filed for PCR regarding her 2011 DWI conviction,

[2] Because defendant's second DWI conviction occurred more than ten years before her third conviction, the court treated the third conviction as a second conviction for sentencing purposes. See N.J.S.A. 39:4-50(a)(3).

and the court vacated that conviction. Ibid. However, before the defendant went to trial on the N.J.S.A. 2C:40-26(b) charge, she again plead guilty to the 2011 DWI charge, and the court once again suspended her license for two years. Ibid.

At her trial, the defendant argued she was not guilty of violating N.J.S.A. 2C:40-26(b), asserting her license was not validly suspended at the time of the alleged offense because the conviction was subsequently vacated. Id. at 4. The trial court rejected this argument and reasoned that on the date the defendant drove, her license was suspended and she was aware of the suspension. Ibid. The court therefore denied the defendant's motion to dismiss the indictment and found her guilty of violating N.J.S.A. 2C:40-26(b), and we affirmed. Id. at 7-8.

The facts here are distinguishable from Sylvester because, by the time of defendant's trial on the N.J.S.A. 2C:40-26(b) charge, he had only one prior DWI conviction. Here, defendant initially plead guilty to two DWI charges. Like Sylvester, defendant obtained PCR, vacating his DWI convictions. However, unlike Sylvester, defendant was not re-convicted of both DWI charges; the court dismissed one and he plead guilty to the other. Therefore, at the time the Law Division convicted defendant of violating N.J.S.A. 2C:40-26(b), his second DWI

conviction had been vacated. Accordingly, the State could not prove an element of the crime charged — a second DWI conviction — a prerequisite to the mandatory 180-day incarceration period imposed by N.J.S.A. 2C:40-26(b) and (c).

Our holding is consistent with State v. Laurick, 120 N.J. 1, 16, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990), where our Supreme Court held "a prior uncounseled DWI conviction may establish repeat-offender status for purposes of the enhanced penalty provisions of the DWI laws"; however, "a defendant may not suffer an increased period of incarceration as a result of . . . an uncounseled DWI conviction." The court provided guidance for future cases, stating that unless the lack of counsel results in a "miscarriage of justice," the court should not grant relief. Id. at 10.

Here, we conclude that convicting defendant of driving while suspended for a second or subsequent DWI conviction when he only has one prior DWI conviction would constitute a miscarriage of justice. Furthermore, sentencing defendant to the minimum imprisonment of 180 days under N.J.S.A. 2C:40-26(c) would bring about "an increased period of incarceration as a result of . . . an uncounseled DWI conviction." See Laurick, supra, 120 N.J. at 16. Although counsel technically represented defendant, the representation was allegedly ineffective, and the

Law Division later vacated both convictions and the municipal court then dismissed one of the two prior DWI charges.

Although we concluded, under the facts of Sylvester, that Laurick applied only to N.J.S.A. 39:3-40 and did not extend to N.J.S.A. 2C:40-26, Sylvester, supra, 437 N.J. Super. at 7, we find the facts under review markedly different. Here, defendant initially entered guilty pleas to both DWI charges. However, the Law Division vacated those pleas and the municipal court dismissed one of the charges, resulting in only one DWI conviction at the time the Law Division found him guilty of driving while suspended for a second or subsequent DWI conviction. By contrast, in Sylvester, the defendant re-entered her guilty plea to the DWI charge at a later date. Id. at 3. As a result, she had the same number of prior DWI convictions at the time the court found her guilty of violating N.J.S.A. 2C:40-26(b) as she had on the date of her offense. Because one of defendant's two prior DWI convictions was vacated and not later reinstated, we reverse defendant's conviction for driving while suspended for a second or subsequent DWI conviction under N.J.S.A. 2C:40-26(b).

We note the Law Division also found defendant guilty of the lesser charge of driving while suspended under N.J.S.A. 39:3-40. While we have not been provided with defendant's sentencing

transcript, we assume the judge merged the N.J.S.A. 39:3-40 conviction into the N.J.S.A. 2C:40-26(b) conviction. Before us, defendant concedes "he should be made subject to [N.J.S.A. 39:3-40] given the dismissal of his previous DWI and the State's inability to prove every element of N.J.S.A. 2C:40-26(b)." We agree and therefore remand for the Law Division to sentence defendant on the N.J.S.A. 39:3-40 conviction.

Reversed and remanded. We do not retain jurisdiction.