SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4108-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TRUYEN VO,

Defendant-Appellant.

Submitted December 7, 2016 – Decided March 24, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Municipal Appeal No. 52-2014.

Timothy J. Dey, attorney for appellant.

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Megan M. Cowles, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the March 26, 2015 order of the Law Division denying his petition for post-conviction relief (PCR). Defendant filed this petition seeking relief from the use of a

2010 conviction for driving while intoxicated (DWI), N.J.S.A. 39:4-50, to enhance the penalty for a subsequent DWI conviction. We affirm.

The procedural history of this case can best be understood in the context of our drunk driving laws, as amended over the years, which provide progressively-enhanced penalties for repeat offenders. Penalties for first-time offenders include a fine between $250 and $500, license suspension for a period between three months and one year, and, in the court's discretion, a term of imprisonment not to exceed thirty days, with twelve to forty-eight hours of detainment at an Intoxicated Driver Resource Center (IDRC). N.J.S.A. 39:4-50(a)(1). Second-time offenders are subject to a fine of between $500 and $1000, a mandatory two-year license revocation, and a term of imprisonment of not less than forty-eight consecutive hours nor more than ninety days in length. N.J.S.A. 39:4-50(a)(2). Penalties for third or subsequent violations include a mandatory $1000 fine, a mandatory ten-year license revocation and a mandatory custodial term of 180 days, 90 days of which may be served in an approved drug or alcohol in-patient rehabilitation program. N.J.S.A. 39:4-50(a)(3).[1]

[1] Prior to January 20, 2004, the mandatory 180-day jail term for a third or subsequent DWI conviction could be lowered by up to 90 days served performing community service. L. 2002, c. 34, §17.

If more than ten years elapse between convictions, N.J.S.A. 39:4-50(a) provides a "step-down" provision under which the earlier violation does not enhance the sentence of the subsequent conviction. State v. Revie, 220 N.J. 126, 128 (2014); State v. Lucci, 310 N.J. Super. 58, 61-62 (App. Div.), certif. denied, 156 N.J. 386 (1998). "Thus, a defendant's record of prior DWI offenses has a pivotal impact on his or her exposure to a term of incarceration, the loss of his or her driver's license, and other penalties." Revie, supra, 220 N.J. at 133.[2]

Against this statutory backdrop, on March 27, 2010, defendant, a native Vietnamese speaker, was charged in the Township of Sayreville with DWI, N.J.S.A. 39:4-50; refusal to submit to a breath test, N.J.S.A. 39:4-50.4; failure to maintain a lane, N.J.S.A. 39:4-88(b); and reckless driving, N.J.S.A. 39:4-96. On July 22, 2010, defendant appeared in Sayreville Municipal Court represented by counsel. Because of defendant's limited English

[2] Additional financial penalties and assessments for DWI include a $100 surcharge to support the Drunk Driving Enforcement Fund, N.J.S.A. 39:4-50.8; a $100 fee payable to the Alcohol Education, Rehabilitation and Enforcement Fund, N.J.S.A. 39:4-50(b); a $75 assessment for the Safe Neighborhoods Services Fund, N.J.S.A. 2C:43-3.2; a $50 assessment under N.J.S.A. 2C:43-3.1(2)(c); a $100 DWI surcharge under N.J.S.A. 39:4-50(i); an insurance surcharge for a three-year period of $1000 per year for each of the first two convictions and $1500 per year for the third or subsequent conviction occurring within a three-year period, N.J.S.A. 17:29A-35(b)(2)(b); up to $33 in court costs, N.J.S.A. 22A:3-4; and a $6 motor-vehicle violation fine, N.J.S.A. 39:5-41(d) to (h).

proficiency, a Vietnamese interpreter was secured by the municipal court judge through language line.

With the assistance of the interpreter, defendant pled guilty to DWI, admitting that on March 27, 2010, when he was stopped by police in Sayreville, he was operating a motor vehicle while he was intoxicated. Defendant also admitted that he was pleading guilty to DWI freely and voluntarily. The municipal court judge dismissed the refusal charge because of the "language issue," "merged in and dismissed" the remaining motor vehicle violations, and sentenced defendant as a first-time DWI offender. Defendant was provided with and executed an English version of a document titled "Notification of Penalties for Subsequent DWI," which explained the enhanced penalties for subsequent DWI convictions, but the municipal court judge did not give defendant verbal warnings of what would happen if he was convicted of a second or third DWI.

On July 19, 2013, defendant was again charged with DWI and related motor vehicle violations in Hamilton Township. Defendant was represented by counsel and a Vietnamese interpreter was utilized throughout the municipal court proceedings. Defendant pled guilty to DWI and was sentenced as a second-time DWI offender

on March 12, 2014.[3] With the assistance of the interpreter, the municipal court judge gave defendant verbal and written warnings about the enhanced penalties for subsequent DWI convictions and defendant acknowledged receipt of the warnings on the record.

On December 14, 2013, defendant was again charged with DWI and related motor vehicle violations in the Township of Cherry Hill. Defendant was represented by counsel and a Vietnamese interpreter was utilized throughout the municipal court proceedings. Defendant pled guilty and was sentenced as a third-time DWI offender on June 4, 2014.[4] Because defendant's PCR application regarding the 2010 DWI conviction was then pending in Sayreville Municipal Court, the Cherry Hill municipal court judge stayed the mandatory custodial aspect of defendant's sentence but imposed all other penalties. With the assistance of the interpreter, the municipal court judge gave defendant verbal and written warnings about the enhanced penalties for subsequent DWI convictions and defendant acknowledged receipt of the warnings on the record.

Defendant's petition for PCR relief in Sayreville Municipal Court sought to vitiate his 2010 DWI conviction so that it could

[3] The remaining violations were dismissed.

[4] The remaining violations were dismissed.

not be used to enhance the custodial aspect of his 2014 sentence. Defendant argued that his 2010 guilty plea was defective because he was not warned of enhanced future punishment for subsequent DWI convictions and, therefore, he was not aware of the consequences of his plea. On September 18, 2014, the Sayreville municipal court judge denied defendant's application, finding that the written warnings defendant received were sufficient. Thereafter, defendant appealed the denial to the Law Division.

On March 20, 2015, following oral arguments and a de novo review of the record, the Law Division judge denied defendant's petition from the bench and issued a memorializing order on March 26, 2015. The Law Division judge acknowledged that defendant was not given warnings of the enhanced penalties for subsequent DWI convictions when he pled guilty in 2010. However, relying on State v. Petrello, 251 N.J. Super. 476 (App. Div. 1991), the court determined that the municipal court judge's failure to give the warnings did not mandate the relief requested. This appeal followed.

On appeal, defendant raises the following points for our consideration.

> I. THE FAILURE TO WARN OF THE ENHANCED PENALTIES ASSOCIATED WITH A SECOND AND SUBSEQUENT DWI CONVICTION BARS ENHANCED TIME OF INCARCERATION BOTH UNDER COURT [RULE] 7:6-

2(a)(1), N.J.S.A. 39:4-50(a), [LAURICK][5] & [HRYCAK].[6]

II. THE MOTION JUDGE COULD NOT HAVE FOUND THAT THIS DEFENDANT POSSESSED A "BASE KNOWLEDGE" OF ENGLISH; THE RECORD IS DEVOID OF TESTIMONY AND IT [IS] STIPULATED THAT NO ONE BUT THE INTERPRETER SPOKE VIETNAMESE.

III. THE COURT OF FIRST CONVICTION DID NOT ELICIT A SUFFICIENT FACTUAL BASIS.

On an appeal such as this, we "consider only the action of the Law Division and not that of the municipal court[,]" State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001), because the Law Division's determination is de novo on the record from the municipal court. R. 3:23-8(a)(2). Although we are ordinarily limited to determining whether the Law Division's de novo factual findings "could reasonably have been reached on sufficient credible evidence present in the record[,]" State v. Johnson, 42 N.J. 146, 162 (1964), we owe no such deference here because the Law Division decided the application under review on the papers without taking testimony. See State v. Harris, 181 N.J. 391, 421 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). Our review of purely legal issues is plenary.

[5] State v. Laurick, 120 N.J. 1, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990).

[6] State v. Hrycak, 184 N.J. 351 (2005).

State v. Goodman, 415 N.J. Super. 210, 225 (App. Div. 2010), certif. denied, 205 N.J. 78 (2011).

Rule 7:10-2, the analog to Rule 3:22, provides a PCR remedy for municipal court convictions. Rule 7:10-2(c)(1) provides for post-conviction relief from a municipal court sentence based on "substantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of New Jersey." In Laurick, supra, 120 N.J. at 17, the Court made clear that "[p]ost-conviction relief from the effect of prior convictions should normally be sought in the court of original jurisdiction, which [would] be in the best position to evaluate whether there [had] been any denial of fundamental justice." It is defendant's burden to prove the defect and obtain the relief of vacating the earlier conviction. Id. at 11-12. See also Hrycak, supra, 184 N.J. at 363 (reiterating that the burden to obtain such relief rests on defendant).

A defendant must establish by a preponderance of the credible evidence, entitlement to the relief requested on PCR. State v. McQuaid, 147 N.J. 464, 483 (1997). To sustain the burden of demonstrating that an injustice has occurred, a defendant must allege and articulate specific facts, "which, if believed, would provide the court with an adequate basis on which to rest its

decision. A court reviewing a petition that does not allege facts sufficient to sustain that burden of proof should not jump to its own conclusions regarding the factual circumstances of the case." State v. Mitchell, 126 N.J. 565, 579 (1992).

Relying on Rule 7:6-2(a)(1) and N.J.S.A. 39:4-50(c), defendant argues that the municipal court judge's failure to warn him of the enhanced penalties associated with subsequent DWI convictions when he pled guilty in 2010, bars imposition of the mandatory 180-day period of incarceration for his 2014 DWI conviction. We disagree. We recognize that "[f]or a plea to be knowing, intelligent and voluntary, the defendant must understand the nature of the charge and the consequences of the plea." State v. Johnson, 182 N.J. 232, 236 (2005); R. 7:6-2(a)(1). Further, in relevant part, N.J.S.A. 39:4-50(c) provides:

> Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third or subsequent violation of this section. A person shall be required to acknowledge receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of this section.

It is undisputed that when defendant pled guilty to DWI in 2010, he was not given verbal warnings of the enhanced penalties

for subsequent DWI convictions, and the written warnings were conveyed in a language defendant does not speak. Cf. State v. Marquez, 202 N.J. 485, 508 (2010) (holding that reading the standard statement to motorists in a language they do not speak is akin to not reading the statement at all and renders a refusal conviction defective). However, in State v. Nicolai, 287 N.J. Super. 528, 532 (App. Div. 1996), we held that "the failure to receive written or oral notice of the penalties applicable to a second, third or subsequent conviction does not bar imposition of the progressively-enhanced sentences mandated by our statutes." Accord State v. Petrello, 251 N.J. Super. 476, 478-79 (App. Div. 1991). To hold otherwise "would frustrate the obvious legislative intent to provide enhanced penalties for each subsequent conviction of the statute." Id. at 478. Since we have characterized drunk driving as "one of the chief instrumentalities of human catastrophe[,]" such a holding would be untenable. State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984).

We also reject defendant's argument that the absence of a factual basis rendered his 2010 guilty plea a constitutional nullity. First, defendant is precluded from raising this issue on appeal because he did not raise the issue before the Law Division judge. Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citing State v. Robinson, 200 N.J. 1, 20 (2009), certif. denied,

226 N.J. 213 (2016)). Secondly, assuming the argument was properly preserved, it has no merit. We recognize that before accepting a guilty plea to DWI from defendant, the municipal court judge was required to address defendant personally and determine "by inquiry . . . that there [was] a factual basis for the plea." R. 7:6-2(a)(1). However, as the Court noted in State v. Mitchell, 126 N.J. 565, 577-78 (1992), although our procedural rules require a judge to elicit a factual basis for a guilty plea,

> [a]s long as a guilty plea is knowing 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 a basis. A factual basis is constitutionally required only 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.
>
> [Ibid. (citations omitted).]

Here, when defendant pled guilty in 2010, he acknowledged that he was pleading guilty to DWI freely and voluntarily and, in applying for PCR relief, defendant has made no contemporaneous claim of innocence. Rather, the sole basis for the application is to avoid the mandatory 180-day term of incarceration required for a third or subsequent DWI conviction. Accordingly, any defect in the factual basis for the plea is not of constitutional

dimension, and thus does not invalidate the plea for the purpose of enhancing the mandatory jail term for a third DWI conviction to 180 days.

Affirmed. Any stay currently in effect is vacated.