SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4222-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY J. DICARLO, JR.,

Defendant-Appellant.

Submitted May 16, 2017 – Decided July 18, 2017

Before Judges Espinosa and Grall.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Municipal Appeal Nos. E12-0757, E12-0758, and E12-0759.

Helmer, Conley & Kasselman, P.A., attorneys for appellant (Patricia B. Quelch, of counsel and on the brief).

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

PER CURIAM

Defendant Anthony J. DiCarlo, Jr. pled guilty to "operating a motor vehicle with a blood alcohol concentration of 0.08%

blood alcohol concentration or more . . . ." N.J.S.A. 39:4-50(a). Defendant's attorney advised the municipal court judge that his client was entering the plea with the understanding that summonses issued on the same occasion would be dismissed. Those summonses were for reckless driving, N.J.S.A. 39:4-96, based on his driving sixty-five miles per hour in a construction zone, and a violation summons of N.J.S.A. 39:4-88(b), based on his making an unsafe lane change.

The judge asked defendant if he was pleading guilty because he was guilty of driving under the influence, and defendant said, "Yes." With defendant's attorney's consent, the judge marked and admitted the State's exhibit, which was an Alcotest worksheet reporting a .10 reading and a "mean reading of .106750."

Addressing defendant, the judge said: "[P]lease understand, sir, those two readings are more than sufficient in and of themselves to form the basis for a conviction assuming that the trooper was a qualified . . . Alcotest operator and the machine was working properly on that day, do you understand that, sir?" Defendant responded, "Yes." The judge's next question was, "Is that why you are pleading guilty to the charge?" Defendant said, "Yes" and proceeded to acknowledge that his plea was "free and voluntary."

Defense counsel addressed the judge on sentencing, and the judge imposed an appropriate sentence and dismissed the other summonses in conformity with the agreement. That was done on September 13, 2012, and defendant did not appeal.

More than three years later, on October 15, 2015, defendant appeared in municipal court on a motion to vacate the guilty plea. Defendant was represented by a different attorney, who argued that the plea was accepted without an adequate factual basis. The judge who accepted the plea, after hearing counsel's argument on the inadequacy of the questions he had posed in eliciting a factual basis, denied the motion.

Defendant's new attorney appealed the denial of the motion to vacate to the Superior Court. Our review is of the proceeding in Law Division. State v. Johnson, 42 N.J. 146, 157 (1964) (addressing the process when appeals from convictions in municipal courts were taken to county courts and then from the county courts to the Appellate Division). Defense counsel limited his argument to the adequacy of the factual basis, arguing that a court may not presume facts required to establish the essential elements of the offense. He contended the judge failed to elicit any fact from defendant and argued that the municipal court judge needed to inquire about what alcohol defendant drank and when he drank it.

The Superior Court judge distinguished proofs required to establish disputed facts at trial and undisputed evidence establishing the elements of an offense in a plea proceeding. He found the State's exhibit reporting the Alcotest readings and defendant's agreement that his blood count was tested "by someone authorized to administer such a test, that it was, in fact, above the limit of .08, and that he . . . also operated a motor vehicle while under the influence . . . ." The judge concluded that the exhibit and defendant's admissions provided an adequate factual basis.

Having considered the record, the judge's decision, and the arguments presented on appeal, we affirm. The arguments on appeal, have insufficient merit to warrant discussion beyond the brief comments that follow. R. 2:11-3(e)(2). In State v. Tate, the Supreme Court provided the following guidance on the importance of a factual basis for a guilty plea and what is required to establish one:

> [T]he principal purpose of the factual-basis requirement . . . is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." [The Rule] serves as a fail-safe mechanism that filters out those defendants whose factual accounts do not equate to a declaration of guilt. Thus, before accepting a guilty plea, "the trial

> court must be 'satisfied from the lips of the defendant that he committed the acts which constitute the crime.'" A factual basis for a plea must include either an admission or the acknowledgment of facts that meet "'the essential elements of the crime.'"
>
> [220 N.J. 393, 406 (2015) (emphasis added and citations omitted).]

The elements of the per se violation, which is the form of driving while under the influence to which defendant pled guilty, are straight forward. Pursuant to N.J.S.A. 39:4-50(a):

> [A] person who [1] operates a motor vehicle while under the influence . . . **or** [2] operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood **or** [3] permits another person who is under the influence . . . to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood" [commits this offense].

The foregoing provision includes three separate bases for a finding of guilt under N.J.S.A. 39:4-50(a). A factual basis for both elements of the per se violation – operating a vehicle and having a blood alcohol content of .08 or higher – was established by defendant's acknowledgment that the reason for his guilty plea was that he understood his "two readings [were] more than sufficient in and of themselves to form the basis for

a conviction assuming that the trooper was a qualified . . . Alcotest operator and the machine was working properly on that day." For that reason, Judge Tyner properly denied the motion to vacate.

Affirmed.