SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4657-15T2

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WAYNE TERPSTRA,

Defendant-Respondent.

Argued January 25, 2017 – Decided March 14, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Municipal Appeal No. 15-038.

Paula Jordao, Assistant Prosecutor, argued the cause for appellant (Fredric M. Knapp, Morris County Prosecutor, attorney; Ms. Jordao, on the briefs).

Denis F. Driscoll argued the cause for respondent (Inglesino, Webster, Wyciskala & Taylor, LLC, attorneys; Mr. Driscoll, of counsel and on the brief; Derek W. Orth, on the brief).

PER CURIAM

The State appeals from the June 14, 2016 judgment of the Law Division sentencing defendant as a second-time drunk driving offender with respect to the custodial aspect of his sentence even though defendant was previously convicted of driving while intoxicated (DWI) in 1981, 1982, 1988 and 1995. The State contends that defendant's sentence is illegal because his prior DWI convictions mandate the imposition of a 180-day jail term on his 2015 DWI conviction. We agree and reverse.

The procedural history of this case can best be understood in the context of our drunk driving laws, which provide progressively-enhanced penalties for repeat offenders as amended over the years. 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]

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).[2] "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.

Against this statutory backdrop, on January 23, 2015, defendant was charged with DWI, N.J.S.A. 39:4-50, in the town of Boonton. At the time, defendant had been convicted of DWI on four

[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.

[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).

prior occasions. In 1980, defendant was charged with DWI, N.J.S.A. 39:4-50, in the Township of Parsippany-Troy Hills, pled guilty, and was sentenced as a first-time DWI offender on July 2, 1981. In 1982, defendant was charged with DWI, N.J.S.A. 39:4-50, and refusal, N.J.S.A. 39:4-50.2, in the Township of Pequannock, pled guilty, and was sentenced as a second-time DWI offender on November 3, 1982. In 1988, defendant was charged with DWI, N.J.S.A. 39:4-50, in Wall Township, pled guilty, and was sentenced as a third DWI offender on December 19, 1988. In 1995, defendant was charged with DWI, N.J.S.A. 39:4-50, and refusal, N.J.S.A. 39:4-50.2, in Montville Township, pled guilty and was sentenced as a third-time DWI offender on May 22, 1995.[3]

In the present case, following a trial in the Township of Boonton Municipal Court that was limited to determining the legality of the motor vehicle stop, the municipal court judge determined that the stop was valid and found defendant guilty of DWI based on stipulated facts which included a blood alcohol reading of 0.17%, a per se violation of N.J.S.A. 39:4-50.[4]

[3] Defendant's drivers abstract indicates that on the same date, defendant was convicted of driving with a suspended license, N.J.S.A. 39:3-40.

[4] Defendant was also convicted of failing to obey a stop sign, N.J.S.A. 39:4-144, but acquitted of reckless driving, N.J.S.A. 39:4-96.

Defendant was granted a step-down because more than ten years had elapsed since his 1995 DWI conviction. Accordingly, on September 15, 2015, defendant's fifth DWI conviction was treated as a fourth DWI conviction for sentencing purposes, and defendant was sentenced to a ten-year license suspension, one year installation of ignition interlock device upon reinstatement of his driving privileges, twelve hours detainment at the IDRC, and a 180-day jail term, 90 days of which could be served in an approved alcohol rehabilitation program. All mandatory fines, fees and penalties were also assessed.[5] On the same date, defendant was granted a stay of the custodial aspect of the sentence pending appeal to the Law Division.[6]

Following a trial de novo in the Law Division, on January 29, 2016, defendant was again found guilty of DWI, but granted an adjournment for the submission of sentencing briefs.[7] Defendant argued to the trial court that his prior DWI convictions should not be considered as prior offenses to enhance his sentence because

[5] The stop sign violation was merged into the DWI.

[6] Several conditions were imposed in conjunction with the stay, including posting cash bail in the amount of $2500, signing a waiver of extradition, weekly reporting to probation, and undergoing random testing for drugs and alcohol.

[7] The stay and its attendant conditions was continued.

he was not issued appropriate warnings prior to pleading guilty to DWI in 1981, 1982, 1988, and 1995. To support his argument, defendant submitted certifications from the attorneys who represented him in 1988 and 1995, as well as defendant's own certification. In the certifications, the affiants averred that they had no recollection of whether defendant was warned of the impact of a guilty plea on a subsequent DWI charge. Relying on State v. Laurick, 120 N.J. 1, cert. denied, 498 U.S. 967, 111 S. Ct. 429, 112 L. Ed. 2d 413 (1990), defendant argued that, as a result, he should not be subjected to the mandatory custodial sentence. After considering defendant's arguments, on March 11, 2016, the trial court granted another adjournment of the sentencing to allow defendant to file a Laurick application in Montville Municipal Court challenging his 1995 DWI conviction.[8]

On June 6, 2016, the Montville Municipal Court granted defendant's Laurick application. The court found that defendant's 1995 guilty plea to DWI was deficient because defendant was not advised of enhanced future punishment for subsequent DWI convictions. Thus, the court determined that "the custodial aspect of [d]efendant's sentencing for the 2015 DWI conviction in the Town of Boonton [could not] be enhanced by his 1995 DWI conviction

[8] The stay and its attendant conditions was again continued.

in the Township of Montville[.]" A memorializing order was entered on June 7, 2016. The State's appeal of that order is currently pending.

As a result of the municipal court order, on June 14, 2016, the trial court granted defendant's application and refrained from imposing the mandatory 180-day custodial sentence required for a third or subsequent DWI offense. Instead, the trial court sentenced defendant as a second-time DWI offender with respect to the custodial aspect of his sentence and imposed forty-eight hours to be served in the IDRC. The State objected on the ground that notwithstanding the contested 1995 DWI conviction, defendant still had a prior 1981, 1982 and 1988 DWI conviction. According to the State, although defendant was entitled to the statutory step-down for the 1988 DWI conviction because more than ten years elapsed between the 1988 and the 2015 convictions, the 2015 conviction would still be defendant's third DWI conviction, thereby subjecting him to the mandatory 180-day jail term. In rejecting the State's argument, the trial court applied Laurick and concluded that defendant could not be subjected to a loss of liberty beyond that applicable to a second DWI conviction. The remaining portions of the sentence originally imposed in the municipal court were again imposed by the trial court. The State's appeal followed.

On appeal, the State reiterates the arguments made to the trial court and asserts that the court's reliance on Laurick was misguided and resulted in the imposition of an illegal sentence. Because the arguments address questions of law, our standard of review is plenary. Accordingly, we give no "special deference" to the Law Division's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

In Laurick, our Supreme Court held that "an uncounseled conviction without waiver of the right to counsel is invalid for the purpose of increasing a defendant's loss of liberty." Laurick, supra, 120 N.J. at 16; see also State v. Hrycak, 184 N.J. 351, 354 (2005) (reaffirming the holding in Laurick). "In the context of repeat DWI offenses, this means that the enhanced administrative penalties and fines may constitutionally be imposed" but the maximum jail sentence "may not exceed that for any counseled DWI convictions. For example, a third-offender with one prior uncounseled conviction could not be sentenced to more than ninety days' imprisonment." Laurick, supra, 120 N.J. at 16.

Here, there was no claim that defendant's prior DWI convictions were uncounseled. Rather, defendant contends that his prior DWI convictions cannot serve to enhance the custodial aspect of his 2015 sentence because, when he pled guilty, he was not

advised of enhanced future punishment for subsequent DWI convictions contrary to the dictates of State v. Kovack, 91 N.J. 476 (1982) and its progeny. Defendant contends that his prior guilty pleas were therefore defective and resulted in a manifest injustice.[9] 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." See also State v. Petrello, 251 N.J. Super. 476, 478-79 (App. Div. 1991).

In Laurick, 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." Laurick, supra, 120 N.J. at 17. It is defendant's burden to prove the defect and obtain the relief of vacating the earlier conviction. Id. at 11-12. Therefore, if defendant's constitutional rights were violated in any of his previous DWI convictions as he asserts, defendant was required to

[9] Rule 7:6-2(a)(1) establishes the requirements imposed on the municipal court before the acceptance of a guilty plea.

seek post-conviction relief to set aside those convictions before the municipal court where each conviction was entered.[10]

Here, defendant prevailed in his post-conviction application regarding his 1995 DWI conviction.[11] However, the prior 1981, 1982 and 1988 convictions, even with the statutory step-down for the 1988 conviction, still subjects defendant to sentencing as a third-time DWI offender with the mandatory 180-day jail term. The ruling regarding the 1995 conviction did not relieve defendant of his burden to prove any defect regarding his 1981, 1982 and 1988 DWI

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[10] 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[.]"

[11] We also reject defendant's assertion that in 1995 and presumably before, he had no expectation that a future DWI conviction would subject him to mandatory incarceration since, up until January 4, 2004, a defendant convicted of a subsequent DWI could, in the discretion of the court, substitute ninety days of his sentence for community service while the remaining ninety days could be served in a county workhouse, an inpatient rehabilitation program, or another approved facility. We have determined that amendments to the enhanced penalties codified in N.J.S.A. 39:4-50 do not limit consideration of prior offenses for enhancement purposes to those prior offenses committed after the amendment's effective date. State v. Gelok, 237 N.J. Super. 503, 506 (App. Div. 1989) (citing State v. Fahrer, 212 N.J. Super. 571, 576 (App. Div. 1986)). We concluded that to do so would produce an absurd result. Ibid.

convictions.[12] "The statute, not a prior court ruling, controls the appropriate sentence." State v. Zeikel, 423 N.J. Super. 34, 44 (App. Div. 2011). "When the Legislature imposes minimum penalties for certain offenses, the judiciary must enforce that mandate." Nicolai, supra, 287 N.J. Super. at 531. The judgment of the Law Division is reversed, and the matter is remanded to that court for resentencing in accordance with this opinion.

Reversed and remanded. The stay is vacated. We do not retain jurisdiction.

[12] At oral argument, defendant asserted that such an application was stymied by the unavailability of the municipal court records. Indeed, under Rule 7:8-8(a), sound recordings and stenographic records of municipal court proceedings are required to be retained for only five years. See also N.J.A.C. 15:3-2.1 (setting standards for retention and destruction of public records). While such an application would initially have to overcome the five-year filing deadline for post-conviction relief, R. 7:10-2(g)(2), defendant did not certify to any good faith efforts to obtain information or locate documents in furtherance of making such an application. Rather, defendant appears to take the position that he need only claim a constitutionally defective guilty plea at a time when the bulk of the records are no longer available in order to obtain relief. We are satisfied that such a showing does not suffice to carry defendant's significant burden. See State v. Weil, 421 N.J. Super. 121 (App. Div. 2011) (holding that a defendant who files a Laurick PCR petition to obtain relief from enhanced penalties for DWI based on a purported uncounseled prior DWI conviction is not absolved from establishing a prima facie case for relief where her time delay has resulted in destruction of most of the records pertaining to the prior conviction).