

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

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-0989-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY SIERVO,

Defendant-Appellant.

Submitted November 15, 2017 – Decided January 3, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Municipal Appeal
No. 2016-027.

Rem Law Group, PC, attorneys for appellant
(Joseph P. Rem, Jr., and Tamra Katcher, of
counsel and on the briefs).

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

PER CURIAM

More than seven years after pleading guilty in municipal
court to two motor vehicle violations – driving while intoxicated

(DWI), N.J.S.A. 39:4-50(a), and refusing to submit to a breath test (Refusal), N.J.S.A. 39:4-50.2(a) — defendant sought to withdraw his pleas. He argued in municipal court and again in the Law Division the facts he admitted during his plea colloquy did not establish the elements of these statutory violations. Both courts denied his application. On this appeal, defendant argues:

POINT I

THE STANDARD FOR REVIEW OF A DENIAL TO VACATE A GUILTY PLEA WHEN THE PLEA IS NOT SUPPORTED BY AN ADEQUATE FACTUAL BASIS IS DE NOVO. (NOT RAISED BELOW).

POINT II

APPELLANT'S FACTUAL BASIS FOR HIS GUILTY PLEA DID NOT SET FORTH THE ESSENTIAL ELEMENTS OF THE OFFENSE AND THEREFORE MUST BE VACATED.

POINT III

APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA IS NOT GOVERNED BY THE TIME LIMITATIONS OF POST-CONVICTION RELIEF AND AS SUCH HIS APPLICATION IS NOT TIME BARRED.

Having concluded defendant's appeal is untimely, we affirm.

On August 27, 2009, defendant and his attorney appeared in Fairfield Township Municipal Court on four traffic summonses: DWI, Refusal, careless driving, N.J.S.A. 39:4-97, and failing to drive within a single lane, N.J.S.A. 39:4-88(b). Defendant pled guilty to the DWI and Refusal, and the municipal court merged the two other violations. For the DWI, the judge fined defendant \$300,

revoked his driving privileges for three months, ordered him to spend twelve hours in an intoxicated driver resource center, and imposed mandatory assessments and costs. For the Refusal, the judge revoked defendant's driving privileges for seven months, concurrent with the three-month DWI revocation, and imposed court costs.

Before accepting defendant's plea, the municipal court judge questioned defendant to assure he was entering the plea knowingly and voluntarily, explained the rights defendant was giving up by pleading guilty, and informed defendant of the penalties for second and third DWI and Refusal violations. The judge then elicited the following factual bases for the pleas:

[Judge]: Now on the date in question, which I understand to have been July 6, 2009, did you ingest alcohol and then drive a motor vehicle in Fairfield?

[Defendant]: Yes.

[Judge]: And what did you drink on the date in question?

[Defendant]: Vodka.

[Judge]: Okay, and that consumption of vodka affected your ability to operate the motor vehicle?

[Defendant]: Yes.

[Judge]: Okay, and how many vodkas did you consume?

[Defendant]: Four.

[Judge]: Okay, and you were then asked to take a breath test; is that correct?

[Defendant]: Correct.

[Judge]: And you refused to take a breath test?

[Defendant]: Yes.

Following this colloquy, the judge declared defendant had entered his pleas knowingly and voluntarily. The judge imposed the penalties, fines, assessments, and costs we have mentioned.

Nearly seven years later, defendant filed an application with the Municipal Court, seeking to have his guilty pleas vacated. The municipal court judge denied defendant's application. Defendant appealed to the Law Division "from the denial of [his] [p]ost-[c]onviction [r]elief application of the Municipal Court." The Law Division judge also denied defendant's application.

The Law Division judge found the application was time-barred by Rule 3:22-12, which requires, with certain exceptions, that a defendant file a first petition for post-conviction relief (PCR) not more than five years after a judgment of conviction is entered "pursuant to [Rule] 3:21-5." R. 3:22-12(a)(1). Notwithstanding this determination, the judge also found the factual bases for defendant's pleas were adequate. The judge noted defendant had recently been "charged with [a new] offense." The judge found

defendant was attempting to withdraw his guilty plea in order to avoid an enhanced penalty on the pending charge. The judge entered an order denying defendant's application and defendant appealed.

On appeal, defendant contends we must reverse his DWI and Refusal convictions because his factual bases did not establish the elements of these statutory violations. He contends the rules which authorize a court to permit a defendant to withdraw a plea contain no time limits.

We conclude defendant's application to withdraw his guilty plea is time-barred, albeit not precisely for the same reasons as those expressed by the Law Division judge. See State v. Armour, 446 N.J. Super. 295, 310 (App. Div. 2016) (explaining an appellate court may affirm a trial court's decision for reasons different from those expressed by the trial court). In view of this conclusion, we do not reach defendant's challenge to the factual bases for his pleas.

Our review of a trial court's order denying "a motion to vacate a guilty plea for lack of an adequate factual basis is de novo." State v. Urbina, 221 N.J. 509, 528 (2015). That is so because "[a]n appellate court is in the same position as the trial court in assessing whether the factual admissions during a plea colloquy satisfy the essential elements of an offense." State v. Tate, 220 N.J. 393, 404 (2015). We owe no deference to a trial

court on an issue based on undisputed facts that presents a legal question. Manalapan Realty, LP v. Twp. Comm., 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

We turn to defendant's motion to withdraw his pleas. A defendant can challenge the factual basis for a guilty plea by filing a motion with the trial court, by challenging the plea on direct appeal, or by challenging the plea by filing a PCR petition. Urbina, 221 N.J. at 527-28. Here, defendant did not file a direct appeal, so we will evaluate the timeliness of his application under both the rules concerning motions to withdraw pleas and the rules concerning PCR petitions.¹

Rule 7:6-2 authorizes guilty pleas in municipal court. Rule 7:6-2(b) provides: "A motion to withdraw a plea of guilty shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice." Rule 3:21-1 contains a nearly identical provision: "A motion to withdraw a plea of

¹ It is not clear defendant argued in the Law Division, as he does on appeal, that, procedurally, he filed a motion to withdraw his plea and not a PCR petition. His appeal from the Municipal Court order appears to contradict this contention. In addition, defendant did not object when the trial court treated his application as a PCR petition. We nonetheless consider defendant's current argument.

guilty or non vult shall be made before sentencing, but the court may permit it to be made thereafter to correct a manifest injustice." Neither rule imposes a time limit on an application to withdraw a plea.

The rules vest discretion in the respective courts to permit a defendant to make a post-sentence motion to withdraw a plea if doing so will correct a manifest injustice. Assuming solely for the purpose of our analysis that one or the other of defendant's pleas lacked an adequate basis, we conclude there would have been no manifest injustice in denying defendant permission to make the motion, and thus there was no manifest injustice in denying it.

The "principal purpose" of the court rule requiring a defendant to provide a factual basis for a plea "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.'" Tate, 220 N.J. at 406 (quoting State v. Barboza, 115 N.J. 415, 421 (1989)). Thus, "[a] factual basis for a plea must include either an admission or the acknowledgment of facts that meet 'the essential elements of the crime.'" Ibid. (quoting State ex rel. T.M., 166 N.J. 319, 333 (2001)). Here, there is little likelihood defendant pled guilty without realizing his conduct did not actually fall within the charges.

During his plea colloquy, defendant admitted driving after consuming four vodka drinks that affected his ability to operate a motor vehicle, and he admitted that he refused to provide a breath sample. He completed his sentences for these infractions more than five years before filing the motion to withdraw his pleas. In the context of the court rules concerning PCR petitions, our Supreme Court has noted:

As time passes after conviction, the difficulties associated with a fair and accurate assessment of the critical events multiply. Achieving "justice" years after the fact may be more an illusory temptation than a plausibly obtainable goal when memories have dimmed, witnesses have died or disappeared, and evidence is lost or unobtainable.

[State v. Mitchell], 126 N.J. 565, 575 (1992).]

The Court has also noted "the need for achieving finality of judgments and to allay the uncertainty associated with an unlimited possibility of relitigation." Id. at 576. These considerations are of no less concern when, after similar delay, a defendant seeks to overturn a guilty plea through the procedural device of a motion to withdraw a guilty plea, rather than a PCR petition.

Of additional significance in the case before us is the absence of a claim by defendant that he was not guilty of either DWI or refusal, or did not understand a nuanced element of either statutory violation. In contrast, the Law Division judge found

defendant's motivation for filing the motion was his attempt to avoid an enhanced sentence on new charges. Defendant has not disputed that finding.

Considering the problems caused by the passage of significant time following defendant's guilty pleas, defendant's non-assertion of innocence or misunderstanding of the nature of the charges, and the trial court's determination of defendant's motivation, defendant's motion to withdraw his pleas do not constitute a manifest injustice. Defendant's arguments to the contrary are devoid of merit.

We next address the untimeliness of defendant's application to withdraw his plea if the application is deemed a PCR petition. Defendant does not contend on appeal that he filed his motion to withdraw his plea as a PCR petition. We previously noted the facts that suggest otherwise. Thus, the Law Division judge found Rule 3:22-12(a), which provides "no [PCR] petition shall be filed . . . more than [five] years after the date of entry . . . of the judgment of conviction that is being challenged," rendered defendant's application time-barred. Rule 7:10-2(b)(2), regarding PCR petitions following convictions of offenses in municipal court, similarly provides that petitions based on any ground other than an illegal sentence "shall not be accepted for filing more than five years after entry of the judgment of conviction or

imposition of the sentence sought to be attacked." Defendant did not argue to the Law Division judge that his application fell within an exception to either five-year time bar. Consequently, his application was time-barred by the rules regarding the filing of PCR petitions in Municipal Court and in Superior Court.

Although we need not address whether defendant's factual bases for his pleas were adequate, we make the following observations. A municipal court judge

shall not . . . accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant and, in the court's discretion, of others, that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea.

[Rule 7:6-2(a)(1).]

In situations where a defendant's plea results from a plea agreement, the agreement's "terms and the factual basis that supports the charge(s) shall be fully set forth on the record personally by the [municipal] prosecutor." R. 7:6-2(d).

Defendant pled guilty to the provision of the DWI statute that penalizes a person "who operates a motor vehicle while under the influence of intoxicating liquor." N.J.S.A. 39:4-50(a). The phrase "under the influence of intoxicating liquor" is not defined in the statute. Our Supreme Court has noted, "since 'intoxication'

is not the expression used, it is not requisite that . . . the accused be absolutely 'drunk,' in the sense of being sodden with alcohol." State v. Johnson, 42 N.J. 146, 164 (1964) (citations omitted). The Court further noted: "At the other extreme, the described condition means something more than having partaken of a single drink even though, physiologically, the smallest amount of alcohol has some slight effect or influence on an individual." Id. at 164-65. The Court explained the legislature's intention "was to prescribe a general condition, short of intoxication, as a result of which every motor vehicle operator has to be said to be so affected in judgment or control as to make it improper for him to drive on the highways." Id. at 165.

The proper definition of the crucial element was early established in New Jersey in [State v. Rodgers, 91 N.J.L. 212, 215, 217 (E. & A. 1917)]:

The expression "under the influence of intoxicating liquor" covers not only all the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition which is the result of indulging in any degree in intoxicating liquors and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.

[Johnson, 42 N.J. at 165.]

In State v. Emery, 27 N.J. 348 (1958), the Court rephrased the meaning of "under the influence of intoxicating liquor," but did so "without [a] change in substance." Johnson, 42 N.J. at 165. In Emery, the Court said, "[i]t is sufficient if the presumed offender has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected." 27 N.J. at 355 (emphasis added).

More recently, the Court reiterated "the term 'under the influence' means 'a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway.'" State v. Bealor, 187 N.J. 574, 589 (2006) (quoting State v. Tamburro, 68 N.J. 414, 421 (1975)). Thus, "[g]enerally speaking, it means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs." Tamburro, 68 N.J. at 421.

Readily apparent from the Supreme Court's jurisprudence is that consideration of whether one is "under the influence of intoxicating liquor" must begin with the effect the consumption of alcohol has had on the accused's physical or mental condition. In the case before us, the municipal court judge asked defendant nothing specifically about his physical or mental condition. The

judge did not ask defendant if the alcohol he consumed impaired his physical condition or mental faculties – his judgment or control – so as to make it improper for him to operate a motor vehicle. Making these inquiries would have been the better course and likely would have avoided a challenge to the adequacy of the plea.

We also note the elements of Refusal are:

(1) the arresting officer had probable cause to believe that defendant had been driving or was in actual physical control of a motor vehicle while under the influence of alcohol or drugs; (2) defendant was arrested for driving while intoxicated; (3) the officer requested defendant to submit to a chemical breath test and informed defendant of the consequences of refusing to do so; and (4) defendant thereafter refused to submit to the test.

[State v. Marquez, 202 N.J. 485, 503 (2010).]

The factual basis for defendant's guilty plea to these elements could have been established through defendant's "explicit admission of guilt or by . . . [his] acknowledgment of the underlying facts constituting essential elements" of Refusal, but defendant did neither. State v. Gregory, 220 N.J. 413, 419 (2015) (citing State v. Campfield, 213 N.J. 218, 231 (2013)).

In any event, we affirm defendant's convictions on the basis that his challenge to them was untimely.

Affirmed.