

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3074-15T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ARTHUR W. GILLIAM, JR.,

Defendant-Appellant.

Argued March 5, 2018 - Decided April 13, 2018

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
13-09-1297.

Steven E. Braun, Designated Counsel, argued
the cause for appellant (Joseph E. Krakora,
Public Defender, attorney; Steven E. Braun,
on the brief).

William P. Miller, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for the respondent (Dennis Calo,
Acting Bergen County Prosecutor, attorney;
William P. Miller, of counsel and on the
brief).

PER CURIAM

Defendant Arthur W. Gilliam, Jr. appeals from the Law Division's denial of his pre-sentence motions to withdraw his guilty plea. We reverse and remand.

I.

Defendant was charged in a 2013 Bergen County superseding indictment with: second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4) (count one); third-degree criminal restraint, N.J.S.A. 2C:13-2 (count two); fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (count three); third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a) (count four); and third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a), 9:6-1, 9:6-3, and 9:6-8.21 (count five). Defendant, then thirty-two years old, allegedly sexually assaulted an acquaintance, T.G.,¹ then fifteen years old, on various dates between March 20, 2011, and June 20, 2011.

On the trial date of October 28, 2014, defendant approached the State, seeking to negotiate a plea agreement that eluded the parties until then. On that date, defendant pled guilty to second-degree sexual assault. In return, the State agreed to dismiss the remaining charges in the indictment, and recommend a maximum eight-

¹ We use initials to protect the confidentiality of the child victim, pursuant to Rule 1:38-3(c)(9), and the privacy of the witnesses.

year term of imprisonment. Defendant was permitted to argue for a six-year term of imprisonment at sentencing. The plea agreement also subjected defendant to Megan's Law, N.J.S.A. 2C:7-1 to -23; parole supervision for life ("PSL"); a psychological and physical evaluation at the Avenel Diagnostic and Treatment Center ("ADTC"); and no contact with T.G.

Before the trial judge, while represented by two attorneys, defendant acknowledged his understanding of the plea agreement, including the consequences of Megan's Law and PSL. He understood he was waiving his right to a trial, including "the right to call and subpoena witnesses." Defendant also indicated he was satisfied with his attorneys' services.

For the purpose of eliciting a factual basis for his plea, defendant testified to the following:

[Defense counsel]: [Defendant], between March 20th in 2011, a few years ago, and April 28th of 2011, were you in the City of Hackensack in Bergen County?

[Defendant]: Yes, sir.

[Defense counsel]: Which is in the State of New Jersey. Correct?

[Defendant]: Yes.

[Defense counsel]: And at that point [on] one of those days you had sexual vaginal penetration with somebody named [T.G.]?

[Defendant]: Yes.

[Defense counsel]: At the time she was [fifteen] years old?

[Defendant]: Yes.

[Defense counsel]: And you knew she was [fifteen] years old?

[Defendant]: Yes.

[Defense counsel]: All right. And you knew as an adult over the age of [twenty-one] that you cannot have sex with someone who [is] under the age of [sixteen?]

[Defendant]: Yes.

[Defense counsel]: And just so to clean it up, it [was] penile/vaginal penetration. Is that correct?

[Defendant]: Yes.

Pursuant to his colloquy with defendant, the plea judge found defendant "pled guilty freely and voluntarily. He [is] not under any duress or coercion, no one is threatening him or forcing him to plead guilty." The judge also found defendant provided a factual basis for his guilty plea, and "he "underst[ood] the nature and the consequences of the plea." Sentencing was scheduled for February 20, 2015 before a different judge.

According to the State's version of the offense, on July 1, 2011, then-fifteen-year-old T.G, informed law enforcement that she

was invited to defendant's apartment to smoke marijuana.² T.G. denied having sexual intercourse with defendant but claimed he locked the door and refused to let her leave his apartment, touched her buttocks, kissed her neck, and attempted to pull down her pants. Defendant also exposed his penis, and asked T.G. whether she "could handle this." Defendant permitted T.G. to leave after she started screaming.

However, on January 16, 2012, during a group therapy session at a Juvenile Justice Commission ("JCC") facility where T.G. was confined, T.G. reported "she had been raped during the spring of 2011." The next day, T.G. reported to the responding JCC investigator that she and her friend, A.W., went to defendant's apartment in Spring 2011, to smoke marijuana. Defendant introduced T.G. to his mother, R.M., who was in her bedroom watching pornography, with a "dildo" placed beside her. R.M. later smoked marijuana with defendant, A.W. and T.G. After A.W. left, defendant touched T.G., pushed her on a bed, took off her clothing, and penetrated her with his penis. T.G. said "no," but was "too high to do anything." Although she screamed for help, defendant's mother did not respond. T.G. dressed and ran out of the apartment

² The police report, dated July 6, 2011, indicates the date of occurrence is May 1, 2011, but the report does not indicate how the detective determined that date.

after the sexual assault. T.G. indicated she did not initially disclose sexual penetration because she "did not want to get [defendant] in trouble and did not want her father to find out that he had raped her."

Shortly after entering his guilty plea, at the outset of his presentence investigation ("PSI") interview by the probation department, defendant stated:

I am taking my plea back. What [T.G.] said about my mother, I can't let this happen. I was under duress and I want to take my plea back. I will not talk, and I do not want to go to [ADTC] for any appointment. My attorney is suspended for three months and I do not want to go to court without him. They lied to me. The State lied to me. They said I could go to Trinidad. I can't go with [PSL]. I want to take my plea back.

On January 22, 2015, defendant filed a motion to withdraw his guilty plea. In support of the motion, defendant filed a certification stating he was "innocent of each and every charge set forth in the superseding indictment." He stated he was held in solitary confinement prior to entering his plea agreement. He claimed he was overwhelmed by stress and depression and his "thinking was not clear. [He] ple[]d guilty and gave a factual basis just to end [his] incarceration." Defendant also stated he was satisfied with the services of his counsel, but his factual statement at the time of his plea hearing was "not accurate. [He]

never touched [T.G.]." Defendant mentioned he had "meritorious defenses to these allegations."

On April 14, 2015, the date of sentencing, a different judge held a hearing on defendant's motion. The motion judge considered correspondence received from defendant in January 2015, stating, "I [am] writing to you because I would like for you to deeply consider letting me take my plea back. I was under duress when I pled guilty and I do not want to go to prison for a crime that I did not commit."³ During the hearing, defendant gave a brief statement reiterating his innocence and claim that he pled guilty under duress. The motion judge also considered a certification of A.W., which the judge characterized as "claiming that all these allegations are false," and a certification of R.M.⁴

Following oral argument, the motion judge applied the factors set forth in State v. Slater, 198 N.J. 145, 157-58 (2009), and rendered an oral decision denying defendant's motion. The court determined defendant failed to assert a colorable claim of

³ Defendant's letter is not contained in the record before us.

⁴ The judge did not characterize the claims made by R.M. in her certification. On appeal, defendant does not argue R.M.'s certification establishes a colorable claim of innocence. R.M.'s certification is contained in the record and indicates she never met T.G., has never watched pornography, or smoked marijuana, and that she was at work "when [T.G.] claimed to have met her and watched a movie with [defendant]."

innocence, finding defendant's "blanket statement" denying sexual intercourse with T.G. was insufficient to satisfy the first Slater factor. In doing so, the judge determined the certifications of A.W. and R.M. did not contain new information, having been previously filed in support of defendant's prior motions, and bore upon credibility but not on claims of innocence. "Specifically [A.W.'s] certification talks about credibility concerns, that she does not believe T.G. but that [is] what trials are for. So this should have been something that should have been litigated during the course of the trial but . . . defendant chose not to." Rather, "there are no significant reasons for . . . defendant's withdrawal other than to cause delay and also to not have to face the consequences of his own decision." The court placed "a lot of weight" on the existence of a plea bargain because defendant approached the State and received the benefit of a negotiated plea on the day of trial when the State was ready to proceed.

Further, the court observed defendant waited "four months"⁵ before writing to the court expressing his desire to vacate his guilty plea. Not having entered defendant's guilty plea, the

⁵ Defendant submitted correspondence to the court and filed his motion on January 22, 2015, i.e., three months after entering his guilty plea on October 28, 2014.

motion judge listened to an audio recording of the hearing. The court rejected defendant's claim of duress, stating defendant sounded "calm" when responding to the plea judge's inquiry. The judge also found the record was devoid of any complaints by defendant regarding his solitary confinement. The court noted defendant's lengthy criminal history and consequent familiarity in "making a decision to plead guilty or not." Finally, the motion judge rejected defendant's contention that his attorney, the assistant prosecutor and judge represented he could relinquish his United States citizenship and relocate to Trinidad, finding no basis in the record to support these claims.

On March 4, 2016, a different judge heard defendant's "renewed" motion to withdraw his plea prior to sentencing.⁶ Defendant stated under oath he was informed by one of his two plea

⁶ After defendant's motion was denied, his sentencing was postponed because he refused an ADTC examination. Apparently, defendant sought to renew his motion, but failed to electronically file the motion, contrary to the sentencing judge's scheduling order. By order entered January 22, 2016, the second judge dismissed defendant's motion for failure to comply with her scheduling orders. At sentencing, counsel claimed he delayed filing the motion because of ongoing negotiations with the State, which reduced its recommendation to a five-year term of imprisonment on the sentencing date. Defense counsel further indicated that if "PSL had been taken off the table the deal would have been perhaps more palatable."

attorneys⁷ that, because he was "a big black guy[,]" the jury would return a guilty verdict and defendant would be sentenced to "thirty years or more." Secondly, he claimed he did not "rape" T.G., and that she lied in her second statement. Defendant also claimed his first attorney, whom he had since "fired . . . helped [the State,]" asking rhetorically, "Why would he make me cop out when I got witnesses. He scared me. I was scared. He told me thirty years."

Although the sentencing judge determined defendant's motion was not properly filed, she briefly considered the Slater factors. The judge found defendant's colorable claim of innocence was addressed previously; his reason for seeking to withdraw his motion was an attempt to avoid PSL; his defense was not strong; he received the benefit of a plea bargain from the State, which reduced its recommendation in court that date; and there would be some prejudice to the State because the delay tactics had been ongoing for years. The court then sentenced defendant to five years' imprisonment, pursuant to the State's recommendation, with the collateral consequences set forth in the plea agreement.

On November 15, 2016, defendant appealed the sentence imposed, which we heard on a sentencing calendar. R. 2:9-11.

⁷ Defendant's other plea attorney continued to represent defendant at sentencing.

During oral argument, appellate counsel contended defendant "wishes to withdraw his plea of guilty. . . . [I]n the alternative he would like no [PSL]." Counsel further argued defendant had a "strong colorable inference" because T.G. gave two statements that she was not sexually assaulted, and "another witness who apparently in some way supports that contention." The State countered defendant possessed these statements prior to pleading guilty and did not want to be on PSL because he wanted to reside in Trinidad. We denied defendant's appeal, finding the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. State v. Gilliam, A-3074-15 (App. Div. Nov. 15, 2016).

On November 6, 2017, the Supreme Court granted certification, and remanded the matter to us "for briefing, argument and reconsideration regarding the issue whether the trial court appropriately applied the factors of State v. Slater, 198 N.J. 145 (2009), in denying defendant's motion to withdraw his guilty plea before sentencing." State v. Gilliam, ____ N.J. ____ (2017).

On remand, defendant maintains the trial court erred in evaluating the merits of his motions and misapplied the Slater factors.

II.

Where a defendant wishes to withdraw from a plea agreement before sentencing, the standard for the court's determination is whether it is in "the interests of justice." R. 3:9-3(e). A decision granting or denying a motion to vacate is committed to the sound discretion of the motion judge. State v. Bellamy, 178 N.J. 127, 135 (2003). This discretionary determination requires the judge to weigh "the policy considerations which favor the finality of judicial procedures against those which dictate that no man be deprived of his liberty." State v. Johnson, 182 N.J. 232, 237 (2005) (quoting State v. McQuaid, 147 N.J. 464, 487 (1997)).

Pursuant to this standard, we will reverse the trial court's determination whether to allow a defendant to withdraw a guilty plea "only if there was an abuse of discretion which renders the lower court's decision clearly erroneous." State v. Simon, 161 N.J. 416, 444 (1999) (citing State v. Smullen, 118 N.J. 408, 416 (1990)). "[T]he burden rests on the defendant, in the first instance, to present some plausible basis for his request, and his good faith in asserting a defense on the merits." Slater, 198 N.J. at 156 (quoting Smullen, 118 N.J. at 416). A defendant must also demonstrate why that defense was not raised at the time of

the plea. Slater, 198 N.J. at 160 (citing State v. Gonzalez, 254 N.J. Super. 300, 303 (App. Div. 1992)). "Generally, representations made by a defendant at plea hearings concerning the voluntariness of the decision to plead, as well as any findings made by the trial court when accepting the plea, constitute a 'formidable barrier' which defendant must overcome before he will be allowed to withdraw his plea." Simon, 161 N.J. at 444 (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977)).

A trial court must consider and balance four factors when evaluating a motion to withdraw a guilty plea: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused.'" State v. Munroe, 210 N.J. 429, 442 (2012) (quoting Slater, 198 N.J. at 157-58). "No single Slater factor is dispositive; 'if one is missing, that does not automatically disqualify or dictate relief.'" State v. McDonald, 211 N.J. 4, 16-17 (2012) (quoting Slater, 198 N.J. at 162).

The first Slater factor focuses on whether a defendant has asserted a colorable claim of innocence. "A core concern underlying motions to withdraw guilty pleas is to correct the

injustice of depriving innocent people of their liberty." Slater, 198 N.J. at 158. "A colorable claim of innocence is one that rests on 'particular, plausible facts' that, if proven in court, would lead a reasonable factfinder to determine the claim is meritorious." Munroe, 210 N.J. at 442 (quoting Slater, 198 N.J. at 159). In weighing such motions, trial courts must bear in mind that "[a] bare assertion of innocence is insufficient to justify withdrawal of a plea." Slater, 198 N.J. at 158. Rather, the defendant must present "specific, credible facts and, where possible, point to facts in the record that buttress [his or her] claim." Ibid. In making that determination, the court may consider evidence disclosed in discovery. Ibid. There must be more than just a "change of heart" to warrant leave to withdraw a guilty plea once entered. Id. at 157. "However, when there are colorable reasons for withdrawal, coupled with an appropriate assertion of innocence, 'arguments against permitting withdrawal of a plea prior to sentencing weaken considerably' absent unfair prejudice or advantage." Id. at 162 (quoting Smullen, 118 N.J. at 417).

On appeal, defendant argues T.G.'s conflicting statements and the certification of A.W. establish a colorable claim of innocence. Initially, we are not persuaded by defendant's argument that T.G.'s

statements are necessarily "conflicting" in that she gave plausible reasons for not immediately reporting penetration. Although T.G.'s initial statement does not allege sexual penetration, it recounts that defendant touched her inappropriately and exposed his penis, contradicting defendant's assertion that he never "touched" T.G.

We next address defendant's claim that A.W.'s certification gives rise to a colorable claim of innocence. We recognize that, unlike in Slater, defendant's plea colloquy contradicts his after-the-fact claim of innocence and A.W.'s statement. Munroe, 210 N.J. at 445. Nevertheless, both trial judges erred in giving A.W.'s certification short-shrift. A.W.'s certification is not merely an assessment of T.G.'s credibility. A.W. asserts she was present the entire time T.G. was in defendant's apartment, and A.W. did not observe defendant "make any advances to T.G." Because A.W.'s certification contains "'particular, plausible facts' that, if proven in court, would lead a reasonable factfinder to determine the claim is meritorious," we find defendant has asserted a colorable claim of innocence. Id. at 442 (quoting Slater, 198 N.J. at 159).

The second Slater factor focuses on whether the defendant "presented fair and just reasons for withdrawal" of the guilty

plea, and considers the effectiveness of those reasons. Slater, 198 N.J. at 159. Although we are not to approach the reasons for withdrawal with "skepticism," we "must act with 'great care and realism' because defendants often have little to lose in challenging a guilty plea." Id. at 160 (citing State v. Taylor, 80 N.J. 353, 365 (1979)). Our courts have identified a number of reasons that warrant withdrawal of a plea. These reasons include whether:

(1) the court and prosecutor misinformed the defendant about a material element of the plea negotiation, which the defendant relied on in entering his plea; (2) the defendant was not informed and thus did not understand material terms and relevant consequences of the guilty plea, namely, the direct, penal consequences of the plea; (3) [the] defendant's reasonable expectations under the plea agreement were not met; and (4) the defendant has not only made a plausible showing of a valid defense against the charges, but also credibly demonstrated why that defense "was forgotten or missed" at the time of the plea.

[Slater, 198 N.J. at 159-60 (internal citations omitted).]

Here, both the motion judge and sentencing judge determined defendant's reasons for seeking to withdraw his plea were specious, emphasizing he sought to avoid the PSL consequences of his plea. We agree the record does not support defendant's contention that defense counsel, the State and the court represented that he could

relocate to Trinidad. Specifically, when placing the terms of the plea agreement on the record, the assistant prosecutor referenced her discussion with both counsel and the court regarding defendant's desire to return to Trinidad, reiterating: "the State takes no position. . . . [T]hat will be something subject to [PSL]" and the Division of Parole's determination. Further, the plea agreement explicitly provided, "[THE] STATE TAKES NO POSITION ON VOLUNTARY REMOVAL TO TRINIDAD."

Moreover, during his colloquy with the plea judge, defendant acknowledged his understanding of the plea agreement, and the collateral consequences of his plea, including PSL, i.e., he would "be supervised by the Division of Parole for at least [fifteen] years, and would be subject to the . . . conditions of parole, including . . . restrictions on where [he could] live." Thus, the record does not support defendant's claim that he was misinformed about his ability to relocate to Trinidad. See Slater, 198 N.J. at 159-60.

The record also belies defendant's claim he was under duress, as a result of his solitary confinement, when he entered his guilty plea. The plea judge specifically found to the contrary, and the motion judge observed his calm demeanor when listening to the audio recording. Nor did defendant submit any evidence of duress

stemming from his solitary confinement, such as complaints to the jail's medical unit.

However, defendant's claim that the attorney he has since fired "scared" him into pleading guilty because that attorney indicated defendant's exposure was thirty years if he went to trial, is not as obvious from the record. Yet, the motion judge dismissed this claim out-of-hand, finding

It says on the plea forms that the maximum would be ten years. Even the Judge told you it was ten years. The Judge did [not] tell you that your maximum was a life sentence or thirty years. So I do [not] find that [is] credible either, when the maximum on your indictment is only up to ten years because it is a second[-]degree crime and [your attorneys] have been doing criminal cases for many, many years. So they know what a second [-]degree crime is worth, five to ten [years]. They know third[-]degree crimes are three to five [years]. So I do [not] find that that was the case and that [is] not what the Judge told you. The Judge specifically told you what you were facing.

The motion judge was mistaken on several points. While the plea form indicates defendant's exposure pursuant to the terms of the plea agreement is ten years, it does not indicate defendant's total exposure had he gone to trial and been convicted of one second-degree offense, three third-degree offenses and one fourth-degree offense. Nor did the plea judge explicitly state the maximum term of imprisonment defendant was facing either as a

result of his plea to the second-degree offense, or had he been convicted after trial of all five offenses charged in the superseding indictment.

We find, therefore, defendant's claim that he pled guilty because of his attorney's representations about his maximum sentencing exposure after trial cannot be completely or fairly assessed on the record before us. This claim appears to concern conversations between defendant and his former attorney, which are not contained in the record. Further, we will not speculate why his plea attorneys sought a reduced plea offer on behalf of defendant on the day of trial when, at the very least, A.W. contradicted T.G.'s account. Thus, we cannot assess why these defenses were not raised at the time of defendant's guilty plea. Slater, 198 N.J. at 160 (citing Gonzalez, 254 N.J. Super. at 303).

As to the third Slater factor, a defendant has a heavier burden in seeking to withdraw a plea entered as part of a plea bargain. Ibid. However, because "the vast majority of criminal cases are resolved through plea bargains . . . [the Court did] not suggest that this factor be given great weight in the balancing process." Id. at 161.

Under the circumstances of this particular case, we find the motion judge did not err by weighing "heavily" the existence of

a plea bargain. See State v. Means, 191 N.J. 610, 619-20 (2007) (negotiated pleas are entitled to a higher degree of finality). On the day of trial, the defense requested that the State reopen its plea offer, negotiating an agreement that allowed defendant to argue for six years' imprisonment for a second-degree offense, far below the maximum term of ten years. N.J.S.A. 2C:43-6(a)(2) (fixing the sentence for a second-degree crime between five and ten years).

As to the fourth factor, "[t]here is no fixed formula to analyze the degree of unfair prejudice or advantage that should override withdrawal of a plea." Slater, 198 N.J. at 161. Rather, "courts must examine this factor by looking closely at the particulars of each case." Ibid. The Court suggested that trial courts consider the State's loss of, or inability to locate, essential witnesses for trial, and whether the passage of time has affected the State's ability to present important evidence. Ibid.


Here, defendant moved to vacate his guilty plea within three months of its entry and prior to sentencing. He also indicated his intention shortly after he entered his guilty plea during his PSI interview. In any event, the State has not put forth any specific reasons it would be unfairly prejudiced by withdrawal of the plea. Therefore, the motion judge and the sentencing judge

erred in finding the State would be prejudiced by defendant's "delay tactics."

Having considered the parties' arguments in light of the record and applicable legal principles, we reverse and remand and direct the trial court to conduct an evidentiary hearing as to whether defendant has "presented fair and just reasons for withdrawal" as defined in State v. Slater, 198 N.J. at 148, 159 (2009). If defendant has satisfied the second Slater factor, the trial court should then weigh that factor along with the remaining three Slater factors, as set forth above, in determining whether defendant should be permitted to withdraw his guilty plea. McDonald, 211 N.J. at 16-17 (citing Slater, 198 N.J. at 162).

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION