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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-5097-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IRENE E. KOERNER, a/k/a
GIRNA BALAZOVA,

Defendant-Appellant.

Submitted December 21, 2017 – Decided January 10, 2018

Before Judges Haas and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
14-10-1810.

David J. Foley, III, attorney for appellant.

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Carey J.
Huff, Assistant Prosecutor, of counsel and on
the brief).

PER CURIAM

Following a trial, a jury convicted defendant of the fourth-degree crime of operating a motor vehicle during a period of license suspension for a second or subsequent conviction of driving

while intoxicated (DWI), N.J.S.A. 2C:40-26(b). The trial judge then found defendant guilty of the related motor vehicle offense of driving while her license was suspended, N.J.S.A. 39:3-40.¹

The judge sentenced defendant on the fourth-degree offense to five years of probation, conditioned on completion of a 364-day county jail term,² with a parole ineligibility period of 180 days. On the driving while suspended motor vehicle violation, the judge imposed the mandatory minimum penalties for this offense, which included a \$1000 fine, a six-month suspension of defendant's registration, and a six-month loss of driving privileges. This appeal followed.

On appeal, defendant raises the following contentions:

POINT I

THE CONVICTION BELOW MUST BE REVERSED . . .
BECAUSE JUROR [NO.] 275 WAS IMPROPERLY
DISMISSED.

¹ The police issued additional citations to defendant charging her with DWI, N.J.S.A. 39:4-50; failure to maintain a lane, N.J.S.A. 39:4-88(b); driving without a license, N.J.S.A. 39:3-10; reckless driving, N.J.S.A. 39:4-96; failure to wear a seatbelt, N.J.S.A. 39:3-76.2f; failure to produce a driver's license, N.J.S.A. 39:3-29; and failure to stop, N.J.S.A. 39:4-144. Pursuant to a consent order entered by the parties, the trial judge remanded these violations to the municipal court for resolution.

² After sentencing, defendant was mistakenly transferred to State prison. As a result, the trial court granted defendant's motion for the entry of an amended judgment of conviction reducing her sentence to 353 days to ensure that she would serve the custodial sentence in county jail as intended.

POINT II

THE CONVICTION BELOW MUST BE REVERSED BECAUSE THE PROOFS OF THE ELEMENTS OF THE OFFENSE WERE INSUFFICIENT.

POINT III

DEFENDANT'S SENTENCES ARE SUBJECT TO MERGER AND SHOULD HAVE BEEN MERGED.

POINT IV

THE REMAND OF THE DWI CASE AND OTHER MOVING VIOLATIONS WAS IMPROPER, TAINTS THE PROCEEDINGS[,] AND REQUIRES A NEW TRIAL. (NOT RAISED BELOW).

POINT V

DEFENDANT'S SENTENCE IS EXCESSIVE. (NOT RAISED BELOW).

We find insufficient merit in defendant's Points I, II, IV, and V, to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add the following brief comments concerning these contentions.

During the jury selection process, a prospective juror told the judge that was she unable to follow and comprehend the judge's preliminary instructions to the jury pool because she did not understand English. The judge took a break in the selection process to investigate whether an interpreter who spoke Slovak, the juror's first language, was available to assist the juror.

After determining that such an accommodation could not be made, the judge excused the juror.

Defendant did not object until after the jury was sworn later in the day, and the judge denied her motion for a mistrial. Because the juror was not "able to read and understand the English language[,]" N.J.S.A. 2B:20-1(b), she was not qualified for jury service, and the judge properly excused her. Therefore, defendant's argument to the contrary is clearly without merit.

We also reject defendant's contention in Point II that the judge incorrectly relied upon certified dispositions of motor vehicle offenses showing defendant's prior DWI convictions and the periods of her license suspensions as proof of the elements of N.J.S.A. 2C:40-26(b). The dispositions, which were prepared by two municipal court administrators who testified at the trial, were obviously business records admissible in evidence pursuant to N.J.R.E. 803(c)(6) and (8). State v. Luzhak, 445 N.J. Super. 241, 249 (App. Div. 2016).

We likewise find no merit in defendant's claim in Point IV that the judge erred by remanding all of the motor vehicle charges, other than the driving while suspended offense, to the municipal court for disposition. A defendant may waive certain rights at trial, even if those rights are of a constitutional dimension. State v. Fortin, 178 N.J. 540, 609 (2004). Here, defendant and

the State entered into a consent order remanding the motor vehicle offenses to the municipal court. In the order, defendant expressly waived "any [d]ouble [j]eopardy issues" related to having the motor vehicle charges tried in the municipal court instead of the Superior Court. Once having entered into this consent order, defendant could not appeal its terms. Pressler & Verniero, Current N.J. Court Rules, cmt. 2.2.3 on R. 2:2-3 (2018); see also N.J. Schools Constr. Corp. v. Lopez, 412 N.J. Super. 298, 308 (App. Div. 2010) (citing Winberry v. Salisbury, 5 N.J. 240, 255 (1950)).

We are also satisfied that in sentencing defendant, the judge made findings of fact concerning aggravating and mitigating factors that were based on competent and reasonably credible evidence in the record, and applied the correct sentencing guidelines. State v. Case, 220 N.J. 49, 64-65 (2014). Because we discern no basis to second guess the sentence, we reject the contentions defendant raises in Point V.

Turning to Point III, we agree with defendant that her conviction for violating N.J.S.A. 39:3-40, should have merged into her conviction under N.J.S.A. 2C:40-26(b). Merger of these offenses is appropriate because by definition the criminal offense of operating a motor vehicle during a period of license suspension for a second or subsequent DWI conviction under N.J.S.A. 2C:40-26(b) incorporates the motor vehicle offense of driving while

license suspended under N.J.S.A. 39:3-40. See State v. Frank, 445 N.J. Super. 98, 108 (App. Div. 2016) (holding that "it is appropriate to merge the conviction of a[] [criminal] offense and motor vehicle violation where their elements and the evidence presented to establish these elements correspond").

However, "[m]andatory penalties attached to a merged violation survive merger, even if the elements of the merged violation are completely encompassed in the surviving violation." Id. at 109. Thus, while this matter must be remanded for the entry of a corrected judgment of conviction (JOC) reflecting the merger of the two offenses, the mandatory sentence imposed by the judge under N.J.S.A. 39:3-40 need not be disturbed.

In sum, we affirm defendant's conviction. We remand for the entry of an amended JOC reflecting the merger of defendant's conviction for violating N.J.S.A. 39:3-40 into her conviction under N.J.S.A. 2C:40-26(b). We otherwise affirm defendant's sentence. 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