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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0795-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DMITRY PAVEDAIKA,

Defendant-Appellant.

Submitted October 6, 2022 – Decided December 22, 2022

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Municipal Appeal No. 10-02-21.

Frederick P. Sisto, attorney for appellant.

Mark Musella, Bergen County Prosecutor, attorney for respondent (Deepa S.Y. Jacobs, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Over five years after pleading guilty to driving while intoxicated (DWI), N.J.S.A. 39:4-50, defendant Dmitry Pavedaika was arrested again in 2021 and charged with a second DWI, along with reckless driving, N.J.S.A. 39:4-96, charges that are still pending. After his second arrest, defendant sought to withdraw his guilty plea to his first DWI, primarily arguing before the municipal court and the Law Division that he failed to provide a sufficient factual basis for the DWI charge.

After both courts denied his application, plaintiff appealed and argues before us:

POINT I

DEFENDANT'S CONVICTION FOR [DWI] (N.J.S.A. 39:4-50) SHOULD BE VACATED BECAUSE THERE WAS AN INADEQUATE FACTUAL BASIS.

POINT II

DEFENDANT'S CONVICTION SHOULD BE VACATED CONSISTENT WITH FUNDAMENTAL FAIRNESS UNDER THE UNIQUE CIRCUMSTANCES OF THIS UNDERAGE D.W.I. CASE.

POINT III

DEFENDANT'S PLEA SHOULD BE VACATED BECAUSE IT WAS NOT PRECEDED BY THE REQUIRED DETERMINATION THAT IT WAS

MADE WITH AN UNDERSTANDING OF THE
CONSEQUENCES.

POINT IV

DEFENDANT'S PLEA SHOULD BE VACATED
BECAUSE HE WAS NOT PLACED UNDER OATH
AT THE PLEA HEARING.

We have considered defendant's contentions in light of the record and the applicable law and conclude they are without merit. We accordingly affirm the Law Division order denying defendant's request to withdraw his guilty plea.

I.

On June 27, 2015, Fair Lawn police issued defendant summonses for: (1) a first-offense DWI; (2) underage operating a motor vehicle while intoxicated, N.J.S.A. 39:4-50.14; (3) operating a motor vehicle in the wrong direction on a one-way road, N.J.S.A. 39:4-85.1; (4) highway littering, N.J.S.A. 39:4-64; and (5) violation of his probationary driver's license, N.J.S.A. 39:3-13.8. On November 18, 2015, defendant appeared in the Fair Lawn Municipal Court, where he pled guilty to the DWI charge in exchange for dismissal of the remaining tickets.

Defendant, who was represented by counsel, was not placed under oath during the plea hearing. In support of his factual basis for the DWI charge, defendant admitted that he was driving on June 27, 2015, after having consumed

at least one vodka drink—unsure if he had imbibed more than two—and the alcohol in his system impaired his driving ability. Defendant's colloquy with the court provided the sole basis for his plea, as the BAC reading taken by the police was deemed inadmissible because the police failed to observe defendant for the requisite twenty minutes before administering the blood alcohol test.

Before accepting his plea, the municipal court judge advised defendant that by entering a guilty plea, he would be giving up his right to trial, remain silent, and cross-examine witnesses. Defendant stated he understood those rights, still wished to plead guilty, and informed the court that his counsel had adequately answered all his questions and he was satisfied with her services.

The municipal court concluded there was a sufficient factual basis to sustain the DWI charge, and the parties executed a "Request to Approve Plea Agreement" form. In doing so, defendant acknowledged he "underst[ood] the nature of the amended charge(s) against [him] and the consequences of [the] guilty plea . . . [and he] [u]nderst[ood] and agree[d] voluntarily to the terms of the [plea] agreement" The court then sentenced defendant to a three-month suspension of his driver's license and required him to attend twelve hours at an Intoxicated Driver's Resource Center. It also imposed fines and penalties and informed defendant of the penalties for future DWI convictions.

As noted, on January 17, 2021, over five years after he pled guilty to his first DWI, the Borough of Point Pleasant Beach charged defendant with a second DWI and reckless driving. On April 7, 2021, defendant moved to vacate his 2015 DWI conviction, which the Fair Lawn Municipal Court denied after argument on May 12, 2021.

At the motion hearing, defendant's counsel sought to vacate his first DWI conviction so that defendant could enter a guilty plea for underage DWI, which he "submit[ted] [was] consistent with the factual basis made back in 2015." As counsel explained, defendant sought such relief because: "[t]he big difference is that with the pending case, he would then be facing a first offense, and could escape with significant penalties, but with an interlock device, as opposed to a one to two-year complete loss of license which would hinder his employment prospects." The court rejected defendant's argument and concluded increased penalties resulting from a second DWI conviction was an insufficient reason to disturb defendant's guilty plea.

Defendant then appealed to the Law Division and argued: (1) the factual basis he provided during his 2015 DWI plea colloquy was inadequate to support that offense; (2) the municipal court judge failed to make the requisite finding that defendant understood the consequences of entering the guilty plea before

eliciting the factual basis; and (3) the notions of fundamental fairness required the plea be vacated. On October 4, 2021, the court denied defendant's municipal appeal in a written decision.

Applying de novo review, the court first determined "the factual basis entered into the record at the time of the guilty plea was sufficient to sustain the guilty plea for a DWI," as defendant admitted during his plea colloquy that he operated a vehicle while under the influence of alcohol which impaired his ability to drive. The court rejected defendant's argument that fundamental fairness compelled the court to vacate his guilty plea and noted defendant was neither unduly influenced nor pressured to plead guilty.

The court also considered the four factors established by the New Jersey Supreme Court in State v. Slater, 198 N.J. 145, 157-58 (2009), when assessing defendant's post-sentencing application. The court determined defendant was not entitled to withdraw his plea under Slater because he did not assert a "colorable claim of innocence," defendant's reasons for withdrawal "[did] not persuade the court," the plea was entered as part of a plea bargain, and vacating the plea would unfairly prejudice the State.

Defendant thereafter filed a supplemental letter asking the court to vacate his 2015 DWI conviction because the municipal court failed to place him under

oath during the November 18, 2015 plea hearing. The court denied his request in an October 19, 2021 order and written decision.

The court initially concluded it lacked jurisdiction to consider an issue raised for the first time after a de novo decision had been rendered. In the alternative, the court determined defendant's factual basis was sufficient to support the DWI conviction despite the municipal court judge's failure to place defendant under oath. The court noted "[t]he New Jersey Court Rules pertaining to guilty pleas in municipal court differ from the rules applicable to the trial court." Specifically, the court explained, although Rule 3:9-2 requires a criminal court to question the defendant under oath or affirmation before accepting a guilty plea, Rule 7:6-2(a)(1), the applicable municipal court Rule, lacks such an oath requirement.

II.

As noted, defendant first argues the municipal court failed to elicit an adequate factual basis to support his guilty plea as required by Rule 7:6-2(a)(1). Specifically, defendant claims "nothing in the defendant's plea colloquy . . . can reasonably be interpreted as providing a knowing factual basis to being 'under

the influence," and "the [c]ourt's recitation of those three words and the accused answering 'yes' is insufficient."¹ We disagree.

When we review a Law Division order following the court's de novo review of an appeal from a municipal court, we "consider only the action of the Law Division and not that of the municipal court." State v. Oliveri, 336 N.J. Super. 244, 251 (App. Div. 2001). Although we are ordinarily limited to determining whether the Law Division's de novo factual findings "could reasonably have been reached on sufficient credible evidence present in the record[,]" State v. Johnson, 42 N.J. 146, 162 (1964), we owe no such deference here because the Law Division decided the motion under review on the papers without taking testimony, see State v. Harris, 181 N.J. 391, 421 (2004). Further, our "review of a trial court's denial of a motion to vacate a guilty plea for lack of an adequate factual basis is de novo." State v. Tate, 220 N.J. 393, 403-04

¹ Defendant further argues the Law Division improperly relied on unproven allegations in the 2015 Fair Lawn police reports, which were not provided in the record, to cure the inadequate factual basis provided by the plea colloquy. Although the court recited facts contained within the police report in its statement of the case, we do not read the court's analysis as relying in any way on those facts. Rather, the court relied solely on defendant's plea colloquy in determining whether a factual basis existed. Because we also conclude the plea colloquy established a proper factual basis, we do not address further the court's alleged reliance on the police reports.

(2015) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

To support a guilty plea, "our law requires that each element of the offense be addressed in the plea colloquy." State v. Campfield, 213 N.J. 218, 231 (2013). "Simply put, a defendant must acknowledge facts that constitute the essential elements of the crime." State v. Gregory, 220 N.J. 413, 420 (2015). "The factual basis for a guilty plea can be established by a defendant's explicit admission of guilt or by a defendant's acknowledgement of the underlying facts constituting essential elements of the crime." Id. at 419 (citing Campfield, 213 N.J. at 231).

In Campfield, the Court recognized the judge's inquiry of a defendant during the plea hearing "need not follow a 'prescribed or artificial ritual.'" 213 N.J. at 231 (quoting State ex rel. T.M., 166 N.J. 319, 327 (2001)). "[D]ifferent criminal charges and different defendants require courts to act flexibly to achieve constitutional ends." Ibid. (quoting T.M., 166 N.J. at 327). The Court also noted a "defendant's admissions 'should be examined in light of all surrounding circumstances and in the context of an entire plea colloquy.'" Id. at 231-32 (quoting T.M., 166 N.J. at 327).

A person violates N.J.S.A. 39:4-50 by "operat[ing] a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug." "Intoxication" includes "not only . . . obvious manifestations of drunkenness but any degree of impairment that affects a person's ability to operate a motor vehicle." State v. Zeikel, 423 N.J. Super. 34, 48 (App. Div. 2011). "Impairment" refers to any diminution "of a person's physical or mental abilities to operate a motor vehicle." Ibid.

During the plea colloquy, the municipal court specifically asked defendant, "[y]ou're admitting to . . . operating a vehicle in the Borough of Fair Lawn on or about . . . June 27th near Hirschklau and Plaza Road northbound. And at that time, you were under the influence of alcohol. Is that correct?" Defendant answered in the affirmative and explained he had consumed multiple vodka drinks prior to driving. The court then asked, "[a]nd you understand you're admitting . . . that the . . . alcohol in your system affected your ability to operate the vehicle on June 27th?" Defendant again answered in the affirmative.

We are satisfied defendant's explicit statement that he drove his vehicle while under the influence of alcohol and impaired satisfied each element of the DWI offense. That unequivocal acknowledgement satisfied the standards set

forth in Gregory and provided an adequate factual basis to support defendant's guilty plea.

III.

Defendant next argues the Law Division erred in denying his request to withdraw his guilty plea, again contending: (1) fundamental fairness mandates such relief; (2) the municipal court failed to advise him of the consequences of his plea until after it elicited a factual basis; and (3) defendant was not placed under oath at the plea hearing. We have considered all of these arguments in the context of the four-part Slater test and reject them.

Where a defendant's plea is supported by an adequate factual basis, we review a court's decision denying a request to withdraw that plea for an abuse of discretion, Tate, 220 N.J. at 404 (citing State v. Lipa, 219 N.J. 323, 332 (2014)), and will reverse only if the abuse of discretion "render[ed] the lower court's decision clearly erroneous," Lipa, 219 N.J. at 332 (quoting State v. Simon, 161 N.J. 416, 444 (1999)).

In Slater, 198 N.J. at 157-58, our Supreme Court set forth the following four factors courts are to "consider and balance" in evaluating motions to withdraw a guilty plea supported by an adequate factual basis: "(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." "No factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief." Id. at 162.

This four-factor analysis applies to motions filed either before or after sentencing, but presentence motions will be granted in the "interests of justice," Id. at 156 (quoting R. 3:9-3(e)), while "post-sentencing motions must meet a higher standard of 'manifest injustice' to succeed," Ibid. (quoting R. 3:21-1). Accordingly, as defendant moved to withdraw his plea over five years after sentencing, he must satisfy the higher manifest injustice standard. Further, defendant bears "the burden . . . to present some plausible basis for his request, and his good faith in asserting a defense on the merits." Ibid. (quoting State v. Smullen, 118 N.J. 408, 416 (1990)).

Under the first Slater factor, we address whether "defendant has asserted a colorable claim of innocence." Id. at 157. As the Court noted, "[a] core concern underlying motions to withdraw guilty pleas is to correct the injustice of depriving innocent people of their liberty." Id. at 158.

This factor clearly weighs in favor of the State as defendant fails to advance any colorable claim of innocence. Instead, during the May 12, 2021

motion hearing defendant admitted his conduct was "consistent with the factual basis made back in 2015." And, before us, rather than arguing we should permit him to withdraw his plea because he was innocent of his initial DWI charge, defendant concedes he seeks to vacate his original plea only so he can immediately enter a guilty plea for underage DWI based on the same set of facts, and, thus, face lesser penalties for his second DWI conviction.

Under the second Slater factor, we address the "nature and strength of defendant's reasons for withdrawal." Id. at 159. In doing so, we "focus[] on the basic fairness of enforcing a guilty plea by asking whether defendant has presented fair and just reasons for withdrawal, and whether those reasons have any force." Ibid. This factor also weighs in favor of the State.

Defendant contends it was fundamentally unfair to preclude him from withdrawing his guilty plea because of the unique circumstances surrounding that plea. Defendant explains the underage drinking statute applies to "[a]ny person under the legal age . . . who operates a motor vehicle with a [BAC] of 0.01 [percent] or more, but less than 0.08 [percent]" N.J.S.A. 39:4-50.14. Defendant claims he was unfairly precluded from pleading guilty to that offense because his BAC reading was inadmissible. Additionally, he reasons, under the "legal age" DWI statute, "a DWI conviction exposes defendants to second

offense DWI charges and their significantly greater penalties, whereas an [u]nderage DWI does not."

Defendant argues the doctrine of fundamental fairness therefore mandates withdrawal of his guilty plea because the State's errors rendered the BAC results inadmissible, thus depriving him of evidence that would potentially have placed his actions within the scope of the underage DWI statute and subjected him to lesser penalties for his second DWI. To cure this "anomaly"—that underage defendants are prejudiced by breath test inadmissibility—defendant seeks to stipulate to a BAC between .01 and .07 percent and plead guilty to underage DWI.

"The doctrine of fundamental fairness 'is an integral part of due process, and is often extrapolated from or implied in other constitutional guarantees.'" State v. Miller, 216 N.J. 40, 71 (2013) (quoting Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 578 (2008)). "The doctrine effectuates imperatives that government minimize arbitrary action, and is often employed when narrowed constitutional standards fall short of protecting individual defendants against unjustified harassment, anxiety, or expense." Ibid. (quoting Doe v. Poritz, 142 N.J. 1, 109 (1995)). "'Fundamental fairness is a doctrine to be sparingly applied.' The doctrine is 'applied in those rare cases where not to do so will subject the

defendant to oppression, harassment, or egregious deprivation.'" Id. at 71-72 (citations omitted) (quoting Doe, 142 N.J. at 108).

We are satisfied this is not the "rare" case where the doctrine of fundamental fairness mandates withdrawal of defendant's guilty plea. As noted, defendant elected to plead guilty to DWI in exchange for the dismissal of four additional charges, including underage DWI, and, as far as we can discern from the record, he did so without undue pressure or harassment. Additionally, nothing in the record suggests defendant was precluded from stipulating to a lower BAC and pleading guilty to underage DWI during the plea hearing, and defendant does not argue as such. That defendant's counsel may have overlooked this solution does not constitute the "oppression, harassment, or egregious deprivation," ibid. (quoting Doe, 142 N.J. at 108), necessary to invoke the doctrine of fundamental fairness, nor does it constitute a "manifest injustice" as required under Slater to grant defendant's post-sentencing application.

Next, relying on Maida v. Kuskin, 221 N.J. 112, 123 (2015), defendant contends his plea was not entered knowingly because the court did not advise him of the consequences of pleading guilty to DWI until after eliciting a factual basis for that charge, contrary to Rule 7:6-2(a)(1).

Rule 7:6-2(a)(1) provides in relevant part:

the court 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.

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

"The Rule thus contemplates that the plea be made in open court, that the municipal court judge make a sufficient inquiry to conclude that any plea is knowing and voluntary, and that there be a factual basis for the plea." Maida, 221 N.J. at 123. "For a plea to be knowing, intelligent, and voluntary, the defendant must understand the nature of the charge and the consequences of the plea." State v. Johnson, 182 N.J. 232, 236 (2005).

In performing the inquiry into whether a defendant understands the consequences of a plea, "a court is not responsible for informing a defendant of all consequences flowing from a guilty plea, [but] at a minimum the court must ensure that the defendant is made fully aware of those consequences that are 'direct' or 'penal.'" Id. at 237 (quoting State v. Howard, 110 N.J. 113, 122 (1988)). "Even misinformation about a collateral consequence may vitiate a guilty plea if the consequence is a material element of the plea." State v. Jamgochian, 363 N.J. Super. 220, 225 (App. Div. 2003).

Having considered the record in light of these legal principles, we reject defendant's contention that his plea should be vacated because he allegedly did not understand the consequences of his plea prior to his plea colloquy. Although defendant correctly notes the municipal court judge did not specifically advise defendant of the range of penalties before accepting his guilty plea, defendant does not submit a certification or any other evidence substantiating that he did not know or understand either the direct or collateral consequences of his plea including any component of the sentence he received, and he has not alleged his sentence was excessive.

Further, defendant was sentenced immediately following his plea and therefore knew the direct consequences for almost six years before he moved to withdraw the plea. In addition, his three-month license suspension was undoubtedly completed well before he moved to withdraw his plea years later in 2021. We find defendant's long delay in moving to withdraw his plea significantly undermines any argument that he pleaded guilty without knowledge of the consequences he faced. See Slater, 198 N.J. at 160 ("In general, the longer the delay in raising a reason for withdrawal, or asserting one's innocence, the greater the level of scrutiny needed to evaluate the claim.").

Finally, relying on Rule 3:9-2, defendant argues his guilty plea should be vacated because the municipal court failed to place him under oath during the plea hearing. Although we acknowledge prejudice might result from a municipal court's failure to place a defendant under oath prior to eliciting a factual basis, the second Slater factor generally "requires trial courts to ascertain not only the existence of a valid defense but to determine whether a defendant has 'credibly demonstrated' why a 'defense was "forgotten or missed" at the time of the plea.'" State v. McDonald, 211 N.J. 4, 23 (2012) (quoting Slater, 198 N.J. at 160). Here, defendant never asserted any uncertainty about the veracity of the statement he provided during the unsworn plea colloquy, nor advanced any explanation for his delay in raising this defense.

Additionally, although we acknowledge the significance attendant to the oath requirement, see infra pp. 20, as the Law Division judge explained Rule 7:6-2(a)(1) does not require a defendant swear or affirm to an oath before providing a factual basis supporting a plea, contrary to Rule 3:9-2. We therefore decline to hold the municipal court's failure to place defendant under oath at the plea hearing entitles him to plea withdrawal.

While we are satisfied the failure to administer an oath to defendant does not warrant relief under Slater in the circumstances here, we refer the matter to

the Municipal Court Practice Committee for its consideration of an amendment of Rule 7:6-2 to include the swearing-in requirement embedded in Rule 3:9-2. The Committee may also wish to address whether any proposed amendment of Rule 7:6-2 may have to include or accommodate a different inconsistency.

For example, defendants are expressly permitted to enter guilty pleas in municipal court in certain cases for which they need not appear to provide an oath or affirmation before a judge. Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, Pressler & Verniero, Current N.J. Court Rules (2023). In those circumstances, the plea by mail form provides the following language at the bottom: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment." Richmond & Burns, New Jersey Municipal Court Practice, Appendix, Form 12, at 1304 (2022). Similarly, as a result of the COVID-19 pandemic, our Supreme Court has permitted defendants to plead guilty to DWI by mail and, consequently, a form with nearly identical language is in use. Ramsey, New Jersey Drunk Driving Law, "PLEA BY MAIL" § 1.5 (2021).

Neither our published case law nor relevant commentary has identified a reason for the discrepancy in the oath requirement between Rules 3:9-2 and 7:6-

2.² Our Supreme Court noted in Maida, however, that Rule 7:6-2(a)(1) "is intended to mirror the protections of Rule 3:9-2." 221 N.J. at 123 (citing Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 7:6-3(a)(1) (2014)); see also State v. Gale, 226 N.J. Super. 699 (Law Div. 1988); State v. Martin, 335 N.J. Super. 447, 450 (App. Div. 2000); State v. Colon, 374 N.J. Super. 199, 212 (App. Div. 2005).

In addition, we recognize an individual's sworn or affirmed testimony is not a mere formality and the oath requirement "constitutes a strong reminder that [a witness] has a special obligation to testify truthfully and that he is subject to punishment should he fabricate." State v. Caraballo, 330 N.J. Super. 545, 555 (App. Div. 2000). Consequently, "N.J.R.E. 603 requires that all prospective witnesses be sworn or affirmed." Id. at 554. "If the proposed witness refuses either to take an oath or make an affirmation or declaration, the witness should not be allowed to testify." Ibid. While N.J.R.E. 603 covers all prospective

² The present version of Rule 7:6-2, which was adopted between the issuance of the 1991 Rules of Court and the 1992 Rules of Court, incorporated and expanded on the provisions in the former Rule 7:4-2(b). Pressler & Verniero, Current N.J. Court Rules, R. 7:6-2 note (2022). Nothing in the comments on Rule 7:6-2 or the former Rule 7:4-2 suggests the intentional omission of an oath or affirmation requirement for entering a guilty plea in municipal court. Ibid.

"witnesses" in evidentiary proceedings, it presumably applies with equal force to defendants pleading guilty.

Under the third Slater factor, we address whether the plea was entered as part of a plea bargain. As noted, defendant pled guilty for DWI in exchange for the dismissal of four other offenses arising out of the same incident. According to the Slater Court, "defendants have a heavier burden in seeking to withdraw pleas entered as part of a plea bargain." 198 N.J. at 160. This is because "[t]he system rests on the advantages both sides receive from it." Id. at 161. Accordingly, this factor clearly weighs in favor of the State.

Under the fourth Slater factor, we address whether withdrawal would result in any unfair prejudice or advantage. "There is no fixed formula to analyze the degree of unfair prejudice or advantage that should override withdrawal of a plea." Ibid. Relevant factors, however, include:

the loss of or inability to locate a needed witness, a witness's faded memory on a contested point, . . . the loss or deterioration of key evidence whether the passage of time has hampered the State's ability to present important evidence [and] the State's efforts leading up to the plea and whether it is fair to require the State to repeat them.

[Ibid.]

Here, over seven years have passed since the incident giving rise to the plea agreement. As noted, the State's case was entirely dependent upon the officer's observations at the time of the offense as the State failed to satisfy conditions precedent to introduce defendant's BAC results. Under these circumstances, to permit defendant to withdraw his plea would unfairly place the State at a disadvantage as it would require the State to prosecute an undisputedly stale claim. We therefore conclude the fourth Slater factor also weighs in favor of the State.

After considering the Slater factors in totality, we agree with the court that defendant failed to meet his burden of proving denial of his motion to vacate constituted manifest injustice. In this regard, we find most consequential defendant's multiple admissions to having driven under the influence and that he seeks only to avoid the consequences of having pled guilty to DWI. To the extent we have not specifically addressed any of the parties' arguments, it is because we have concluded they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION