

**NOT FOR PUBLICATION WITHOUT THE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-3192-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM E. VALLOREO,
a/k/a WILLIAM VALLOREO,

Defendant-Appellant.

Submitted March 28, 2022 – Decided April 13, 2022

Before Judges Fasciale and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Municipal Appeal No. A-21-0002.

Levow DWI Law, PA, attorneys for appellant (Evan M. Levow, of counsel and on the brief; Christopher G. Hewitt, on the brief).

Grace A. MacAulay, Camden County Prosecutor, attorney for respondent (Hannah M. Franke, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

More than twelve years after pleading guilty in municipal court to driving while intoxicated (DWI), N.J.S.A. 39:4-50(a), defendant William E. Valloreo sought to withdraw his guilty plea. He now appeals from a June 2, 2021 Law Division order entered after a de novo review, denying his petition for post-conviction relief (PCR) and upholding his DWI conviction. Defendant argued in the municipal court and again in the Law Division he did not provide an adequate factual basis for his guilty plea, and that he did not waive his constitutional rights before pleading guilty. Both courts denied his PCR application. In this appeal, defendant argues:

POINT I

THE DEFENDANT DID NOT PROVIDE A SUFFICIENT FACTUAL BASIS TO SUPPORT A FINDING OF GUILT ON THE CHARGE OF [DWI].

POINT II

THE DEFENDANT DID NOT VOLUNTARILY AND INTELLIGENTLY WAIVE ALL OF HIS CONSTITUTIONAL RIGHTS PRIOR TO ENTERING A GUILTY PLEA.

POINT III

THE MUNICIPAL COURT JUDGE RELIED ON INAPPROPRIATE CRITERION FOR DENYING [PCR]. (Not raised below).

POINT IV

[DEFENDANT]'S PETITION WAS NOT TIME-BARRED.

We conclude defendant's PCR petition was untimely and affirm.

I.

The record shows on October 5, 2009, defendant and his attorney appeared in Winslow Township Municipal Court on the DWI charge. Defendant pled guilty after his attorney waived a formal reading of the complaint and withdrew his not guilty plea. After the judge asked if counsel had the Chun Worksheet A,¹ counsel advised in the negative but stated he and defendant "read it on the computer . . . together."

Before accepting defendant's guilty plea, the municipal court judge questioned defendant to assure he was entering the plea knowingly and voluntarily. The following colloquy ensued:

[THE COURT:] Thank you. A copy of the Chun Worksheet A. The readings were intolerant. The machine was

¹ State v. Chun, 194 N.J. 54 (2008). In New Jersey, most police departments use a device known as the Alcotest to breathalyze DWI suspects' blood alcohol concentration. In Chun, our Court established standards for the use of these devices to maximize their accuracy. See Id. at 147-53. The Court issued an order requiring certain foundational documents be submitted to deem the Alcotest results scientifically reliable. Id. at 150-51, 53-54

working properly, and the reading is
a .19[%] . . . and .2[%].

[DEFENSE COUNSEL:] Correct.

[THE COURT:] So, it's going to be a .19[%].

[DEFENSE COUNSEL:] Thank you, Judge.

The judge then administered the oath to defendant and elicited the
following factual basis for the plea:

[THE COURT:] Sir, do you admit that on [July 31,
2009], you were driving in Winslow.
You had been drinking. You were
stopped. You were asked to take a
breath test. You took the test. Your
reading was a .19[%]. You thought
you were intoxicated and because of
that intoxication, you thought your
driving was impaired?

[DEFENDANT:] Yes, Your Honor.

[THE COURT:] Made a free and voluntary intelligent
plea. I have a copy of the Chun
Worksheet A. The machine was
working properly and the readings
were true. I have a copy of his
transcript. I'll hear you as to
sentencing, sir.

Following the plea allocution, defense counsel advised the judge this was
defendant's "second offense." A couple of weeks previously, defendant pled
guilty to his first DWI charge in Laurel Springs. The judge fined defendant

\$525; revoked his driving privileges for two years; ordered him to spend forty-eight hours in an intoxicated driver resource center; ordered thirty days of community service; suspended his driving registration privileges for two years; and imposed mandatory assessments and costs. Defendant opted for a two-year driving registration suspension over a one-year interlock device. The judge informed defendant about the repercussions of his second guilty DWI plea, the potential consequences of a third offense, and his right to file a direct appeal, which defendant acknowledged. The record shows defendant never filed a motion to withdraw his guilty plea or a direct appeal from his DWI conviction.

On November 13, 2020, more than twelve years after pleading guilty to DWI, defendant filed a PCR petition in the Winslow Municipal Court seeking to have his guilty plea vacated. Defendant asserted "[a] proper factual basis was not obtained" under Rule 7:6-2 during his plea hearing, thus requiring vacating the guilty plea. In addition, defendant contended his PCR petition was not time-barred because it was "[a] petition to correct an illegal sentence" under Rules 3:22-12(a) and 7:10-2(b)(1), which allow PCR petitions to be filed more than five years after a judgment of conviction has been entered.

Initially, the municipal court judge denied defendant's PCR petition on the papers submitted. However, after defense counsel requested oral argument, the

municipal court judge, who was also the plea judge, scheduled oral argument for January 27, 2021. During oral argument, defense counsel reiterated the points raised in the PCR petition but added the long delay in filing for PCR was because "the practice, statewide, ha[d] changed significantly over the past ten years to come in line, so to speak, with the adherence to . . . this particular [c]ourt [r]ule."

Following argument, the municipal court judge again denied defendant's PCR that day and rendered an oral opinion. With respect to defense counsel acknowledging he and defendant reviewed the Chun Worksheet A together before the plea hearing, the judge found "[a]ttorneys can make factual statements on the record that affect[] their clients." In addition, the judge found defendant's guilty plea and the requisite factual basis elicited "did follow the Rule" and "if [he] vacated this judgment, [he]'d have to vacate every judgment [he] did for the last, at least, the last ten to [fifteen] years." A memorializing order was entered.

On February 16, 2021, defendant appealed to the Law Division from the appeal of his PCR application in the municipal court. Defendant renewed the same arguments he made to the municipal court judge and requested the matter "be re-listed for trial" because he wanted "to get his license back." The Law

Division judge also denied defendant's application, but acknowledged the plea colloquy's brevity. Nevertheless, the Law Division judge found defendant's guilty plea was "knowing, intelligent, and voluntary" and defendant did "understand the nature of the charge and the consequences." The judge elaborated:

While it was truncated, while it was brief, while it was short, . . . I do feel from what I've read here that the defendant knew that he was intoxicated and that . . . reading was discussed and showed that certainly he was over the limit, and that he entered the plea knowing[ly] and voluntar[ily].

By way of example, the Law Division judge stated questions he would normally ask defendants in order to establish a factual basis for a plea and acknowledged "that was not done [below]." But, the Law Division judge ultimately found defendant's PCR petition was untimely filed "twelve years really after the fact," and that there was no excusable neglect. This appeal followed.

II.

In our review of a Law Division order following its 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. Olivieri, 336 N.J. 244, 251 (App. Div. 2001), overruled on other grounds, State v. Ciancaglini, 411 N.J. Super.

280 (App. Div. 2010). Where the Law Division decides a PCR petition without an evidentiary hearing, we similarly conduct a de novo review of the Law Division's factual findings and legal conclusions. See State v. Harris, 181 N.J. 391, 419 (2004) (finding where no evidentiary hearing is held, an appellate court conducts "a de novo review of both the factual findings and legal conclusions of the PCR court"); see also State v. Zeikel, 423 N.J. Super. 34, 40-41 (App. Div. 2011) (explaining an appellate court's "standard of review is plenary" where the trial court "did not take any testimony but relied solely on the same documentary record that is before [the appellate court] on appeal").

When reviewing a court's denial of a motion to withdraw a guilty plea, "[a] trial judge's finding that a plea was voluntarily and knowingly entered is entitled to appellate deference so long as that determination is supported by sufficient credible evidence in the record." State v. Lipa, 219 N.J. 323, 332 (2014). We will reverse a court's decision denying a "defendant's request to withdraw his [or her] guilty plea . . . only if there was an abuse of discretion which renders the lower court's decision clearly erroneous." Ibid. (quoting State v. Simon, 161 N.J. 416, 444 (1999)). "A denial of a motion to vacate a plea is 'clearly erroneous' if the evidence presented on the motion, considered in light of the controlling legal standards, warrants a grant of that relief." State v.

O'Donnell, 435 N.J. Super. 351, 372 (App. Div. 2014) (quoting State v. Mustaro, 411 N.J. Super. 91, 99 (App. Div. 2009)).

A defendant can challenge the factual basis for a guilty plea by filing a motion to withdraw the plea with the municipal court, by filing a direct appeal, or by way of a PCR petition. State v. Urbina, 221 N.J. 509, 527-28 (2015). Here, as we stated, defendant did not file a direct appeal or a motion to withdraw his guilty plea. Therefore, we will address defendants' PCR petition under the following principles.

The timeline of a defendant's PCR petition in municipal court is governed by Rule 7:10-2(b)(2) (stating the petition "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, unless it alleges facts showing that the delay in filing was due to defendant's excusable neglect.)"

To establish "excusable neglect," a defendant must demonstrate more than simply "a plausible explanation for a failure to file a timely PCR petition." State v. Norman, 405 N.J. Super. 149, 159 (App. Div. 2009). Factors to be considered whether excusable neglect exists include "the extent and cause of the delay, the prejudice to the State, and the importance of the [defendant]'s claim in determining whether there has been an 'injustice' sufficient to relax the time

limits." State v. Afandor, 151 N.J. 41, 52 (1997) (quoting State v. Mitchell, 126 N.J. 565, 580 (1992)). "[T]he burden to justify filing a petition after the five-year period will increase with the extent of the delay" unless there are "compelling, extenuating circumstances." Ibid. To establish a fundamental injustice, "there should at least be some showing that" the alleged violation "played a role in the determination of guilt." State v. Laurick, 120 N.J. 1, 13 (1990).

Defendant contends "[t]here was no purposeful delay or neglect on his part" because he "was unaware of the fact that his factual basis was defective until he had spoken to an attorney who reviewed the case history." However, defendant waited more than five years to have an attorney review his case when he was capable of doing so within the five-year window. We find no support for defendant's argument and conclude he has not met his burden to show excusable neglect under Rules 3:22-12(a)(1)(A) and 7:10-2(b)(2).

III.

Defendant also asserts that his PCR petition is timely under Rule 7:10-2(b)(1) because of the municipal court judge's "failure to comply with the rules regarding the acceptance of a guilty plea, namely, that the plea be understandably and voluntarily entered." State v. Owczarski, 236 N.J. Super.

52, 55 (Law Div. 1989). Under Rule 7:10-2(b)(1), "[a] petition to correct an illegal sentence may be filed at any time." In the criminal context, our Court has recognized "that under some extraordinary circumstances, a court's improper acceptance of a guilty plea may constitute an illegal sentence within the meaning of Rule 3:22-12. For a guilty plea to be illegal in that sense, however, its acceptance must implicate constitutional issues." Mitchell, 126 N.J. at 577; see also Owczarski, 236 N.J. Super. at 55 ("A sentence which has been imposed on the basis of an illegal plea is itself illegal.").

Defendant maintains he did not voluntarily and knowingly waive his constitutional rights before the municipal court judge accepted his guilty plea. In order to properly accept a guilty plea, a municipal court judge must address the defendant personally and determine "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). A municipal court judge's failure to comply with the rule that a guilty plea be offered knowingly and voluntarily violates a defendant's due process rights. Mitchell, 126 N.J. at 585-86 (citing Owczarski, 236 N.J. Super. at 58).

The "principal purpose" of Rule 7:6-2(a)(1) requiring the judge to elicit 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." State v. Tate, 220 N.J. 393, 406 (2015) (internal quotation marks omitted) (quoting State v. Barboza, 115 N.J. 415, 421 (1989)). Nonetheless, "an inadequate factual basis does not necessarily entitle a defendant to relief upon a collateral attack of a conviction." State v. Belton, 452 N.J. Super. 528, 540 (App. Div. 2017); see also State v. Pena, 301 N.J. Super. 158, 163 (1997) (holding "the requirement to take a factual basis is not absolute" and not every alleged deficiency in the eliciting of a factual basis constitutes reversible error).

Here, defendant contends the factual basis for his guilty plea lacked "any discussion or admission as to what type of alcohol [he] had consumed[,] how it impaired [his] ability to operate a motor vehicle, and to what degree." However, none of these are required elements under N.J.S.A. 39:4-50(a). Saliently, defendant acknowledged the underlying facts constituting the essential elements of DWI by affirmatively answering the municipal judge's question about driving with a blood alcohol concentration of .19%. Moreover, defendant admitted he believed he was intoxicated and that his driving was impaired as a result. "As long as a guilty plea is knowing and voluntary . . . a court's failure to elicit a factual basis for the plea is not necessarily of constitutional dimension and thus

does not render illegal a sentence imposed without such basis." Belton, 452 N.J. Super. at 540 (alteration in original) (quoting State v. Mitchell, 126 N.J. 565, 577 (1992)).

But, "a contemporaneous claim of innocence alters the legal significance of the lack of factual basis." Ibid. "[W]hen there are indicia, such as a contemporaneous claim of innocence, that the defendant does not understand enough about the nature of the law as it applies to the facts of the case to make a truly 'voluntary' decision on his own" then "[a] factual basis is constitutionally required." Id. at 540-41 (quoting Mitchell, 125 N.J. at 577); see also Barboza, 115 N.J. at 421 n.1 ("A factual basis is not constitutionally required unless the defendant accompanies the plea with a claim of innocence.").

In the matter under review, at no point during the plea colloquy or the almost twelve years thereafter did defendant assert a contemporaneous claim of innocence. Rather, defendant argues that due to the limited factual basis elicited by the municipal court judge, defendant did not knowingly and voluntarily enter his guilty plea. We are unpersuaded.

Defendant pled guilty to the provision of the DWI statute that penalizes "[a] person who operates a motor vehicle under the influence of intoxicating liquor." N.J.S.A. 39:4-50(a). The statute provides that in order to be found

guilty of DWI, a person must operate "a motor vehicle while under the influence of intoxicating liquor . . . or operate[] a motor vehicle with a blood alcohol concentration of [.08%] or more." Ibid. Our Court has 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 [or her] to drive on the highways." State v. Johnson, 42 N.J. 146, 165 (1964).

Defendant did not express any dissatisfaction with his attorney's representation; he acknowledged his understanding of the offense committed; and the significance of his guilty plea. Moreover, this was not defendant's first DWI guilty plea. In reviewing the Chun Worksheet A with his attorney prior to entering his guilty plea, defendant was well aware that his breathalyzer reading was "over the limit." Therefore, we are convinced defendant's guilty plea was knowing and voluntary, and we outright reject his newly minted claim of innocence.

IV.

Defendant seeks to withdraw his guilty plea through his PCR petition. Doing so "would take ten years off . . . his [driver's license] suspension." Again, we reject defendant's argument.

PCR "is not a substitute for appeal from a conviction or for a motion incident to the proceedings in the trial court." R. 7:10-2(b)(3); see also R. 3:22-3 (analogous rule for PCR petitions in criminal practice). "[A] defendant may not employ [PCR] to assert a new claim that could have been raised on direct appeal or to relitigate a claim already decided on the merits." State v. Goodwin, 173 N.J. 583, 593 (2002) (citations omitted). Under Rule 7:10-2(d)(1), a defendant may be barred from asserting any claims he could have raised at trial or on direct appeal, unless the judge concludes by way of motion or at the hearing: "(A) the grounds for relief not previously asserted could not reasonably have been raised in any prior proceeding; (B) enforcement of the bar would result in fundamental injustice; or (C) denial of relief would be contrary to the Constitution of the United States or of New Jersey." This rule is intended "to promote finality in judicial proceedings." State v. Echols, 199 N.J. 344, 357 (2009) (quoting State v. McQuaid, 147 N.J. 464, 483 (1997)).

Here, we discern no basis to grant the PCR defendant requests. Defendant's claim that the factual basis for his guilty plea was inadequate under Rule 7:6-2(a)(1) could have been raised in a direct appeal. Any purported failure to do so does not provide defendant refuge through the guise of a PCR petition.

R. 7:10-2(d)(1). Therefore, we conclude defendant's PCR petition is procedurally barred under Rule 7:10-2.

We note a motion to withdraw a guilty plea is a separate and distinct motion from PCR. See R. 7:6-2(b). Accordingly, a different appellate standard of review applies. We will reverse a trial court's decision denying a "defendant's request to withdraw his [or her] guilty plea . . . only if there was an abuse of discretion which renders the lower court's decision clearly erroneous." Lipa, 219 N.J. at 332 (quoting Simon, 161 N.J. at 444). "A denial of a motion to vacate a plea is 'clearly erroneous' if the evidence presented on the motion, considered in light of the controlling legal standards, warrants a grant of that relief." O'Donnell, 435 N.J. Super. at 372 (quoting Mustaro, 411 N.J. Super. at 99).

Here, defendant's counsel expressly stated during oral argument before the Law Division judge that "this is not a motion to withdraw a plea." Due to the relief sought and interchangeable use of the terms, the difference is worth mentioning. The Law Division judge aptly construed defendant's motion as a PCR petition and reviewed it under the de novo standard. Reviewing the PCR on appeal as a motion to withdraw a guilty plea instead, the Law Division's decision would be reviewed for an abuse of discretion. Lipa, 219 N.J. at 332.

In any event, the outcome is the same because the Law Division's decision "is supported by sufficient credible evidence in the record." Ibid.

We have considered defendant's remaining arguments and conclude they are without 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