SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3724-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KIMBERLY KILLION,

Defendant-Appellant.

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Argued October 31, 2022 – Decided March 14, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 19-08-1916.

James J. Gerrow, Jr., argued the cause for appellant (Sitzler & Sitzler, attorneys; James J. Gerrow, Jr., of counsel and on the brief).

Boris Moczula, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Boris Moczula, of counsel and on the brief).

PER CURIAM

Defendant Kimberly Killion appeals from the June 29, 2021 Law Division order denying her motion to vacate the retraxit guilty plea to assault by auto, N.J.S.A. 2C:12-l(c)(3). We affirm.

I.

We recite the facts from the plea, sentencing, and motion hearings. In May 2019, at approximately 10:22 p.m., defendant was driving her car when she drove through the front façade of a commercial building and into a pizza shop. Three individuals inside of the pizza shop were injured because of the incident. Garris Eddington, the owner, was transported to the hospital for back and neck pain. Employees Jiovanni McKinley experienced leg pain and Jason Sanders sustained a cut to the left side of his abdomen. Both declined medical treatment. Defendant exited and then re-entered her car before she attempted to back out of the building. An unidentified individual went behind defendant's car and motioned for her to stop.

Pennsauken Police Department officers and emergency medical technicians were dispatched to the scene. According to the officers, defendant showed signs of alcohol impairment—she "smelled" of alcohol and "slurred" her speech. Defendant also admitted to drinking a "substantial amount of alcohol." She reported pain in her neck and head area and was "agitated" and "extremely uncooperative" while being treated. Defendant was transported to the hospital

and consented to officers obtaining a blood sample. Defendant's blood alcohol content was .195 %, plus or minus .012% as measured by NMS labs.

The next day, Camden County Police Detective Douglas Rowand began an investigation. Rowand viewed surveillance video from a nearby bar showing defendant sitting at the bar between a married couple. Several days later, Rowand spoke with the male patron who stated defendant was already at the bar when he and his wife arrived at 5:00 p.m. Defendant and the couple were the last patrons to leave the bar at approximately 10:18 p.m. The male patron reported they followed defendant's car and he observed defendant's car inside of the pizzeria and realized it was her.

The next day, Rowand interviewed Eddington, who said he was sitting at the pizza shop counter when defendant's car "came through the building" and "hit him." Rowand also saw surveillance videos which showed the crash from several different angles. The interior camera video showed defendant's car enter the building, strike Eddington, and then collide with the rear counter. In the video, defendant was "leaning over toward the passenger side of the [car]" and did not "'brace herself for impact at any point during the crash." In the exterior camera video, defendant struck the curb before making a hard left turn into the building.

In August 2019, a Camden County Grand Jury returned Indictment No. 1916-08-19, and charged defendant with three counts of third-degree assault by auto, operating a motor vehicle while intoxicated in violation of N.J.S.A. 39:4-50, and causing bodily injury of others while within 1,000 feet of a school zone in violation of N.J.S.A. 2C:12-1(c)(3).

Defendant's application for the Pre-Trial Intervention Program (PTI) was rejected on October 23, 2019. Defendant's appeal of the denial was denied.

Thereafter, defendant entered a negotiated guilty plea. In exchange for the plea, the State agreed to dismiss the remaining two counts, recommend noncustodial probation with "all conditions to be fixed by the court." Defendant also agreed to enter a guilty plea to the pending ticket for the charge of driving while under the influence within 1,000 feet of a school zone at sentencing. The negotiated plea was memorialized in a signed plea agreement, which noted defendant reserved the right to make a Warren[1] argument at sentencing.

At her plea allocution, defendant told the court she discussed the charges with counsel, received all discovery, and was "fully satisfied" with the advice and services given by counsel. When asked by the judge if anyone promised her "anything different under a Warren argument," she responded "no."

[1] State v. Warren, 115 N.J. 433 (1989).

After a factual basis for the plea was established, defense counsel questioned defendant regarding the possibility of the revocation of her teaching license. Defendant answered affirmatively that prior to the plea allocution, she discussed with her attorney the "possibility" that her employment would be terminated because of the conviction.

The judge confirmed defendant's understanding about the consequences of her guilty plea:

> [COURT]: Okay. Now, Ms. Killion, your attorney has indicated on the record that he's discussed with you that your conviction could result in a termination of your employment. Correct?
>
> [DEFENDANT]: Yes.
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> [COURT]: You understand that no one can make that determination except your employment. Which is true. The employment under the statute -- that's who makes that determination. The answer is yes. The next question is: Knowing that this conviction could result in a termination of your employment -- you've indicated that you're a schoolteacher. Correct?
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> [DEFENDANT]: Yes.
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> [COURT]: And you know, ma'am, more than I know, as a teacher, you have a license. Is that correct?
>
> [DEFENDANT]: Yes.

[COURT]: And you understand that having a conviction could also affect your license that you have as a teacher as well; is that correct?

[DEFENDANT]: Yes.

[COURT]: And knowing that having this conviction, if I accept the plea, could affect you having -- continuing to have a teaching license? And without a license, you understand that you could also lose your job teaching; is that correct?

[DEFENDANT]: Yes.

[COURT]: Knowing all of that regarding employment and all, do you still want to plead guilty today?

[DEFENDANT]: Yes.

[COURT]: Okay. And that's after you discussed all of this with your attorney. Correct?

[DEFENDANT]: Yes.

The judge accepted defendant's plea after concluding there was a factual basis, and the plea was made knowingly and voluntarily.

In March 2020, the New Jersey Department of Education (DOE) notified defendant because of her plea and conviction, she was permanently disqualified from holding any paid or unpaid position at any institution under the supervision

of the DOE. Within a week, defendant was notified by the Pennsauken School District she was terminated.

In September 2020, defendant moved to withdraw her guilty plea. Following oral argument, on June 29, 2021, the judge issued an oral opinion and entered an order denying defendant's motion.

Consequently, on July 8, 2021, defendant was sentenced to four years' probation, subject to conditions and assessed fines and penalties.

On appeal, defendant raises the following arguments:

> POINT I
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> DEFENDANT[']S PLEA OF GUILTY WAS ENTERED BASED UPON THE ERRONEOUS ADVICE OF COUNSEL AS TO THE COLLATERAL CONSEQUENCES OF FORFEITURE OF PUBLIC EMPLOYMENT WHICH VIOLATED THE EFFECTIVE ASSISTANCE OF COUNSEL STANDARD ESTABLISHED IN STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) RESULTING IN A PLEA OF GUILTY THAT WAS NOT KNOWING AND VOLUNTARY IN NATURE IN VIOLATION OF [RULE] 3:9-2.
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> POINT II
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> DEFENDANT SHOULD HAVE BEEN PERMITTED TO WITHDRAW HER GUILTY PLEA, PURSUANT TO [RULE] 3:21-1, AS THE INTERESTS OF JUSTICE WERE NOT SERVED BY EFFECTUATING THE PLEA AGREEMENT.

II.

We are not persuaded by defendant's contention she received ineffective assistance of counsel based on erroneous advice concerning her guilty plea and the potential consequences to her employment.

For purposes of the Sixth Amendment of the United States Constitution, we are guided by the well-established two-part standard enunciated in Strickland and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42 (1987), to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 58. Defendant is required to satisfy both prongs of the standard establishing that: (l) counsel's performance was deficient and he or she made errors that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-88, 694.

We are satisfied from our review of the record and considering the applicable legal principles, the trial judge correctly determined defendant failed to demonstrate the ineffectiveness of trial counsel under the Strickland/Fritz test. In a comprehensive oral decision, the trial judge appropriately concluded

defendant's reliance on Strickland was misplaced since the two-prong standard is reserved for post-conviction applications.

The judge then addressed the merits under Strickland for the sake of completeness. The judge noted a "defendant was not entitled to withdraw [her] guilty plea because "'she was not informed that the collateral consequence of a conviction [was] a loss of [her teaching license]'" under State v. Medina, 349 N.J. Super. 108 (App. Div. 2002)." The plea record reveals defendant explicitly stated the plea agreement and the possible loss of employment was discussed with her counsel before the hearing date. Moreover, when questioned by the trial judge on at least two occasions, defendant answered she was satisfied with counsel's advice and services. Defendant also answered "yes" to the judge's inquiries regarding her understanding of the guilty plea and potential loss of employment. Knowing the "possibility" of termination, defendant voluntarily chose to enter the guilty plea. The judge determined based on the "detailed" plea colloquy placed on the record; defendant failed to make a prima facie showing of ineffective assistance of counsel.

Defendant contends if "[she] had a proper understanding of what could be accomplished by a Warren[2] argument at sentencing . . . and the forfeiture of

[2] Under Warren, a defendant has the right to argue for a sentence less than the sentence recommended by the State. 115 N.J. 433. However, a trial judge

public employment statute, it would have been a rational decision for her to reject the plea agreement and proceed to trial." We reject this contention. The plea colloquy reveals the judge explained a Warren argument and informed defendant the judge had the sole discretion to grant a Warren application. The judge further found defendant "knew she was pleading guilty to a third[-]degree offense" and "expected to be sentenced according to the plea agreement." Lastly, defendant did not indicate during the plea colloquy she "expect[ed] to be sentenced to a lesser charge under … Warren " since "she [pleaded] guilty because she was in fact guilty of third-degree assault by auto … while driving under the influence." Given the evidence, defendant has not demonstrated the outcome would have been any different and she would not have lost her teaching license if she had rejected the plea bargain and proceeded to trial,

We find unavailing defendant's contention that prior defense counsel "misunderstood N.J.S.A. 2C:51-2, the forfeiture of public employment, and as a result she was misled regarding the loss of her teaching position." Defendant conflates forfeiture with the revocation of her teaching license under N.J.S.A. 18A:6-7.3 and N.J.A.C. 6A:9B-4.5, which governs licensed education personnel. As noted above, defendant affirmed she understood the possibility

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always retains discretion to sentence a defendant, even if the State and the defendant have entered into a plea agreement. Id. at 447-48.

of losing her teaching license when asked by her counsel and the trial judge. That is all that was required. See State v. Heitzman, 107 N.J. 603, 604 (1987). The judge found defendant's argument made after she received her termination letter that she would have gone to trial amounted to "a bald assertion." We likewise find defendant offers nothing more than the conclusory statement.

We next address defendant's second contention the "interests of justice were not served" by denying her motion under Slater.[3] A guilty plea "create[s] a 'formidable barrier' the defendant must overcome in any subsequent proceeding." Slater, 198 N.J. at 156-57 (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977)). Thus, a defendant seeking to withdraw a guilty plea bears the burden of establishing the Slater factors weigh in support of the requested relief. Id. at 156-58. A defendant "must present specific credible facts and, where possible, point to facts in the record that buttress their claim." Id. at 158.

Slater requires consideration of the following 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."

[3] State v. Slater, 198 N.J. 145 (2009).

Id. at 150. "No factor is mandatory; if one is missing, that does not automatically disqualify or dictate relief." Id. at 162.

Here, defendant's withdrawal motion was supported by her certification, which offered limited facts and no citations to the record supporting her request for relief. Defendant's certification did not provide any facts addressing the Slater factors. Defendant certified her attorney explained "the only option available . . . was to plead guilty and ask the court to lower the crime to a lesser degree which would save [her] employment" and "her employer [would] decide if [her] employment would be terminated upon conviction." Defendant stated she "learned this was a Warren argument to be made at sentencing."

In rendering her oral opinion, the judge thoroughly analyzed each of the Slater factors. As to the first factor, the judge concluded defendant did not establish a "colorable claim of innocence" because she did not submit medical proofs that she could not remember the incident due to head trauma from the crash. The judge noted defendant submitted an expert report that challenged the admissibility of the blood test results had there been a trial; the judge however determined "the issue of chain of custody [did not apply] to the colorable claim of innocence." The judge concluded the factual basis for the plea allocution, plea colloquy, and discovery "weighed against defendant."

With regard to the second factor, defendant contends she was "misled" by counsel's advice regarding the Warren argument and "misunderstood" the collateral consequences of her guilty plea. The judge explained she "[could not] have guessed what the Warren argument [would have been]" since she had "no idea what plea counsel would have presented because it never made it to that point."

Defendant's contention that she was misled by counsel is contradicted by her statements given under oath as evidenced by the plea colloquy. As noted by the judge, "[t]he transcript speaks for itself in reference to what is it that Warren means and what she expected." During the plea colloquy, defendant acknowledged "there was no promise made by defendant or anyone that she would not lose her job." Defendant also agreed to plead guilty "knowing that having the conviction" would impact her teaching license. The judge concluded defendant's argument that "her attorney told her something different" contrasted with the judge's finding defendant was "credible" when she entered a "knowing and voluntary" plea. The judge gave significant weight to this factor.

We conclude defendant's assertions are unsupported by any facts or evidence depicting her lack of understanding or advice, demonstrating how it allegedly affected her decision to plead guilty, or explaining the possible

collateral consequence of termination of which she claims she was unaware. We are satisfied defendant's guilty plea to assault by auto is supported by an adequate factual basis.

The third Slater factor—whether the plea was "entered as part of a plea bargain"—is generally not weighty, but nevertheless does not fall in her favor since defendant's plea was entered pursuant to a negotiated plea agreement. Slater, 198 N.J. at 160-61. The judge did not give much weight to this factor.

Finally, under the fourth factor—whether allowing the plea withdrawal would result in unfair prejudice to the State or unfair advantage to defendant—the judge found there did "not appear" to be any prejudice to the State. However, "[t]he State is not required to show prejudice" if a defendant has failed to establish a sufficient reason for withdrawal. Id. at 162.

We find no basis in the record to conclude the judge abused her discretion in denying defendant's motion under the required analysis in Slater, and we decline to substitute our judgment for the judge in weighing the factors. See State v. Tate, 220 N.J. 393, 404 (2015). We are also convinced defendant failed to demonstrate the requested plea withdrawal was warranted under the pre-sentencing "interests of justice" standard under Rule 3:9-3(e).

Any arguments presented by defendant we have not expressly addressed 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