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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2284-13T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

C.L.M.,

Defendant-Appellant.

Submitted February 9, 2015 – Decided April 10, 2015

Before Judges Sabatino and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Municipal Appeal No. 12-13-A.

The Hernandez Law Firm, P.C., attorneys for appellant (Thomas M. Cannavo, of counsel and on the brief).

Geoffrey D. Soriano, Somerset County Prosecutor, attorney for respondent (John R. Ascione, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant C.L.M. appeals from the Law Division's denial of her application for post-conviction relief (PCR), and her alternative motion to withdraw her guilty pleas to two separate

driving while intoxicated (DWI) offenses from 2006. We find no merit to the claims raised on appeal and affirm.

At approximately 12:15 a.m. on April 15, 2006, Somerville Patrolman Anthony Brattole responded to a report of a motor vehicle accident. A Mercedes Benz driven by defendant had rear-ended a Dodge Neon. The Dodge driver told the officer he was stopped at a red light when his vehicle was struck from behind by defendant. He added that defendant had been belligerent to him and his family and may have been intoxicated.

When the officer approached defendant, he smelled alcohol on her breath, and noticed that her eyes were watery and appeared "to be in a constant semi-closed state." The officer asked defendant if she had been drinking and she admitted that she had been out to dinner and "had some drinks."

The officer then activated his vehicle's mobile video recorder (MVR) and began to conduct field sobriety tests. Defendant was first asked to say the alphabet and got as far as the letter "v." On her second attempt, she got as far as "f." She completed the walk-and—turn test in a steady fashion but took more steps than requested. On one of several finger-to-nose tests, she opened her eyes and touched the side of her nostril. When asked to count backwards from 19 to 7 she got as

far as 14. Brattole then placed defendant under arrest and advised her of her Miranda[1] rights.

At the police station, defendant again attempted to perform field sobriety tests. She was able to complete the alphabet, nose-touch, and heel-toe tests, but was unable to count backwards from 15 to 5, getting as far as 13 after two attempts, and to 5 on the third.

After being read the Standard DWI Refusal Statement, defendant agreed to submit to a breathalyzer test. An Alcotest 7110 MK111-C was utilized and the first test indicated that defendant's blood alcohol content (BAC) was .21%, more than double the concentration required to trigger the presumption of intoxication under N.J.S.A. 39:4-50(a). Defendant was issued summonses for DWI, careless driving, and driving with a suspended license.

On April 20, 2006, defendant made her first appearance in municipal court and entered a plea of not guilty. She told the judge she would be retaining counsel. Her plans apparently changed, as at her next appearance on May 18, 2006, she requested the appointment of counsel. Due to a conflict, the public defender could not represent defendant so the matter was

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

adjourned for the appointment of another attorney. Less than three weeks after this court appearance, defendant was again arrested for DWI.

On June 6, 2006, at 8:03 p.m. Somerville Officer Sean Kiernan observed defendant driving the Mercedes. He began to follow her after she made a left turn onto South Bridge Street without signaling. Kiernan observed defendant's car travelling north, but veering completely into the southbound lane. Kiernan activated his MVR[2] and defendant's vehicle can be seen stopped at a red light, protruding into the intersection, completely over the stop line, and blocking the crosswalk.

Kiernan stopped defendant and noticed that her eyes were watery and bloodshot and the smell of alcohol was coming from her vehicle. Defendant produced her credentials, but when Kiernan asked her several times if she had been drinking, she simply stared at the officer without responding. When the officer asked if she understood the question, she explained that she did not want to answer any questions.

Asked to complete field sobriety tests, defendant performed the walk-and-turn test successfully, but failed the finger dexterity and one-leg-stand tests. She was placed under arrest

[2] The reported erratic driving occurred before the MVR was activated.

and transported to the stationhouse. She submitted a breath sample, and an Alcotest revealed that her BAC was .24%.

On June 15, 2006, defendant appeared on both matters but her appointed counsel was not available. The judge informed defendant that because of her prior DWI convictions, she was facing jail time if convicted on the current charges.

On July 6, 2006, defendant appeared with appointed counsel and the municipal judge scheduled both cases to be tried on July 20, 2006. The judge again told defendant she was facing "grave consequences" if convicted.

It is not clear on the record before us why this case was not tried on July 20, or why nothing happened for six months thereafter. The next time defendant appeared in court was January 12, 2007. On that date, she indicated for the first time that she no longer wanted the public defender to represent her and informed the court that she would retain private counsel. The judge relieved defendant's appointed counsel and told defendant that she had to retain counsel to try this case on the adjourned date, February 8, 2007. The judge was concerned that the older of the two cases was already more than eight months old and remarked that "something is real wrong here." The judge warned defendant that if she did not appear on the adjourned date, he would issue a warrant for her arrest.

On February 22, 2007, defendant appeared with two attorneys, one acting as trial counsel and a second, who informed the court he was retained by defendant to file a motion to vacate a 2005 guilty plea defendant had entered.

The prosecutor elected to move the April 15, 2006 matter to trial first. Defendant's trial counsel told the judge she had represented defendant for three or four weeks, had spoken with her on numerous occasions, and had spent a great deal of time with her. Counsel wanted to place a statement on the record that she had advised defendant to plead guilty and defendant had rejected that advice and elected to go to trial.

Counsel indicated that she was having difficulty communicating with defendant and asked the judge to question defendant. The judge reminded defendant that she was before him one month ago and had accused her prior counsel of failing to properly advise her of the consequences of a DWI conviction. The judge again emphasized that if defendant was convicted of the April 15 incident, it would be her third DWI offense, and she would be subject to a mandatory jail term of ninety days.

The judge then indicated that if defendant pled guilty to both the April and June DWI charges, he could run the two 180-day terms concurrently, and that term could be "cut in half," as she could spend 90 of the 180 days in alcohol rehabilitation.

The judge noted that the ten-year license suspension could not be run concurrently and she would lose her driving privileges for twenty years. Defendant indicated that she understood.

Defendant then entered guilty pleas to both the April and June DWI and driving-while-suspended charges. Because these represented her third and fourth DWI convictions, the judge sentenced her to two 180-day sentences to be served concurrently. He also imposed two ten-year license suspensions to run consecutively, and the appropriate fines and penalties. Defendant was sentenced to ten-day jail terms on each driving-while-suspended charge, with the terms to run concurrently.

Defendant filed separate petitions for PCR on the convictions from the April 15 and June 7, 2006 arrests. The municipal court judge determined that he lacked jurisdiction to consider the ineffective assistance claims and denied the petitions. Defendant then appealed to the Law Division.

Judge Paul W. Armstrong heard oral argument on the trial de novo on May 2, 2013. On December 5, 2013, Judge Armstrong entered an order denying the appeals as to both petitions.

On appeal, defendant raises two points:

> POINT I
>
> THE LAW DIVISION ERRED IN DENYING DEFENDANT'S PLEA WITHDRAW[AL] MOTION. THE GUILTY PLEAS TO THE TWO DWI OFFENSES WERE ILLEGAL AND CONSTITUTIONALLY DEFECTIVE AS

UNINTELLIGENT AND COERCED. THUS, THE PLEAS CONSTITUTE A MANIFEST INJUSTICE AND SHOULD BE VACATED WITH THE MATTERS REMANDED FOR PROPER DISPOSITION.

POINT II

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF PLEA COUNSEL, GIVEN THE DEFICIENT PERFORMANCE AND PREJUDICE. DEFENDANT HAS SHOWN BY A PREPONDERANCE OF EVIDENCE THAT BUT FOR SUCH ERRORS, SHE WOULD HAVE GONE TO TRIAL OR PLED UNDER THE CONDITIONAL CHUN PLEA PROCEDURE AND THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

When the Law Division conducts a trial de novo, its function is to determine the case completely anew on the record made in the municipal court. State v. Johnson, 42 N.J. 146, 157 (1964). Johnson is the seminal case regarding appellate review of municipal court convictions, and established that our review must be "exceedingly narrow." State v. Locurto, 157 N.J. 463, 470 (1999). Our review is limited to determining whether there is sufficient credible evidence present in the record to support the findings of the Law Division judge, not the municipal court. Johnson, supra, 42 N.J. at 161. "It is not our function in reviewing the conviction in question to weigh the evidence anew and to make independent findings of fact as if we were sitting in first judgment on the case. Rather, our obligation is to determine whether there is adequate evidence to support the

judgment rendered below." Ibid. (quoting State v. Emery, 27 N.J. 348, 353 (1958)).

Defendant first claims Judge Armstrong erred in denying her motion to withdraw her pleas to the two 2006 DWIs because those pleas were "constitutionally defective." She next claims that her plea counsel rendered ineffective assistance, and but for counsel's deficient performance, she would have gone to trial or entered a "conditional Chun plea."

We find no merit to either of these arguments and affirm the December 5, 2013 order denying defendant's petitions for PCR and her motion to withdraw her guilty pleas, based on Judge Armstrong's thorough and comprehensive fifty-two page written decision. R. 2:11-3(e)(2). We add only the following brief comments.

The plea transcript demonstrates that defendant provided an adequate factual basis for both the April 15 and June 7, 2006 guilty pleas and that both pleas were knowing, intelligent, and voluntary. N.J.S.A. 39:4-50(a) provides that to be 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 0.08% or more . . . ." Our law requires that each element of the offense

be addressed in the plea colloquy. State v. Campfield, 213 N.J. 218, 231 (2013).

As to the April 15 incident, defendant admitted that she had been driving before the officer arrived and had been involved in a minor accident. She also admitted to consuming alcohol prior to operating the vehicle, and that the Alcotest indicated that her BAC was .21%. As to the June 7 incident, she again admitted she had been driving and, after speaking with her attorney, confirmed that her BAC was .24%.

We reject defendant's claim that an out of tolerance reading from the Alcotest machine used for the April 15 test somehow rendered her plea illegal. Preliminarily, we note that defendant's arguments are not cognizable because her plea of guilty was unconditional. Generally, subject to very limited exceptions not applicable here, a guilty plea constitutes a waiver of all issues that were or could have been raised in prior proceedings. State v. Smith, 307 N.J. Super. 1, 7 (App. Div. 1997). Defendant failed to challenge the Alcotest result. See R. 3:5-7(d) (providing for automatic preservation of appellate review of a suppression issue only if a motion to suppress had been made and denied). By pleading guilty without having previously moved for suppression and without preserving the issue under Rule 3:9-3(f), this contention has been waived.

While we need not address the merits of defendant's argument, we note that, as Judge Armstrong observed, defendant's April 15 DWI conviction did not rely solely on her Alcotest rulings. Having viewed the video recordings made on both dates from the police MVRs and the stationhouse, there was ample evidence of defendant's incapacitation even without the Alcotest results.

Affirmed.