Superior Court of New Jersey,

Appellate Division.

STATE of **New Jersey**, Plaintiff–Appellant,

v.

Davi F. **KANE**, a/k/a Davi **Kane**, Davi F. Kaue, Jamie Katz, Defendant–Respondent.

Argued Jan. 12, 2015.

Decided Feb. 17, 2015.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 12–07–0449.

Gretchen A. Pickering, Assistant Prosecutor, argued the cause for appellant (Robert L. Taylor, Cape May County Prosecutor, attorney; Edward H.S. Shim, Assistant Prosecutor, of counsel; Ms. Pickering, of counsel and on the brief).

James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Mr. Smith, of counsel and on the brief).

Before Judges SABATINO, SIMONELLI, and GUADAGNO.

PER CURIAM.

***1** This matter was previously before this court in 2013, resulting in an opinion in which we (1) noted that defendant had raised colorable claims of the ineffectiveness of her prior counsel in municipal court, and (2) remanded the matter to the Law Division for further development of the record in the context of an application for post-conviction relief ("PCR"). *See State v. Kane,* No. A–2725–12 (App.Div. Oct. 25, 2013).

After considering the testimony of six witnesses at the evidentiary proceeding on remand, the Law Division judge made credibility findings that were substantially favorable to defendant. The judge concluded in a detailed written opinion that defendant had been unconstitutionally deprived of the effective assistance of her first municipal counsel. In particular, the judge criticized that attorney for advising defendant to withdraw her guilty plea to a traffic offense under *N.J.S.A.* 39:3–40 for driving with a suspended license, thereby eliminating her double jeopardy protection and exposing her to prosecution for a fourth-degree offense under *N.J.S.A.* 2C:40–26(b) and a 180–day minimum jail sentence. As a remedy, the Law Division judge reinstated defendant's original municipal guilty plea under *N.J.S.A.* 39:3–40 and barred a prosecution of defendant under *N.J.S.A.* 2C:40–26(b) because of double jeopardy principles.

The State now appeals the Law Division's grant of relief to defendant. The State principally alleges that defendant's first municipal attorney engaged in fraud and in ethical violations by not alerting the municipal judge and the municipal prosecutor that his client's conduct could be subject to prosecution under *N.J.S.A.* 2C:40–26(b). For the

reasons that follow, we reject the State's arguments and affirm the Law Division's disposition.

I.

The procedural history of the matter that led to our remand to the Law Division was set forth in our 2013 opinion:

> Defendant Davi F. Kane was arrested in Ocean City on January 25, 2012 for driving while on the suspended list. Defendant's vehicle had been stopped because she had been talking on a cell phone while driving. There is no contention that she was intoxicated at the time, or was committing a moving violation.
>
> At the time of defendant's motor vehicle stop, she had been serving a ten-year suspension of her driver's license as a result of multiple prior convictions for drunk driving, *N.J.S.A.* 39:4–50.
>
> On March 22, 2012, defendant, represented by counsel, entered into a plea agreement with the municipal prosecutor, in which she pled guilty to driving while on the suspended list, in violation of *N.J.S.A.* 39:3–40. A violation of that statute is a non-indictable offense, triggering mandatory imprisonment in the county jail for not less than ten days, but no more than ninety days. *Ibid.*
>
> The municipal judge sentenced defendant to thirty days in jail, with the ability to serve that time intermittently, under an alternate incarceration program. In addition, the

municipal judge imposed a one-year consecutive suspension of defendant's driver's license, plus various fines and court costs.

***2** The original municipal plea was advantageous to defendant because her conduct was also in violation of *N.J.S.A.* 2C:40–26(b). That statute, which became effective on August 1, 2011, makes it a fourth-degree crime for a motorist to operate a vehicle at a time when his or her driver's license is suspended or revoked for a second or subsequent conviction for driving while intoxicated ("DWI"). In *State v. Carrigan,* 428 *N.J.Super.* 609 (App.Div.2012), *certif. denied,* 213 *N.J.* 539 (2013), we upheld the constitutionality of this new fourth-degree statute, allowing it to apply in circumstances where the underlying DWI suspensions were imposed prior to the statute's August 2011 effective date.

The reason that defendant's original plea was especially advantageous to her is that *N.J.S.A.* 2C:40–26(b) carries a mandatory minimum penalty of 180 days in prison. *N.J.S.A.* 39:3–40 is a lesser-included offense of *N.J.S.A.* 2C:40–26(b), because the elements of the former statute are subsumed among the elements of the latter. Pursuant to *State v. Dively,* 92 *N.J.* 573 (1983), if defendant's original guilty plea to the lesser offense in municipal court had not been vacated, the State would be precluded under Double Jeopardy principles from pursuing a fourth-degree indictment against defendant for the same conduct.

For reasons that [were] not explained in the record [on the first appeal], another attorney, who was associated with defendant's original counsel, appeared five days later before the municipal judge in the company of defendant and withdrew her guilty plea to the lesser offense. The municipal judge took no sworn testimony from defendant acknowledging that she was withdrawing her plea voluntarily. The only comment by defendant recorded in the transcript is her brief remark to the judge stating that she had paid $236 of the fines that had been previously imposed.

Subsequent to the withdrawal of defendant's municipal plea, she was indicted by the grand jury for the fourth-degree offense under *N.J.S.A.* 2C:40–26(b). She then appeared with the attorney who had withdrawn her initial guilty plea in the Law Division, and pled guilty to that more serious charge. In exchange, the State recommended that she be sentenced to the 180–day minimum under the statute.

On the day of sentencing before a different Law Division judge, defendant requested an opportunity to obtain new counsel. Thereafter, defendant's new attorney moved to withdraw her guilty plea to the fourth-degree offense. The Law Division judge declined that request, essentially because defendant had not asserted a colorable claim of innocence.

Defendant then moved for reconsideration, which the Law Division judge denied. The judge recognized that defendant had potentially viable Double Jeopardy and ineffectiveness arguments, but she directed that they be pursued separately in a future

PCR. The judge then sentenced defendant to thirty days in the county jail, without explaining how that shorter sentence could comport with the 180–day minimum under *N.J.S.A.* 2C:40–26(b). Defendant's service of the jail sentence [was] stayed, however, pending the State's appeal.

***3** [*Kane, supra,* slip op. at 3–6.]

In considering the State's appeal and defendant's cross-appeal in 2013 from the Law Division judge's original ruling, we made several key observations and determinations. As to the State's appeal, we acknowledged that the thirty-day sentence that the Law Division had imposed for the indictable offense under *N.J.S.A.* 2C:40–26(b) improperly conflicted with the 180–day mandatory minimum jail sentence required by the Legislature for that offense, assuming, for the sake of argument, that defendant's conviction of that offense was valid. *Id.* at 12. However, we also noted the State's frank acknowledgement in its 2013 brief that defendant's claims of her former counsel's ineffectiveness in allowing her to withdraw her municipal plea and thereby lose her double jeopardy protection "certainly seem to have some validity." *Id.* at 6.

In our 2013 opinion, we addressed the two-part constitutional test of ineffectiveness prescribed by the United States Supreme Court in *Strickland v. Washington,* 466 *U.S.* 668, 687, 104 *S.Ct.* 2052, 2064, 80 *L. Ed.*2d 674, 693 (1984) (requiring proof that (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the accused's defense). *Id.* at 7. As to the second prong of *Strickland* concerning actual

prejudice, we found it "readily apparent, as a matter of law, that if [defendant's] plea to [the] lesser-included [*Title* 39] offense had not been withdrawn, she would have been protected under the Double Jeopardy Clause from prosecution for the fourth-degree crime [under *Title* 2C]." *Id.* at 8; *see also Dively, supra,* 92 *N.J.* at 585–86. As to the first prong of the *Strickland* test concerning deficient performance, we expressed substantial concerns about why defendant's municipal counsel would have allowed her original guilty plea to be withdrawn. *Id.* at 9–10. In expressing those concerns, we suggested that the municipal prosecutor might not have initially recognized a potential for defendant's indictment under *N.J.S.A.* 2C:40–26(b), a statute that had been recently enacted. *Id.* at 10. Alternatively, we raised the possibility that "defendant's former [municipal] counsel may have been under a belief that he had some ethical obligation to have the plea vacated." *Ibid.*

Five witnesses were called by the defense at the remand hearing in the Law Division: defendant herself; defendant's initial attorney who appeared with her in municipal court on March 22, 2012 when she entered her guilty plea ("the first attorney"); the second attorney who appeared with defendant on March 27, 2012 when her guilty plea was withdrawn ("the second attorney"); the municipal prosecutor; and the municipal judge. The State presented one witness, the former municipal court employee [FN1] who had been the "court recorder" for the proceedings on March 22, and 27, 2012.

FN1. The employee now works for the State judiciary.

The remand hearing revealed that defendant's withdrawal of her initial guilty plea in municipal court had been precipitated by oral communication between the municipal court staff and the first attorney. The court contacted the first attorney based on concerns that came to the attention of the municipal judge that the plea may have been, as the judge termed it, "illegal" because of the potential for prosecuting defendant for a fourth-degree indictable offense under *N.J.S.A.* 2C:40–26(b).[FN2] Notably, the municipal prosecutor did not file an application with the court to have the *Title* 39 guilty plea vacated, nor did the prosecutor urge defendant's counsel to take steps to have that plea withdrawn. Instead, the municipal prosecutor candidly testified that he had told the second attorney that he had "made a mistake," and that defendant's case would qualify as an indictable offense under the criminal code. He further told the second attorney that he "was willing to live with the ... terms of the plea that had first been presented under [*N.J.S.A.* 39:3–40] .... [and that he] was not doing anything to have that plea set aside." The municipal prosecutor also stated that, upon learning that defendant was returning to court to withdraw her guilty plea, it "confounded" him as to why she was doing that.

> FN2. In his testimony, the municipal judge did not specify why he was concerned about the legality of the plea, but it appears from the context that the concerns stemmed from the possibility of an indictable offense.

***4** The first attorney acknowledged at the remand hearing that he had been aware of defendant's driving record at the March 22, 2012 hearing, having represented defendant on multiple prior occasions. He specifically acknowledged that he was aware that

defendant's license had been under suspension at the time of her arrest due to previous convictions for DWI and for driving with a suspended license. He was aware of the criminal code amendments that made driving with a suspended license due to a prior conviction for driving while intoxicated a fourth-degree indictable offense. The first attorney also generally was aware of *Dively, supra,* 92 *N .J.* at 573, but he maintained that *Dively,* and the double jeopardy implications of defendant's case, were not in his "train of thought at the time."

The first attorney recalled receiving a communication from the municipal court after the March 22, 2012 hearing regarding defendant's case being "relisted" for further proceedings. Thereafter, he informed defendant by phone that he was unable to accompany her to court for the second hearing due to another court appearance that he could not avoid. The first attorney did not take any steps to discover why the court was scheduling a second hearing after defendant had already been sentenced, but he had "assumed" that the judge had decided to reject the plea, based on the applicability of the criminal statute.

The first attorney did not request a postponement or adjournment of the second hearing that ultimately occurred on March 27, 2012. He also testified that he never had a conversation with the second attorney, whom defendant herself arranged, about the case. On that point, the first attorney acknowledged that he should have discussed the case with the second attorney prior to the March 27 hearing.

The first attorney further testified that, although he had filed a notice of appearance in municipal court, he never filed a substitution of attorney, nor did he receive a substitution from another attorney. In his mind, he testified, it was "acceptable" to him that the second attorney appeared on his behalf at the March 27 hearing, although he said that he learned of that attorney's appearance only after the fact, upon reading the hearing transcript. Although he did not explicitly acknowledge as much, the first attorney's testimony fairly suggested that he was aware that he was still the attorney of record for defendant on March 27, 2012.

The second attorney testified at the remand hearing that, at defendant's request, he agreed to "stand in" for the first attorney, who could not appear at the March 27, 2012 hearing due to a schedule conflict. At that March 27 hearing, the second attorney entered his appearance on behalf of the first attorney rather than on behalf of defendant, specifically presenting himself "on behalf of [the first attorney] representing[ ] *State v. Kane* in this matter." The second attorney testified, contrary to the first attorney, that he did have a brief conversation with the first attorney regarding defendant's case.

***5** The second attorney contended that the first attorney had called him prior to the March 27 hearing, and that they had a "[v]ery, very short conversation," in which the first attorney allegedly informed the second attorney of his scheduling conflict and told the second attorney that he had "already spoken to the prosecutor." The second attorney further testified that the first attorney told him to "just withdraw [defendant's] guilty plea."

After arriving at the municipal court on March 27, 2012, the second attorney had a brief conversation with the municipal prosecutor, a conversation which he described as follows:

> I went up to the prosecutor, asked him if he could fill me in as to what was going on. He told me that he had spoken to [the first attorney] about the matter. The police had charged her with the wrong offense and that was just about all he was going to tell me on that. It was very brief.

After his conversation with the prosecutor, the second attorney then told defendant that he did not "think that it [was] a good idea ... to withdraw her plea at this time," without going into detail as to his reasons. He described the conversation as follows:

> I told [defendant] that I didn't think it was a good idea [to withdraw her guilty plea]. And she told me I wasn't there to think; I was to do what her attorney wanted me to do. So we approached ... the judge and put it on the record.

Thereafter, the second attorney withdrew defendant's guilty plea. As the second attorney recalls it, and the municipal transcript confirms, defendant was not placed under oath before or during the plea withdrawal. The second attorney acknowledged that he withdrew defendant's plea despite his reservations about doing so. He further acknowledged that he withdrew defendant's plea because he felt that it was defendant's desire to withdraw the plea that day, based on her comment about doing "what her

attorney wanted [him] to do" and based on the fact that he felt he was not "in the loop" and was just "[f]ollowing [the first attorney's] orders." After defendant's guilty plea had been withdrawn at the March 27 hearing, the second attorney observed that defendant appeared "upset."

In his remand testimony, the second attorney suggested that he knew of the indictable offenses under *N.J.S.A.* 2C:40–26(b), but he expressed uncertainty as to whether he was actually aware of the penalties under that statute at the time of the March 27, 2012 hearing. In addition, the second attorney acknowledged that March 27, 2012 was the first occasion on which he had ever withdrawn a plea in his legal career.

In her own testimony at the remand hearing, defendant related the circumstances surrounding the withdrawal of her municipal guilty plea at the March 27, 2012 hearing. Defendant testified that her first attorney had called her on the telephone within one or two days after the March 22, 2012 hearing and told her that "there's been a mistake and [that] I had to return back to Ocean City Court and take back my guilty plea." Defendant stated that the first attorney told her that "they would issue a warrant for my arrest" if she did not comply.

***6** Defendant subsequently learned from the first attorney that he could not accompany her to the second hearing because he said that he had to be in another court for another matter. Defendant thus asked an attorney in the same law firm where defendant also had worked, to accompany her, to which he agreed.

Immediately before the March 27 hearing, defendant and the second attorney had a conversation in which that attorney expressed that he was not comfortable withdrawing defendant's guilty plea, because defendant had already been sentenced. Her remand testimony suggests that she was led to believe that if she withdrew her municipal guilty plea, her case "would get sent to the grand jury," although she maintained that she and the second attorney did not discuss the potential penalties of withdrawing her municipal plea.

At the March 27 hearing, the municipal prosecutor informed the court that the second attorney was making a motion to vacate defendant's municipal guilty plea, and that he had "no objection" to this course of action. The municipal prosecutor further suggested, without clearly indicating, that defendant would be charged with an indictable offense, which he described "is what should have happened." The municipal judge addressed the second attorney only to ask him whether he was in agreement, to which counsel indicated that he was, although it is not clear precisely to what he was agreeing.

As we have previously noted, the municipal judge did not address defendant at the March 27 withdrawal hearing. The only time that defendant spoke in court on the record on that date was at the conclusion of the hearing, when she inquired about the $236 in fines that she had already paid, which the judge indicated should be returned to her.

According to defendant's remand hearing testimony, it was not until the hearing in the Law Division on September 6, 2012, when she entered a guilty plea on the indictment, that she realized that she could go to jail. Although she remembered entering a guilty plea

under oath before the Law Division judge who was then presiding, defendant did not understand that the consequences of that guilty plea involved 180 days in jail. At the remand hearing, defendant acknowledged initialing and signing the plea form, and that the Law Division judge had asked her questions about that form. Defendant also asserted in her testimony that the second attorney did not review the plea form with her in detail.

The testimony presented by the State from the municipal court recorder reflects that, at some point on March 22, after defendant had pled guilty to the *Title* 39 violation, she raised with the municipal judge the issue of whether defendant should have instead been prosecuted for the fourth-degree offense under the new criminal code provision. As the court recorder recalled it, that discussion prompted other discussions involving the judge, although she did not participate in those conversations. The municipal judge's own testimony was substantially in accord with the court recorder's recollections.

***7** In a written opinion dated July 30, 2014, Judge Patricia M. Wild found that the first attorney, but not the second attorney, had provided ineffective assistance of counsel in representing defendant. The judge found that neither the first nor the second attorney had advised defendant of the penal consequences, specifically the 180–day mandatory minimum sentence, to which she would be subject if she pled guilty to, or was convicted of, a violation of *N.J.S.A.* 2C:40–26(b). The judge also noted that both the first attorney and the second attorney represented defendant free of charge.

As to the first attorney, the judge made several key factual observations. She found that he "did not understand the sentencing consequences of a conviction under [*N.J.S.A.* 2C:40–26(b)]." In response to the directly-conflicting testimony between the first and second attorney as to whether they had spoken with each other prior to defendant's March 27, 2012 municipal plea withdrawal hearing, the judge found the second attorney's testimony credible and believed that such a conversation, albeit brief, had occurred.

The judge determined that the first attorney "demonstrated unreasonable professional judgment" in his representation of defendant, by "abandon[ing] his client at a critical time in the proceedings[.]" Specifically, the judge cited the fact that the first attorney "failed to request an adjournment of the March 27, 2012 hearing, did not appear at the hearing, and did not arrange to have competent counsel appear on his behalf." In addition, the judge found that the first attorney failed to provide defendant with information that would have allowed her to make an informed decision about withdrawing her municipal guilty plea, specifically the "double jeopardy implications of further proceedings" and the "potential penal consequences" if she were to be charged under the criminal statute.

As to the second attorney, the judge factually determined that he had "consistently expressed his concern" to defendant "as to the wisdom of withdrawing her [guilty] plea," and had, in fact, counseled defendant not to withdraw her plea. The judge also found that the second attorney was not aware of the consequences, either the double jeopardy implications or the penal consequences, of withdrawing defendant's municipal guilty plea, until the Law Division hearing in September 2012. The judge also found it

significant that the second attorney had stated his appearance at the March 27, 2012 hearing as being "on behalf of [the first attorney]."

Based on these factual findings, Judge Wild concluded that the second attorney had not provided ineffective assistance of counsel to defendant. Because the first attorney remained defendant's attorney of record at the March 27, 2012 hearing, he, rather than the second attorney, had breached his duty of diligence and of communication with defendant. Specifically, Judge Wild found:

> This case comes down to the following. Effective counsel would have requested an adjournment of either the municipal matter or the Superior Court matter and would have appeared with [defendant] at Municipal Court on March 27, 2012. Effective counsel would have told [defendant], "You have a good deal in municipal court and you are not required to withdraw your plea; you should not withdraw your plea and if you do, you will be subject to indictment in Superior Court and, if you plead guilty to or are found guilty of the indictable charge, you will be required to spend a minimum of 180 days in jail." [The first attorney] knew all of this. [The first attorney] did not tell [defendant] any of this. Instead, he abandoned her, resulting in her representation by a relatively inexperienced, though well-intentioned, attorney. Effective counsel would never have abandoned his client.

***8** The judge further found that the second attorney "was hampered in giving advice" to defendant due to the first attorney's failure to give "effective advice" to defendant on

the implications of withdrawing her plea, particularly because the judge found that the first attorney "obviously left [defendant] with the belief that she had no alternative other than to withdraw her municipal court plea."

Citing the court's "broad power" to fashion a remedy, Judge Wild therefore vacated defendant's guilty plea and conviction under Indictment No. 12–07–0449, thereby dismissing that matter on the grounds of double jeopardy. The judge additionally vacated defendant's withdrawal of her guilty plea to the municipal complaint, thereby reinstating defendant's guilty plea to that complaint and reinstating the sentence initially imposed by the municipal judge in municipal court.

II.

In its present appeal, the State argues that the trial court erred in granting defendant PCR and in reinstating her original municipal guilty plea and sentence for a violation of *N.J.S.A.* 39:3–40. The State mainly alleges that defendant's guilty plea was the product of fraud, that her first attorney acted unethically in not advising the municipal judge and the municipal prosecutor that defendant was an offender subject to indictment under *N.J.S.A.* 2C:40–26(b), and because defendant had not demonstrated the "actual prejudice" second prong of the *Strickland* test for ineffectiveness. We reject these arguments and affirm the trial court's order, substantially for the sound reasons articulated in Judge Wild's detailed written opinion. We add only a few comments.

There is insufficient evidence in the record to establish that defendant's original guilty plea was procured by fraud or unethical behavior on the part of defense counsel. Defendant's driving abstract was available to the municipal judge and the municipal prosecutor, and was apparently consulted by the court at or prior to the March 22, 2012 plea hearing. The abstract should have readily revealed that defendant was on the revoked list because of a second or subsequent DWI conviction and thus her current driving record posed a violation of *N.J.S.A.* 2C:40–26(b).

To be sure, *N.J.S.A.* 2C:40–26(b) was a relatively new statute as of March 2012, and it is conceivable that the court and the municipal prosecutor may not have been well-attuned to its potential application in DWI cases. Nevertheless, we reject the State's claim that defense counsel was obligated under *R.P.C.* 3.3(a)(5) or other ethical rules to spotlight the statute's potential application adverse to his client's interests. The situation here is markedly distinguishable from *In re Seelig,* 180 *N.J.* 234 (2004), in which a defense attorney affirmatively misled a municipal judge about the facts in a vehicular case, i.e., whether the victims had died. As the municipal prosecutor honestly acknowledged here, it was his responsibility to be aware of the *Title* 2C provision's potential applicability, and to refrain from participating in the entry of a guilty plea to a lesser charge that would have double jeopardy implications for a future prosecution for an indictable offense. The fact that the municipal prosecutor accepted that the original plea was his mistake and decided not to file an application or pursue means to have the plea vacated speaks volumes. There was no "fraud" or unethical behavior by the defense here.

Instead, as Judge Wild aptly found, defendant's first attorney was deficient in advising her to withdraw the plea to her detriment without explaining to her the consequences of that course of action. Even giving all due respect to the court and cooperating with its request to have the case relisted, a proper advocate for defendant would have politely resisted the efforts to have the plea withdrawn. In addition, as Judge Wild found, the first attorney, as counsel of record, failed to provide proper guidance to the second attorney and ensure that defendant's rights at the March 27, 2012 hearing were not sacrificed.

***9** There also was nothing "illegal" about defendant pleading guilty to the *Title* 39 violation as a lesser-included offense of *N.J.S.A.* 2C:40–26(b). *See, e.g., State v. Hessen,* 145 *N.J .* 441, 452 (1996) (noting that the decision "to offer a plea bargain to a lesser included offense" implicates "prosecutorial authority and discretion").

The State's contention that the second prong of *Strickland* is not satisfied here requires no extensive discussion. *R.* 2:11–3(e)(2). As we recognized in our first opinion, the actual prejudice to defendant stemming from these unfortunate circumstances is manifest. The first attorney's improvident decision to have defendant withdraw her guilty plea to the municipal charges, especially since her guilt of driving on the suspended list was clear, surely was prejudicial to her in losing her double jeopardy protection. *See Dively, supra,* 92 *N.J.* at 586.

Affirmed.

N.J.Super.A.D.,2015.

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Not Reported in A.3d, 2015 WL 657667 (N.J.Super.A.D.)

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