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State v. Neal

N.J.Super.A.D.,2006.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,Appellate Division.

STATE of New Jersey, Plaintiff-Respondent,

v.

Pamela NEAL, Defendant-Appellant.

Argued June 1, 2006.

Decided July 20, 2006.

SYNOPSIS

On appeal from Superior Court of New Jersey, Law Division, Morris County, Ind. No. 99-06-753-A.

Stephen S. Weinstein argued the cause for appellant (Stephen S. Weinstein, attorneys; Mr. Weinstein and William G. Johnson, on the brief).

Paula Jordao, Assistant Prosecutor argued the cause for respondent (Michael M. Rubbinaccio, Morris County Prosecutor, attorney; Joseph Connor, Jr., Assistant Prosecutor, on the brief).

Before Judges WEISSBARD and SAPP-PETERSON.

PER CURIAM.

*1 Defendant appeals from the denial of her post-conviction relief (PCR) application after an evidentiary hearing following a remand ordered by this court in an opinion of June 1, 2004.

To place the issues into context, a somewhat extended review of the factual and procedural history is required. To that end, we quote relevant portions of our prior opinion:

The tortuous history of this case began in 1996, when defendant was a plaintiff in a civil action seeking money for damage to items she placed in storage. A fee dispute arose with her then attorney, Jeffrey Bronster. Allegedly a defendant in the property damage action settled for \$14,000, with the check issued payable to several parties, including defendant and Bronster. Bronster signed the check,

which was ultimately deposited by defendant in the account of Peter Sanschagrin, another party involved in the transactions. According to charges arising from the transaction, defendant allegedly forged an endorsement on the check. Approximately three months later, Bronster contacted defendant, asking for legal fees for the \$14,000 settlement. Defendant refused, and Bronster filed criminal charges against defendant, resulting in Hudson County indictments on charges of Forgery, *N.J.S.A. 2C: 21-1*, and Theft by Failure to Make Required Disposition of Property Received, *N.J.S.A. 2C: 20-9*.

Although defendant contends this dispute was settled, the criminal charges were not dismissed and she ultimately enrolled in the Pre Trial Intervention (PTI) program on December 17, 1997, as a result. Defendant left the program and the matter was listed for trial prompting her to reenter PTI. Defendant failed to comply with the conditions of PTI, though (she contends her noncompliance was unknowing), and she was terminated from PTI, with a warrant issued for her arrest.

While the above dispute was ongoing, defendant became embroiled in another series of disputes, these pertaining to the sale of computers. Defendant contends that she intended to help friends and acquaintances by facilitating sales of laptop computers but that the transactions went awry. The victims challenged this description, claiming they paid money for computers that were never received, and defendant was charged with theft.

Specifically, defendant dealt first with Kristin Jones, an employee at Weichert Realty. Defendant claims that she assisted in selling a laptop to Jones, but that, after paying the fee, Jones never received the laptop. To compensate for this failed transaction, defendant asserts that she then facilitated another sale, from which Jones did in fact receive a computer. Jones did not pay the fee for this item, however, and no invoice was sent to defendant.

At the same time, defendant assisted a friend, Anthony Giampapa, with buying a laptop for his son's high school graduation. Defendant helped arrange a

demo model to be sent to Giampapa, who mistakenly understood the computer to be free of charge. Defendant claims that neither she nor Giampapa were billed for this laptop. Defendant maintains that “somehow” an invoice “made its way” to the Morris County prosecutor, resulting in a charge of “theft by deception.”

*2 Again, at approximately the same time, defendant was at the center of another laptop controversy. In this instance, defendant wished to sell her laptop in order to replace it with another, newer model. This time, Jones put defendant in touch with a co-worker, Tony Gervasio, a potential buyer. Gervasio, however, wanted a refurbished laptop. Defendant therefore put Gervasio in touch with an associate who sold laptops in New England. Gervasio ultimately sought to purchase six computers, one for him and the remainder for colleagues at Weichert. Payment was made to defendant, who says she then forwarded the checks to the New England dealer. The money, however, was deposited in defendant's account, and no money was paid to the dealer.

According to defendant, the computers were delivered, but because they were not delivered in a timely manner, the Weichert workers refused them. This prompted her to hire an attorney, Andrew Wulfman. Wulfman took possession of the laptops, asking the would-be purchasers to accept delivery or grant authorization to liquidate them in order to return payment. All potential purchasers asked for, and failed to receive, a refund. They filed criminal complaints against defendant in Morris County.

After defendant was charged in Morris County, she failed to appear for various court dates resulting in the issuance of bench warrants in both Morris and Hudson Counties. To resolve these outstanding complaints, she retained an attorney, Richard Banas, in December 1998. Banas resolved the outstanding warrants and prepared for resolution of the outstanding complaints when he was suspended from the practice of law. According to defendant, Banas failed to notify her of his suspension.

Apparently, defendant again failed to appear in court, claiming Banas failed to keep her informed and two new arrest warrants-for the alleged Hudson

and Morris County violations-were issued. Defendant was arrested on June 7, 1999.

At defendant's court appearance on June 8, 1999, she learned of Banas' suspension and that one of his colleagues, Jon Kearney, Esquire, would be appearing in his place. Unable to make bail, defendant's immediate objective was to be released from jail, and she claims that Kearney advised her that in order to be released from jail, she had to plead guilty to both the Hudson and Morris County charges. Critically, defendant contends she was advised by Kearney that she could later withdraw the pleas as part of a larger strategy to prove her innocence.

The following day, June 9, 1999, defendant was presented with plea forms to sign in court. She asserts that she was ill-informed about the nature of the forms and received inadequate counsel from an uninformed Kearney. The State conversely contends that the record indicates a complete understanding of the proceedings and the plea agreed to. The judge accepted her plea after an extensive voir dire, and defendant was released on her own recognizance.

*3 After she was released, defendant moved to withdraw her plea. Unfortunately, according to defendant, “confusion” in preparing affidavits with her attorneys with respect to this motion and the inclusion of an allegation that defendant had forged a letter from a third-party led to an additional charge of forgery to be presented by the Morris County Prosecutor's Office. Defendant withdrew her motion and again found herself incarcerated.

On August 19, 1999, after a threat by Kearney of withdrawal as counsel, defendant withdrew her motion to withdraw her guilty pleas, and she was subsequently sentenced to three years of probation on all charges, with special conditions imposed.^{FN1} Defendant did not later appeal these convictions, apparently on yet another attorney's advice.

FN1. One of the conditions was restitution to her “victims,” but that condition has not only been satisfied, but defendant has sought protection from the Bankruptcy Court for her restitution obligation.

In June 2003, defendant filed a petition for PCR, contesting the validity of both her Hudson and Morris County convictions. She claimed, among other things, that her confessions were not knowing and voluntary, that there was not an adequate factual basis for her pleas and that her legal representation was constitutionally deficient. Defendant therefore asked for a hearing.

At the PCR hearing, after oral argument, the judge dismissed the petition, concluding that the first two claims were cognizable on direct appeal and were barred by *State v. Mitchell*, 126 N.J. 565 (1992). She then concluded that the last claim, that of ineffective assistance of counsel, did not merit an evidentiary hearing, as defendant failed to establish a prima facie case.

We concluded that the record was insufficient for a determination of defendant's ineffective assistance claim, given the disputed issues as to Kearney's advice. Accordingly, we remanded for an evidentiary hearing, stating: We view the issue to be narrow and discrete. The critical issue to be determined is what occurred when Kearney first appeared to represent defendant and whether his conduct implicates defendant's Sixth Amendment right to counsel. We remand for that limited inquiry.

On remand, Judge Langlois took extensive testimony over a period of four days. Both defendant and Kearney testified and were subjected to intensive cross-examination; other witnesses testified as well. On May 18, 2005, the judge issued a detailed written decision denying the petition, in which she concluded as follows: Mr. Kearney has practiced law for 14 years with experience in criminal, civil, and matrimonial law. His testimony was thoughtful and complete. He sought to answer questions directly and forthrightly. He was believable and understandably upset when the issue over the plea being withdrawn was raised. The court certainly accepts that he was caught up in Ms. Neal's anxiety to leave the jail, yet finds that he gave her only correct legal advice.

The court rejects the testimony of Ms. Neal that she was told what to say; that she was advised to plea guilty; that she was told it was "normal" to later

withdraw it plea; or that she asserted her innocence over and over only to be told to plea. Mr. Ewing claimed that the procedure was a "put up" by Mr. Kearney to present Ms. Neal before the court as guilty. Nothing supports these claims.

*4 On the date of the plea, Ms. Neal claims she never went through the plea form, just signed it, answered all questions yes, and never looked at anything before meeting Mr. Kearney in the courtroom. She claims to have been "rattled." However, Ms. Neal admitted that she took the money from the alleged victims for computers which she obtained for them. She insisted that it is not her obligation to give them the money back. She was angry over the arrest and she blamed her problem on Mr. Banas. She said she actually "lectured" investigator Turner, yet wants the court to believe that she was completely non-assertive when Mr. Kearney reviewed paperwork and plea forms.

At the time of plea, she, on the record, stated she was truthful and satisfied with the advice of her attorney, four times. She explains now that "my circumstances were such that I answered truthfully." She claims to have trusted Mr. Kearney "implicitly" and acted with "blind faith" in him. FN2 Yet, it was *her* "strategy" to say whatever it took to get out of jail. That strategy was hers and hers alone. It was not based on any incorrect advice of Mr. Kearney.

FN2. This idea that Ms. Neal would only do what Mr. Kearney said, just nod and say yes is not consistent with the tone of her follow-up letters through June and July 1999 to Mr. Kearney and Mr. Banas. Ms. Neal is very assertive, and quite insistent in demanding meetings and responses. She tells Mr. Kearney what to say in letter to her employer. She lists questions and wants answers. She demands a strategy on a "go-forward" basis. She demands "the final say in any strategies and actions...."

Ms. Neal stated under oath in open court before Judge Ahto that she was truthful in her plea, that

she understood its consequences; that she was satisfied with the advice of her attorney. She voluntarily chose to plead. There was over an hour, maybe two, of time spent between Ms. Neal and Mr. Kearney. He advised her of the theft statute and focused on her defense and concept that it might be a civil matter. They discussed the facts of the transactions. He said that she should not plead guilty unless she was guilty.

Ms. Neal was not misinformed. She was aware of the facts of her case. She is not unsophisticated. Her educational background is in engineering, as a Ph.D. graduate from Penn State and Harvard MBA coursework. She surrounds herself with mentors and attorneys. Frankly, Ms. Neal has had too many people, involved in too many things, with too much advice, and she is unable to accept responsibility for her own actions. It is just not acceptable that Ms. Neal can now-or even in July 1999-claim that what she said on the record, in front of Judge Ahto, was a lie and designed only to mislead the court and the State to allow her release.

This is no valid basis to claim ineffective assistance of counsel. No showing has been made that any actions by Mr. Kearney violated the Sixth Amendment right to counsel. Mr. Kearney did not misinform her. He acted in her behalf in filing the motion to withdraw the plea. He assisted effectively through the time of sentence. No one can establish that he presented false documents or sought to deceive the court. Mr. Kearney has flatly denied that he made changes on a certification without Ms. Neal's approval or in any manner to deceive the court.

As the Appellate Division sensed initially, there is "significant doubt" to Ms. Neal's claimed misunderstanding; what she was or was not told, what she did or did not know. Testimony at the hearing before this court clears any doubt. Ms. Neal remembers only what she chooses to, in whatever circumstances she finds herself in.

*5 In contrast, Mr. Kearney stepped in for Mr. Banas, addressed the emergent bail situation, reviewed materials from the State, consolidated a Hudson matter, and informed Ms. Neal of her options. He told her not to plead guilty unless she was

guilty. He did not qualify that advice or misinform her of the ability to withdraw the plea. Only later, when she returned in July, did he follow her request to seek to withdraw the plea and assert her innocence. The legal issue remains as before, i.e., whether defendant can establish that the attorney's services failed to meet the standard of effective assistance, and if so, whether any failure resulted in prejudice to this defendant. *See Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Fritz*, 105 N.J. 42, 58 (1987). The court recognizes that if an attorney advises a client to plea guilty knowing that the client cannot truthfully admit to an offense it could be considered representation below the standard acceptable in criminal representation. *See Hill v. Lockhart*, 474 U.S. 52 (1985).

As explained above, the court is satisfied that Mr. Kearney did not compel a plea from Ms. Neal, nor advise her to plead guilty and then withdraw the plea before sentence. Ms. Neal had effective assistance on those days in June 1999, through July 1999. She made her own decision to plea, with proper information from Mr. Kearney. While she was certainly upset over her jail status, she had the opportunity before her plea to consider the legal advice, review the documents with Mr. Kearney, explain the situation and consider her possible defenses. Mr. Kearney did not misinform her, deceive her, or coerce any plea. There is no showing necessary to grant post-conviction relief.

On appeal, defendant presents the following issues: POINT I

PAMELA NEAL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

POINT II

JUDGE LANGLOIS COMMITTED REVERSIBLE ERROR IN DENYING PAMELA NEAL'S MOTION FOR RECUSAL.

POINT III

PAMELA NEAL PROVIDED AN INADEQUATE FACTUAL BASIS WHEN SHE ENTERED HER GUILTY PLEA.

First, we reject defendant's argument that Judge Langlois should have recused herself on the remand proceedings because she had made credibility find-

ings when the matter was first presented to her, and that the record demonstrates that she was biased. At the outset, we note that our prior opinion did not direct that the remand be heard by a different judge. In denying defendant's request for recusal, Judge Langlois noted her obligation to consider the testimony to be presented pursuant to the remand and clearly indicated that she was "very open" to reviewing the forthcoming testimony and changing her earlier conclusions, if warranted. Having reviewed the remand record, we find no evidence of bias and conclude that the judge's recusal was not required because of her earlier involvement and ruling. We find defendant's reliance on *State v. Gomez*, 341 N.J.Super. 560 (App.Div.), cert. denied, 170 N.J. 86 (2001), to be misplaced; the case is entirely distinguishable from the situation presented here.

*6 With respect to the judge's ruling on the ineffective assistance claim, we find ourselves in substantial agreement with her written opinion of May 18, 2005. While defendant, in her brief and at oral argument, points to many reasons why the judge should have reached a different conclusion, and asks us to do so, we are not free to disregard the credibility findings upon which the judge's ultimate determination was based. *State v. Arthur*, 184 N.J. 307, 320 (2005) (citing *State v. Locurto*, 157 N.J. 463, 472 (1999)); see also *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 483-84 (1974). The issue is not whether we might have reached a different conclusion if hearing the witnesses in the first instance. Indeed, the record provides ample cause for concern as to the way in which the events unfolded leading to defendant's pleas. However, the decision was made by a conscientious trial judge, mindful of her responsibilities, and we have no occasion to overturn her ruling.

Finally, defendant argues that her June 9, 1999 guilty pleas were not supported by an adequate factual basis. We agree. In order for a guilty plea to be valid, the trial court must find that: (1) there is an adequate factual basis for the plea; (2) the plea is voluntary; and (3) the defendant comprehends the nature and consequences of the plea. *State v. Bel-*

lamy, 178 N.J. 127, 134 (2003). In light of the vital constitutional values at stake, our courts are "sensitive to the requirement that there be an adequate factual basis for a plea of criminal guilt." *State ex rel. T.M.*, 166 N.J. 319, 326-27 (2001) (quoting *State v. Smullen*, 118 N.J. 408, 414 (1990)). Thus, to be adequate, a factual basis must include either an "admission of guilt of the crime or [an] acknowledgment of facts constituting the essential elements of the crime." *Id.* at 333 (quoting *State v. Sainz*, 107 N.J. 283, 293 (1987)). In assessing the adequacy of the factual basis, the trial court may consider the State's evidence supporting conviction. *Smullen, supra*, 118 N.J. at 418 (1990). The courts employ a flexible approach, viewing the evidence in light of the surrounding circumstances, in order to accomplish constitutional ends. *T.M., supra*, 166 N.J. at 327 (citing *Smullen, supra*, 118 N.J. at 415).

Against this background, defendant asserts that she did not provide an adequate factual basis on which the trial court could agree to her guilty plea. Theft by failure to make a required disposition of property equates to a misappropriation of property. *State v. Kelly*, 204 N.J.Super. 283, 285 (App.Div.1985). To establish a violation of N.J.S.A. 2C:20-9, the State must prove that defendant dealt with the property as if it were her own. *Id.* at 287. Defendant's mere failure to pay for the property is not sufficient to support the State's burden under this statute. *Ibid.*

Defendant argues that the factual basis for the violation of N.J.S.A. 2C:20-9 emanating from the Morris County charge^{FN3} was insufficient because she never declared that she used or intended to use the money for her own purposes. Kearney elicited the following factual basis from defendant:

FN3. According to count one of accusation 99-06-00753-A, the State alleged that defendant purposely retained the property of five Weichert Realty employees in the amount of \$8525 and that she dealt with the property as if it were her own and failed to make the appropriate disposition of that property.

*7 Mr. Kearney: Miss Neal, on or about June 6th of 1998, and between June 6th of 1998 and July 1st of 1998 in the Borough of Mendham, is it true that you had received checks totaling the amount of \$8,525; and these checks actually came from Kristin Jones, Starsey Meyer, Anthony Gervasio, Mary Ann Wezzel, and Bernice Fisher?

Defendant: Yes.

Mr. Kearney: And is it also true that you deposited these checks into your bank?

Defendant: Yes.

Mr. Kearney: And is it also true that you kept this money and never returned this money to any of these individuals?

Defendant: Yes.

Mr. Kearney: And you took this money in a transaction for which you were supposed to give computers to these individuals?

Defendant: Yes.

Mr. Kearney: And you actually have not as of yet gave any computers to those individuals for those checks, correct?

Defendant: Correct.

....

Mr. Kearney: And you're pleading guilty to [this] charge[]?

Defendant: Yes.

Defendant contends that she never admitted to intending to deal with the property as her own; she merely agreed that "as of yet" she had not given the computers to the victims. This makes the factual basis for the guilty plea insufficient. In addition, this admission was suspect because other evidence existed providing factual support for her defense, including the complainant's own affidavit supporting the complaint.

The State responds that defendant admitted to receiving the funds, depositing them in her personal bank account and failing to either deliver the computers or refund the money paid to her. These facts allowed the judge to conclude that defendant had diverted or intended to divert said funds. Essentially, the State claims that this element can readily be inferred from defendant's testimony. The State adds that any evidence supporting a potential de-

fense is irrelevant because it was not adduced at the plea colloquy.

Defendant replies that "inferential satisfaction of the factual basis for a guilty plea," is unacceptable, citing *T.M., supra*, 166 *N.J.* at 334. In this case we agree. The State's argument, as we read it, conceded that Kearney failed to adduce testimony as to this element. Hence, the factual basis for the plea was inadequate.

Defendant next argues that the factual basis for the violation of *N.J.S.A. 2C:20-4a*, also from Morris County, was insufficient. In relevant part, the statute reads:

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

a. Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind, and including, but not limited to, a false impression that the person is soliciting or collecting funds for a charitable purpose; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

*8 [*N.J.S.A. 2C:20-4a.*]

We have held that the State must proffer evidence that the defendant purposely deceived the victim in order to convict under *N.J.S.A. 2C:20-4a*. See *State v. Bennett*, 194 *N.J.Super.* 231, 236 (App.Div.1984) (stating that defendant signing for markers to gain gambling chips at casino is insufficient to prove deception such that grand jury can indict under *N.J.S.A. 2C:20-4*), *certif. denied*, 101 *N.J.* 224 (1985).

At the plea hearing, the following transpired:

Mr. Kearney: And, also between June 6th of 1998 and July 1st of 1998 in the Borough of Mendham, that you had purchased computers from Business Machines Technologies [BMT] valued at \$5,379.50. Is that correct?

Defendant: Yes.

Mr. Kearney: And you had not-let me just see here. You did not pay Business Machines Technologies

that amount of money for those computers as of yet?

Defendant: That's correct.

....

The Court: Well, let me ask you about the theft by deception on Count Two. She indicated she did it and she didn't pay him yet. There should be some deceptive conduct there. This goes back to over-well, not quite a year.

[Prosecutor]: If I may ask a question, Your Honor?

The Court: Yes, if you will, please.

[Prosecutor]: Miss Neal, is it true that from the Business Technologies, you ordered computers from them? Is that so?

The Defendant: Yes.

[Prosecutor]: And you have not paid them. Is that so?

The Defendant: That's correct.

[Prosecutor]: When you received money from the various people in Mendham, did you forward that money to Business Technologies?

The Defendant: No.

Here, defendant argues that she never admitted that she intended to deceive BMT out of equipment or money. Further, nothing in the transcript from the plea hearing indicates that defendant obtained the computers intending not to pay for them. According to *N.J.S.A. 2C:20-4a*, the State must prove more than that the defendant did not subsequently perform a promise. Defendant claims, and the record shows, that her failure to pay BMT was the only thing she testified to at the plea hearing. This should have led to a civil action and not a criminal indictment.

The State replies that the totality of the circumstances allowed the lower court to infer that defendant intended to deceive BMT. She took money from the five Weichert people for the computers, never delivered the computers to those customers and never paid the funds to BMT. The failure to pay, after receiving the funds, shows an intent to deceive.

Again, defendant responds that the attempt to supply an element of the crime through inference is im-

permissible. *T.M., supra*, 166 *N.J.* at 334. We agree. Further, the factual basis for the State's contention that defendant received funds from the Weichert people for the computers purchased from BMT is entirely inaccurate. As a result, the State's discussion is based on incorrect factual assumptions.

*9 Concerning the Hudson County indictment for theft by failure to make required disposition of property, defendant submits that she never admitted to any of the three elements of that crime at the plea hearing. The following occurred at the plea colloquy:

Mr. Kearney: Okay. And regarding the Hudson County indictment, is it true that in Union City, New Jersey on August 31st, 1996 that you endorsed a check that had other endorsements on it? Is that correct?

The Defendant: Yes.

Mr. Kearney: And you deposited this check in a Wayne, New Jersey bank with permission-without the permission of Jeffrey Bronster (phonetic) and/or Peter Sangargean (phonetic). Is that correct?

The Defendant: Yes.

Mr. Kearney: And you knew that that was wrong to do?

The Defendant: Yes.

....

Mr. Kearney: And your pleading guilty to [this] charge[]?

The Defendant: Yes.

....

The Court: All right. Give me something on the Hudson County. I don't have that indictment. What's the charge? ...

[Prosecutor]: May I approach, Your Honor.

The Court: Yes. You received money from Mr. Bronster?

The Defendant: No.

The Court: Do you have property of Jeffrey Bronster. Is that correct?

The Defendant: No.

The Court: Help me out.

[Prosecutor]: Certainly. Miss Neal, did you have possession of a check that was made out to Jeffrey Bronster?

The Defendant: And three other people, yes.

[Prosecutor]: And was it also made out to Peter Barbato (phonetic)?

The Defendant: Yes.

[Prosecutor]: And did you take that check and deposit it into a bank in Wayne, New Jersey?

The Defendant: Yes.

[Prosecutor]: And was it put into an account of someone named Peter Sangargean?

The Defendant: Yes.

[Prosecutor]: Did you have permission from Mr. Bronster and/or Mr. Barbato to deposit that check in that account?

The Defendant: No.

This line of questioning, defendant argues, never established that she needed permission from Bronster or Barbato to deposit the check in Sanschagrín's account such that she breached a legal duty to relinquish their property after she received it. Further, the testimony failed to show that defendant actually dealt with the property as her own. Rather, it proves only that defendant deposited the check in some third party's account; nothing in the record demonstrates that defendant could even access those funds, let alone use them for her own purposes.

The State replies simply that the above testimony proves that defendant violated *N.J.S.A. 2C:20-9*. She deposited a check without getting permission from all four payees. She admitted that she knew it was wrong to do this. The State seems to believe that defendant cashed the check and absconded with the proceeds. Thus, the State posits, defendant provided an adequate factual basis on which the trial court could accept her guilty plea as knowing and voluntary. Defendant responds that nothing in the record disproves that she deposited the funds in Sanschagrín's account. Here again, we find the factual basis sorely lacking.

***10** Nevertheless, a conclusion that the factual basis for a plea, or in this case three pleas, is lacking, does not end our inquiry. For an inadequate factual basis claim to require post-conviction relief based on a constitutional violation, more is required. In *State v. Mitchell*, 126 *N.J.* 565, 577-78

(1992), the Court wrote:

Our procedural Rules do require a judge to elicit a factual basis for a guilty plea. *R. 3:9-2*. As long as a guilty plea is knowing and voluntary, however, 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 a basis. A factual basis is constitutionally required only when 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. *See McCarthy v. United States*, 394 *U.S.* 459, 467, 89 *S.Ct.* 1166, 1171, 22 *L. Ed.2d* 418, 425-26 (1969); *State v. Barboza*, 115 *N.J.* 415, 421 & n. 1 (1989).

See also State v. D.D.M., 140 *N.J.* 83, 95 (1995); *State v. Pena*, 301 *N.J.Super.* 158, 163 (App.Div.), *certif. denied*, 151 *N.J.* 465 (1997). Both *Mitchell* and *D.D.M.* rejected the defendants' post-conviction constitutional attacks on their guilty pleas. In *Mitchell*, the defendant failed to proclaim his innocence at any point in the plea proceedings nor did he "demonstrate a lack of understanding of the law." *Mitchell, supra*, 126 *N.J.* at 578. Similarly, in *D.D.M.*, "defendant did not express a contemporaneous claim of innocence, and the record of the proceeding clearly indicates defendant's satisfaction with his attorney's representation, his acknowledgement of a prior record for similar offenses, and his understanding of the crime and the significance of his guilty plea." *D.D.M., supra*, 140 *N.J.* at 96. By way of contrast, in *Pena*, the defendant continually maintained his innocence both before and after his plea. *Pena, supra*, 301 *N.J.Super.* at 163.

Here, the scenario presented does not fit comfortably within the cited cases. As far as the record before the plea judge reveals, defendant made no claim of innocence contemporaneous with her guilty pleas; she asserted that she understood the charges and the consequences of her pleas. Defendant's level of education suggests that she did understand what she was doing. Insofar as defendant contends that she continuously asserted her innocence to Mr. Kearney, Judge Langlois found her testi-

mony not credible. As quoted above, the judge found that lawyer and client discussed the evidence and the possible defenses, and it was defendant who ultimately decided to plead guilty. Whether that decision was a strategic one, designed to secure her release from incarceration, does not mean that it was not knowing and voluntary. Nor does it necessarily equate with a contemporaneous claim of innocence. It is true that defendant subsequently filed a motion to retract her pleas, but that was not until over a week later, and it was eventually withdrawn.

***11** Our careful review of the record does not persuade us that the inadequate bases of defendant's guilty pleas meet the high standard imposed by *Mitchell* to demonstrate a constitutional violation warranting post-conviction relief. This conclusion obviates any need for us to determine whether this issue was already addressed and decided by our prior opinion.

Affirmed.

N.J.Super.A.D.,2006.

State v. Neal

Not Reported in A.2d, 2006 WL 2009051

(N.J.Super.A.D.)

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