

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-6102-12T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TANIA M. BORGES,

Defendant-Appellant.

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Submitted March 24, 2015 – Decided April 1, 2015

Before Judges Reisner and Higbee.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Indictment No.  
13-01-00141.

Nancy C. Ferro, attorney for appellant.

John L. Molinelli, Bergen County Prosecutor,  
attorney for respondent (Anthony C.  
Talarico, Assistant Prosecutor, of counsel  
and on the brief).

PER CURIAM

Defendant Tanya Borges appeals from her conviction for fourth-degree driving during a period of license suspension imposed for a second or subsequent violation of N.J.S.A. 39:4-50 (driving while intoxicated). N.J.S.A. 2C:40-26(b). Her appeal

focuses on her exclusion from the Drug Court program, which was based on a determination that defendant was subject to a mandatory minimum period of incarceration under N.J.S.A. 2C:40-26(b). See N.J.S.A. 2C:35-14(b)(3) (exclusion from Drug Court probation for persons subject to a mandatory minimum period of incarceration).

Defendant appealed from the Drug Court rejection, and on July 23, 2013, the trial judge granted her application, conditioned on her first serving 180 days in the county jail without parole, the term of imprisonment required by N.J.S.A. 2C:40-26(c). Defendant declined the conditional entry into the Drug Court program, and filed an appeal to this court from the July 23, 2013 order. Defendant then pled guilty to violating N.J.S.A. 2C:40-26(b), conditioned on her right to pursue her appeal of the July 23 order. On November 6, 2013, the trial court sentenced her to serve 180 days in the county jail without parole, but stayed the sentence pending the outcome of her appeal.<sup>1</sup>

On this appeal, defendant presents the following argument:

THE COURT BELOW ERRED BY REFUSING TO ALLOW  
DEFENDANT TO ENTER THE DRUG COURT SPECIAL  
PROBATION PROGRAM IN LIEU OF INCARCERATION  
AND REQUIRING HER, INSTEAD, TO FIRST SERVE A

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<sup>1</sup> Entry of the judgment of conviction, which was a final order, rendered the earlier order ripe for appeal as of right.

180 DAY JAIL SENTENCE WITH NO PAROLE  
ELIGIBILITY AND THEN ALLOWING HER TO ENTER  
THE DRUG COURT PROGRAM.

Defendant's arguments in support of this point require little discussion. R. 2:11-3(e)(2). The short answer is that this case is governed by our recent opinion in State v. French, 437 N.J. Super. 333 (App. Div. 2014), certif. denied, \_\_\_ N.J. \_\_\_ (2015). In French, we held that that a defendant convicted of violating N.J.S.A. 2C:40-26(b) must be sentenced to a term of 180 days in jail without parole and cannot be sentenced to "a non-jail rehabilitation program" in lieu of serving any portion of that jail term. Id. at 338. We reaffirmed that holding in State v. Harris, 439 N.J. Super. 150 (App. Div. 2015).

The Legislature's purpose in requiring a mandatory period of "imprisonment" for this offense, with no possibility of parole, is also clear. Alternatives to jail, like the inpatient drug rehabilitation program involved in French, or the home detention and community service programs at issue here, do not protect the public in the same way as incarceration. This public safety consideration is especially relevant in the case of a defendant who loses his or her driving privileges for DWI, but then continues to drive despite the license suspension.

Because N.J.S.A. 2C:40-26(c) requires a "fixed minimum sentence of not less than 180 days" without parole eligibility for violations of N.J.S.A. 2C:40-26(b), a sentence to a non-custodial "alternative program," instead of jail, is plainly illegal.


[Id. at 160.]

Defendant's reliance on State v. Meyer, 192 N.J. 421 (2007), is misplaced, because the defendant in that case was otherwise eligible for a probationary term. In this case, defendant is not eligible for a probationary term because N.J.S.A. 2C:40-26(c) unambiguously requires that she be sentenced to a jail term of 180 days without parole. Accordingly, we affirm the order on appeal.

This case is remanded to the trial court for the limited purpose of entering an order, within thirty days of the date of this opinion, vacating the stay of defendant's sentence.

Affirmed in part, remanded in part.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION