

STATE OF NEW JERSEY v. M.S.
RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

M.S.,

Defendant-Respondent.

June 17, 2014

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Indictment No. 04-10-00793.

Robert L. Taylor, Cape May County Prosecutor, attorney for appellant (J. Vincent Molitor, First Assistant Prosecutor, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (Michael B. Jones, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

On February 20, 2013, the Law Division entered an order continuing defendant's involuntary civil commitment to a psychiatric hospital pending periodic review, and setting defendant's Kroll term at eleven years. The State appeals from the portion of the order establishing the eleven-year Kroll term. Because the court did not fully explain its analysis in setting defendant's

Krol term, we remand for specific findings and conclusions to be completed within forty-five days. We retain jurisdiction.

I.

The following facts are pertinent to our review. On October 26, 2004, a Cape May County grand jury returned Indictment Number 04-10-00793 (04-793). Counts one and two of Indictment 04-793 charged defendant with terroristic threats, N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b). The charges arose out of an incident that occurred on September 25, 2004 where defendant threatened to kill a local police officer.

On July 12, 2005, a Cape May County grand jury returned Indictment Number 05-07-00415 (05-415). Count one charged defendant with unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); count two charged defendant with possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); counts three and four charged defendant with aggravated assault, N.J.S.A. 2C:12-1(b)(5). The charges arose out of an incident that occurred at the Cape May County jail on May 10, 2005 involving a confrontation between defendant and two corrections officers.

On January 31, 2006, a Cape May County grand jury returned Indictment Number 06-01-00097 (06-097). Counts one and three charged defendant with throwing bodily fluids at a law enforcement officer, N.J.S.A. 2C:12-13; count two charged defendant with unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); count four charged defendant with possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d); counts five, six, and seven charged defendant with aggravated assault N.J.S.A. 2C:12-1(b)(2), N.J.S.A. 2C:12-1(b)(1), and N.J.S.A. 2C:12-1(b)(5). The charges arose out of an incident that occurred on November 22, 2005, involving a confrontation between defendant and four sheriff's officers.

After receiving the testimony of Dr. Elizabeth A. Burns, a clinical psychiatrist, on December 18, 2006, the trial judge found defendant not guilty by reason of insanity (NGI) on all charges under all three indictments. On the same date, the judge found "defendant is dangerous to himself, others or property as a result of said mental illness and that he cannot be released into the community," and ordered his civil commitment. At that time, the judge did not determine the length of defendant's commitment, as required by N.J.S.A. 2C:4-8(a)(3).

Thereafter, the judge conducted periodic reviews of defendant's commitment, R. 4:74-7(f)(2), and each time found defendant's Krol status should continue. Then, on March 23, 2012, defendant moved to vacate his Krol status. While defendant claimed he received a five-year Krol term in 2006, his counsel found nothing in the record to support this contention. Nevertheless, defendant's motion did cause the court to recognize the need to set a Krol term for defendant.

After hearing oral argument on February 1, 2013, the judge set defendant's Krol term at eleven years for all charges under all three indictments. The judge first calculated the maximum term for the charges under Indictment 06-097 would have been eight years:

[W]ere convictions to have [been] entered on counts one through seven . . . given considerations of merger and concurrency, I am reasonably satisfied that the highest maximum period of imprisonment that could properly have been posed as an ordinary term would have been the midpoint on count six, the second degree [offense], or seven years, and one year on count seven, the third degree aggravated assault [charge], . . . for an aggregate of eight years.

The judge further held the charges in counts one through five of Indictment 06-097 would have either merged with counts six and seven or the sentences would have been concurrent with the sentences on those counts.

Regarding the four charges of Indictment 05-415, the judge determined a maximum term of three years. He arrived at this term by adding the maximum term that could have been imposed on count three (eighteen months) to the maximum term that could have been imposed on count four (eighteen months). The judge then merged count one with count two, and determined the three-year term was to run concurrent to the sentences on counts three and four; the judge was satisfied with a three-year term for count two, a third-degree charge, calling it "a low range period of imprisonment." The judge further held the three-year aggregate term of 05-415 would have run consecutive to the eight-year aggregate term of 06-097.

The judge then addressed the two charges in Indictment 04-793. Without stating a maximum term of imprisonment for these charges,² he held the terms would run concurrent with the sentences on Indictments 06-097 and 05-415. However, the judge provided no explanation why the terms under indictment 04-793 would be concurrent and not consecutive. The State then filed this appeal.

II.

Appellate review of NGI matters is "extremely narrow," with deference given to the broad discretion afforded to a trial judge in fashioning a commitment period. *State v. Fields*, 77 N.J. 282, 311 (1978). "[I]n cases involving multiple offenses, an NGI defendant may remain under Krol commitment for the maximum ordinary aggregate terms that defendant would have received if convicted of the offenses charged, taking into account the usual principles of sentencing." *In re Commitment of W.K.*, 159 N.J. 1, 6 (1999). The "usual principles" of sentencing include the merger of offenses and whether separate sentences are to run concurrent or consecutive to each other, but do not include the weighing of aggravating and mitigating factors because N.J.S.A. 2C:4-8(b)(3) establishes the maximum term. *In re Commitment of M.M.*, 377 N.J. Super. 71, 77-78 (App. Div. 2005), *aff'd o.b.*, 186 N.J. 430 (2006); see also Administrative Office of the Court (AOC) Directive # 9-963 (explaining sentencing requirements for Krol commitments).

"Merger stems from the well-settled principle that 'an accused [who] has committed only one offense . . . cannot be punished as if for two.'" *State v. Cole*, 120 N.J. 321, 325-26 (1990) (alteration in original) (quoting *State v. Miller*, 108 N.J. 112, 116 (1987)). Sentencing judges should take a flexible approach to the merger of offenses. *State v. Davis*, 68 N.J. 69, 81 (1975). The Court in *Davis* provided a number of factors for a judge to consider, including:

the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.

[*Ibid.*]

"When multiple sentences of imprisonment are imposed on a defendant for more than one offense, . . . such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence[.]" N.J.S.A. 2C:44-5. In determining whether sentences for multiple offenses should run concurrently or consecutively, the trial court applies these criteria:

- (1) there can be no free crimes in a system for which the punishment shall fit the crime;
- (2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;
- (3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:
 - (a) the crimes and their objectives were predominantly independent of each other;
 - (b) the crimes involved separate acts of violence or threats of violence;
 - (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
 - (d) any of the crimes involved multiple victims;
 - (e) the convictions for which the sentences are to be imposed are numerous;
- (4) there should be no double counting of aggravating factors;
- (5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense; and
- (6) there should be an overall outer limit on the cumulation of consecutive sentences for multiple offenses not to exceed the sum of the longest terms (including an extended term, if eligible) that could be imposed for the two most serious offenses.⁴

[State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed.2d 308 (1986).]

"[W]hen trial courts impose 'either a concurrent or consecutive sentence, '[t]he focus should be on the fairness of the overall sentence,' and [trial judges] should articulate their reasons for their decisions with specific reference to the Yarbough factors.'" State v. Soto, 385 N.J. Super. 247, 256 (App. Div. 2006) (alteration in original) (quoting State v. Abdullah, 184 N.J. 497, 515 (2005)) (internal quotation marks omitted), certif. denied, 188 N.J. 491 (2006). "[A] statement of reasons is a necessary prerequisite for adequate appellate review of sentencing decisions . . . [in order to] determine whether the trial court's imposition of consecutive sentences was a valid exercise of discretion." Ibid. (alteration in original) (quoting State v. Miller, 108 N.J. 112, 122 (1987)).

As we stated in M.M., "the statutory language directing that '[t]he defendant's continued commitment, under the law governing civil commitment, shall be established by a preponderance of the evidence, during the maximum period of imprisonment that could have been imposed,' establishes the measure of the maximum term of commitment." M.M., supra, 377 N.J. Super. at 78 (quoting N.J.S.A. 2C:4-8b(3)). Because "maximum" as used in the statute means maximum, we conclude the judge erred in setting the maximum term of imprisonment for several of the charges.

On Indictment 06-097, count six charged defendant with second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1), and count seven charged defendant with fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(5). The maximum term of imprisonment for a second-degree crime is ten years and for a fourth-degree crime is eighteen months. N.J.S.A. 2C:43-6(a)(2),(4). Thus, the judge should have found the maximum period of imprisonment that could have been imposed on the second-degree charge was ten years, not seven years, and on the fourth-degree charge was eighteen months, not one year.

Similarly, count two of Indictment 05-415 charged defendant with a third-degree offense, possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d). Because the maximum term of imprisonment for a third-degree crime is five years, N.J.S.A. 2C:43-6(a)(3), the judge

should have found the maximum period of imprisonment that could have been imposed on the third-degree charge was five years, not three years.

The three indictments under review charged offenses occurring over a period of fifteen months spanning three calendar years. The indictments concerned crimes which occurred at different locations and involved different victims. Therefore, the judge was not precluded from entering consecutive terms on certain offenses if appropriate. However, the judge needed to make specific findings and conclusions. Here, that was not done.

Defendant concedes the Krol term set by the trial court violates this Court's holding in *M.M.* but argues that decision was "simply misguided." We disagree. Our holding in *M.M.* was based on the statutory language of N.J.S.A. 2C:4-8(b)(3), which establishes the measure of the maximum term of commitment. *M.M.*, *supra*, 377 N.J. Super. at 78.

Defendant further argues the trial court's Krol term is sustainable based upon dicta contained in *Breeden v. N.J. Dep't of Corr.*, 132 N.J. 457, 471 (1993), where the Court recognized that a sentencing court may make concurrent sentences for different crimes, even though separated in time and place, if the offenses represent "a single period of aberrant behavior not warranting consecutive punishment." Here, the judge made no such specific finding when he ruled the sentence imposed for Indictment 04-793 would be concurrent; instead, he simply referenced "the sentencing considerations under *Yarbough* and related case law."

In this case, the judge did not fully explain why he set an eleven-year Krol term, particularly his reasons for the determinations made regarding consecutive and concurrent sentences. Accordingly, we remand for the judge to provide a more complete analysis and statement of reasons, including specific findings and conclusions, for setting defendant's Krol term at eleven years; the court shall provide these findings and conclusions within forty-five days.⁵ Once received, we will enter an order for supplemental briefing.

Remanded for further proceedings consistent with this opinion. We retain jurisdiction.

¹ *State v. Krol*, 68 N.J. 236 (1975).

² The maximum term for each count was five years as each count charged a third-degree offense. N.J.S.A. 2C:43-6(a)(3).

3 Directives have the force of law. *R.K. v. D.L.*, 434 N.J. Super. 113, 130 n.7 (App. Div. 2014).

4 N.J.S.A. 2C:44-5(a) overturned guideline (6), stating "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." See also *State v. Carey*, 168 N.J. 413, 423 n.1 (2001).

5 As part of this analysis, the trial court must utilize the maximum terms of imprisonment that could have been imposed on each charge, as mandated by N.J.S.A. 2C:4-8b(3). Also, we direct the court to specifically address defendant's argument that his conduct represented "a single period of aberrant behavior" under *Breeden*. *Breeden*, *supra*, 132 N.J. at 471.