

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1265-14T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ELIJAH J. HOLLOWAY,

Defendant-Respondent.

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Argued September 30, 2015 – Decided October 27, 2015

Before Judges Alvarez and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 13-11-1385.

Brian D. Gillet, Deputy First Assistant Prosecutor, argued the cause for appellant (Andrew C. Carey, Middlesex County Prosecutor, attorney; Mr. Gillet, of counsel on the brief).

Michael A. Policastro argued the cause for respondent.

PER CURIAM

The State appeals from the sentence imposed by the Law Division pursuant to N.J.S.A. 2C:43-6.2 (the Graves Act "escape valve"). We reverse and remand.

On June 6, 2013, New Brunswick police were dispatched to a residence in response to reports that defendant suffered a

gunshot wound to the foot. Police responded to the residence of defendant's girlfriend and her parents, where defendant reported he was shot in a drive-by shooting but could not identify the assailants. When police received conflicting reports from defendant and his girlfriend, they requested permission to enter the residence. The girlfriend's parents consented to a search of the home. Police found a black High Point 380 handgun in the ceiling. It was subsequently discovered that defendant found the handgun in an alley while walking home, and accidentally shot himself in the foot. Defendant intended to turn the handgun over to police after he discovered it, but hid the gun after it went off due to a pending charge in Somerset County.

On November 6, 2013, defendant was indicted by a Middlesex County Grand Jury for second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). Defendant elected to proceed to trial, which resulted in a hung jury. On May 27, 2014, defendant pled guilty to the charge lodged in the indictment. As a condition of the plea, the State agreed to recommend a three-year term of incarceration with a one-year period of parole ineligibility. The plea agreement also called for the State to seek a waiver from the Assignment Judge to permit the sentence contemplated in the plea agreement pursuant to the Graves Act escape valve. Thereafter, the State filed a motion

before the Assignment Judge, pursuant to N.J.S.A. 2C:43-6.2, seeking to exempt defendant from the mandatory three-year term under the Graves Act.

The Assignment Judge granted the motion and entered an order permitting defendant to be "exempted from the mandatory penalty associated with a violation of N.J.S.A. 2C:43-6 . . . ." The order was modified to remove the State's proposed language ordering defendant to be sentenced to a prison term of three years with one year of parole ineligibility. Neither the Assignment Judge nor the Presiding Judge of the criminal division sentenced defendant.<sup>1</sup> On October 27, 2014, defendant was sentenced to probation for a term of three years.

On November 5, 2014, the sentencing judge entered an order staying the sentence pending appeal. The State filed an appeal

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<sup>1</sup> In a Memorandum dated November 21, 2008, the Acting Administrative Director of the Courts, at the direction of the Chief Justice, clarified that while statutory language indicates that motions for waiver of, or reductions to, the otherwise mandatory minimum terms of imprisonment or parole ineligibility required pursuant to the Graves Act are to be made by the Prosecutor to the Assignment Judge (see N.J.S.A. 2C:43-6.2), that responsibility is delegable by the Assignment Judge to the Criminal Presiding Judge, pursuant to inherent authority and the Rules of Court.

Although not specifically referenced in the Memorandum, we presume that the responsibility for sentencing may also be delegated to the Criminal Presiding Judge. R. 1:33-6(a). We are uncertain whether the delegation extends to other judges assigned to the Criminal Division. We are unaware of any authority that would permit the responsibility for sentencing to be delegated to other than the Criminal Presiding Judge.

on November 10, 2014. On November 18, 2014, the sentencing judge issued an amplification of his statement of reasons. R. 2:5-1(b).

On appeal the State argues:

POINT I

THE SENTENCING COURT DID NOT HAVE DISCRETION TO SENTENCE DEFENDANT, A GRAVES ACT OFFENDER, TO NONCUSTODIAL PROBATION WITHOUT THE PROSECUTOR'S CONSENT.

POINT II

THE TRIAL COURT'S IMPOSITION OF A NONCUSTODIAL SENTENCE ON DEFENDANT'S SECOND-DEGREE CONVICTION AMOUNTED TO AN ABUSE OF DISCRETION; NO BASIS EXISTED FOR OVERCOMING THE PRESUMPTION OF INCARCERATION.

We confine our decision to the first point raised by defendant on appeal. Pursuant to the Graves Act, N.J.S.A. 2C:43-6(c), any person convicted of the unlawful possession of a firearm, N.J.S.A. 2C:39-5(b), "shall be sentenced to a term of imprisonment . . . ." The Graves Act further requires that "[t]he term of imprisonment shall include the imposition of a minimum term[, ] . . . fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater . . . during which the defendant shall be ineligible for parole." Ibid.

In State v. Des Marets, 92 N.J. 62, 73 (1983), the Court stated that, under the then-applicable provisions of the Graves

Act, a person who was convicted of an offense that came within the ambit of the Act, could not "escape a mandatory minimum imprisonment of at least three years." The Court stated that the Graves Act reflected the Legislature's intent "to deter the use of firearms by establishing mandatory minimum terms of imprisonment to ensure certainty of punishment." Ibid.

The Legislature enacted the Graves Act escape valve in 1989. The purpose of the amendment was to allow trial courts to exercise greater discretion in the sentencing of first-time firearms offenders where the imposition of the mandatory minimum terms required by the Graves Act were deemed to be "unnecessarily and unproductively harsh." Cannel, New Jersey Criminal Code Annotated, comment 2 on N.J.S.A. 2C:43-6.2 (2015).

In State v. Alvarez, 246 N.J. Super. 137, 145 (App. Div. 1991), we noted that, under N.J.S.A. 2C:43-6.2, the Assignment Judge has the ultimate sentencing responsibility, and has been given a choice of sentences that can be imposed for first-time Graves Act offenders. We stated the Assignment Judge "can impose a probationary sentence pursuant to N.J.S.A. 2C:43-2(b)(2) or impose a custodial sentence within the authorized range for the offense with a mandatory ineligibility term of one year." Alvarez, supra, 246 N.J. Super. at 145. We added, however, the Assignment Judge "cannot consider either of these

alternatives or options without the prosecutor's consent."

Ibid.

N.J.S.A. 2C:43-6.2 provides in relevant part:

On a motion by the prosecutor made to the [A]ssignment [J]udge that the imposition of a mandatory minimum term of imprisonment under [the Graves Act] for a defendant who has not previously been convicted of an offense under that subsection . . . does not serve the interest of justice, the [A]ssignment [J]udge shall place the defendant on probation . . . or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. The sentencing court may also refer a case of a defendant who has not previously been convicted of an offense under that subsection to the [A]ssignment [J]udge, with the approval of the prosecutor, if the sentencing court believes that the interests of justice would not be served by the imposition of a mandatory minimum term.

In Alvarez, supra, 246 N.J. Super. at 147, we concluded that the Graves Act escape valve was "constitutional because the Assignment Judge has the ultimate authority to decide whether the prosecutor arbitrarily or unconstitutionally discriminated against a defendant in determining whether the 'interests of justice' warrant reference to the Assignment Judge."

The State argues that the probationary sentence authorized by the escape valve statute reposes no discretion in the court since it requires a defendant to be sentenced in accord with N.J.S.A. 2C:43-2(b)(2) to a term of imprisonment. The State

also argues the judge erred in sentencing defendant to non-custodial probation contrary to the plea agreement without prosecutorial consent. Although fundamentally we are in agreement with both arguments, we conclude the error was not the failure of the judge to adhere to the plea agreement but the judge's failure to adhere to the sentencing mandate of N.J.S.A. 2C:43-2(b)(2).

N.J.S.A. 2C:43-2(b)(2) provides in pertinent part:

Except as provided in subsection g. of this section, to be placed on probation and, in the case of a person convicted of a crime, to imprisonment for a term fixed by the court not exceeding 364 days to be served as a condition of probation, or in the case of a person convicted of a disorderly person offense, to imprisonment for a term fixed by the court not exceeding 90 days to be served as a condition of probation[.]

In State v. Vasquez, 129 N.J. 189, 199 (1992), our Supreme Court addressed the issue of mandatory sentences:

Mandatory sentences usually allow for no judicial discretion. See, e.g., State v. Jefimowicz, 119 N.J. 152, 162 (1990) (sentencing standards applicable to discretionary extended terms do not apply to Graves Act because "[t]here is nothing discretionary about this determination"); State v. Towey, 114 N.J. 69, 80, 82 (1989) (no judicial discretion in mandatory sentencing structure of Graves Act); [Des Marets, supra, 92 N.J. at 80] (Legislature can limit the judiciary's discretion to sentence by prescribing mandatory minimum terms for offenses committed with firearms).

In State v. Watson, 346 N.J. Super. 521, 535 (App. Div. 2002), certif. denied, 176 N.J. 278 (2003), a Graves Act case, we referenced the sentence options when a prosecutorial waiver is granted; "a reduced mandatory minimum term of one year, or to place the defendant on probation with the condition of a jail term pursuant to N.J.S.A. 2C:43-2(b)(2)."

Here, the clear and unambiguous statutory mandate provided for a custodial term as a condition of probation. Although defendant received eight days' credit for time served, this does not satisfy the custodial requirement of the sentence. Defendant was not sentenced to those days as a condition of probation. The credit would apply only in the event there was a custodial sentence imposed upon a violation of probation. See N.J.S.A. 2C:45-1(e); State v. Carlough, 183 N.J. Super. 234, 235-36 (App. Div. 1982).

As such, the failure to impose a custodial term renders the sentence illegal and requires we remand this matter for resentencing. We note that at the resentence, assuming a probationary sentence was imposed, the judge would have discretion as to the length of the custodial term as the controlling statute does not mandate the length of imprisonment; only that imprisonment be imposed.<sup>2</sup>

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<sup>2</sup> We are mindful that, notwithstanding the Graves Act implications, defendant's plea was to a second-degree crime.  
(continued)



Finally, to the extent the State argues the judge was specifically bound by the plea agreement's terms relative to the length of the custodial term, we disagree. The plea agreement here was not a "contract plea." See State v. Bridges, 131 N.J. 402, 414 (1993). As we noted, the Graves Act escape valve does not expressly or implicitly limit the sentencing judge's ability to sentence a defendant to a lesser sentence, i.e., custodial term, provided for under the plea agreement, nor does it require the judge to reject the bargain should the judge conclude the plea is not in the interest of justice. See State v. Leslie, 269 N.J. Super. 78, 84 (App. Div. 1993), certif. denied, 136 N.J. 29 (1994). In criminal matters not subject to a "contract plea," the "parties can agree only on a sentence that the prosecutor will 'recommend' to the court; they are not empowered to negotiate a sentence that can have any binding effect." State v. Warren, 115 N.J. 433, 442 (1989).

Reversed and remanded. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION

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(continued)

Upon remand, a probationary sentence, absent prosecutorial consent, would allow the State to appeal. N.J.S.A. 2C:44-1(f)(2); State v. Roth, 95 N.J. 334, 360 (1984).