

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2191-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLAYTON SIMPSON,

Defendant-Appellant.

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Argued January 20, 2015 – Decided June 30, 2015

Before Judges Lihotz and St. John.

On appeal from Superior Court of New Jersey,  
Law Division, Monmouth County, Indictment  
No. 12-05-0863.

Paul E. Zager argued the cause for appellant  
(Paul E. Zager, attorney; Jeff Thakker, of  
counsel; Mr. Zager, on the briefs).

Monica do Outeiro, Special Deputy Attorney  
General/Acting Assistant Prosecutor, argued  
the cause for respondent (Christopher J.  
Gramiccioni, Acting Monmouth County  
Prosecutor, attorney; Ms. do Outeiro, of  
counsel and on the brief).

PER CURIAM

On June 3, 2013, defendant pleaded guilty to an amended  
third-degree eluding charge, N.J.S.A. 2C:29-2b, and driving

while intoxicated (DWI), N.J.S.A. 39:4-50, his third such offense. In exchange for defendant's guilty plea, the State dismissed other motor vehicle infractions related to the incident and recommend a sentence of non-custodial probation on the eluding, and the imposition of the third DWI penalties required by N.J.S.A. 39:4-50(a)(3), including a 180-day jail sentence and ten-year driver's license revocation, on the DWI.

Subsequent to the entry of his guilty plea, defendant obtained relief on his first DWI, and in light of defendant's new status as a second DWI offender, defendant and the State renegotiated the plea agreement prior to sentencing.

During resentencing, the judge relied on the Criminal Code factors outlined in N.J.S.A. 2C:44-1 when determining the aggravating and mitigating factors relevant to defendant's sentence. The judge found these factors to be in equipoise. On the criminal charge of eluding, the judge sentenced defendant to a two-year probationary period, substance abuse testing, and counseling recommended by the probation department, and applicable fines and penalties. The judge also sentenced defendant to "attendance in the inpatient treatment program [as] one of the conditions of [his] probation."<sup>1</sup>

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<sup>1</sup> The judgment of conviction (JOC) does not reflect the judge's sentence for the inpatient treatment to serve as a condition of  
(continued)

As to the DWI charge, the judge sentenced defendant to applicable fines, a twenty-four month driver's license suspension, and a ninety-day custodial sentence. The judge, however, agreed to suspend eighty-eight days of the sentence "subject to [defendant] getting into an inpatient treatment program within 30 days of [his] release from jail."

Defendant does not contest his sentence as it pertains to the eluding charge. On appeal, defendant raises the following issues, concerning only the "custodial portion of his DWI sentence":

POINT I

N.J.S.A. 39:4-50 IS INVALID TO THE EXTENT IT PERMITS STANDARD-LESS JAIL SENTENCING (Indirectly raised below).

POINT II

EVEN IF HENRY (OR MORAN, OR PALMA) APPLIED, THE JAIL SENTENCE SHOULD BE REVERSED SINCE THE SENTENCING JUDGE DID NOT UTILIZE THE FACTORS.

In light of the record and applicable law, we agree with defendant's contention that the sentencing judge improperly relied on N.J.S.A. 2C:44-1 and, instead, should have weighed the

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defendant's probation. However, the judge's determination announced orally at sentencing controls. See State v. Rivers, 252 N.J. Super. 142, 147 n.1 (App. Div. 1991).

factors outlined in State v. Moran, 202 N.J. 311, 326 (2010), in determining defendant's DWI sentence.

We begin our analysis by setting forth well-settled applicable principles regarding our review of a trial court's sentencing decision. We apply a deferential standard. State v. Fuentes, 217 N.J. 57, 70 (2014). We may not substitute our judgment for a sentencing court. State v. O'Donnell, 117 N.J. 210, 215 (1989). We may, however, correct an illegal sentence. See State v. Horton, 331 N.J. Super. 92, 97 (App. Div. 2000) (noting that appellate courts are granted such authority "even though there is no rule expressly authorizing [this]"). An illegal sentence may be corrected at any time so long as the sentence has not been completely served. State v. Schubert, 212 N.J. 295, 309 (2012). An illegal sentence is one that is contrary to the Code of Criminal Justice or constitutional principles. State v. Acevedo, 205 N.J. 40, 45 (2011); State v. Veney, 327 N.J. Super. 458, 462 (App. Div. 2000) (citing State v. Flores, 228 N.J. Super. 586, 591-92 (App. Div. 1988), certif. denied, 115 N.J. 78 (1989)).

The Court's decision in State v. Palma, 219 N.J. 584 (2014), requires judges to utilize the Moran factors in sentencing Title 39 offenses. In Palma, defendant was charged with careless driving, N.J.S.A. 39:4-97. The Court held it was

improper for the sentencing judge to rely on the Criminal Code factors listed in N.J.S.A. 2C:44-1 when sentencing the defendant. Id. at 595. Instead, the sentencing judge must rely on the factors outlined in Moran, supra, 202 N.J. at 328-29, when deciding whether to impose a license suspension or custodial sentence. Ibid.

The Court's decision is grounded in the Legislative intent to keep motor vehicle violations separate and apart from criminal convictions. Ibid. See State v. Schreiber, 122 N.J. 579, 584-85 (1991) (concluding a violation of the [DWI] statute is not a "crime" because motor vehicle violations are not "criminal" offenses but merely petty offenses). The Court noted that the "same analysis applies to careless driving, reckless driving, and other Title 39 convictions that carry a potential for a custodial sentence[,]" to include N.J.S.A. 39:4-50 (DWI). Palma, supra, 219 N.J. at 596.

Here, the sentencing judge sentenced defendant for the DWI infraction, finding aggravating factors: the risk defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3), and the need for deterring the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). The sentencing judge found applicable mitigating factors: the defendant has no prior history of criminal activity, N.J.S.A. 2C:44-1(b)(7), and defendant is

likely to respond affirmatively to probationary treatment N.J.S.A. 2C:44-1(b)(10). In doing so, the judge improperly relied on N.J.S.A. 2C:44-1, when the determination, as it pertains to the DWI charge, should have been made using the guidance of the sentencing factors in Moran, supra, 202 N.J. at 328-29. This error warrants reversal and resentencing of the DWI. See Palma, supra, 210 N.J. at 587.

We reverse and remand for resentencing the DWI conviction, using the Moran factors. Further, we remand to the trial court to amend the JOC to reflect the sentence imposed on the eluding charge includes inpatient treatment as a condition of defendant's probationary sentence.

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