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March 19, 2025

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3174-23T5

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal from a Final Judgment
	:	of Conviction in the Superior
	:	Court, Law Division, Monmouth County
v.	:	
	:	Indictment No. 22-06-0899
COWAN RAINEY,	:	
Defendant-Respondent.	:	Sat Below:
	:	Honorable Christie L. Bevacqua, J.S.C.,
	:	and a jury
	:	

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BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

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Defendant Confined

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### **PRELIMINARY STATEMENT**

After a jury trial, on May 11, 2023, a jury found Defendant-Respondent Cowan Rainey guilty of second degree aggravated assault. The State moved for the imposition of a mandatory extended term of imprisonment pursuant to N.J.S.A. 2C:43-7.1(b)(1). The motion was based on predicate convictions for robbery; one in 1995; and the other on September 29, 2023.

The State filed its Notice of Motion for an extended term on July 14, 2023. At the time that the State's motion was filed, the proposed second predicate crime, a robbery charged under Monmouth County Indictment No. 21-11-1514, was based on a July 7, 2023 jury verdict.

The trial court denied the State's motion, finding that the State's motion had been filed beyond the 14 day deadline set forth in R. 3:21-4(g), and that this severe deficiency was fundamentally unfair to Defendant. The State appealed.

Defendant submits that the trial court's Order should be affirmed, both because the State's motion was not timely filed, and because, when the notice of intention to seek the extended term was filed, Defendant had not yet been sentenced on the second predicate crime, and thus had not "been convicted" of this crime, as required by N.J.S.A. 2C:43-7.1(b)(1).

## **STATEMENT OF PROCEDURAL HISTORY**

On January 6, 1995, Defendant-Respondent Cowan Rainey was convicted of robbery on Monmouth County Indictment No. 94-05-0849. (Pa 20 to Pa22).

Monmouth County Indictment No. 21-11-1514 charged Defendant with conduct that occurred on August 1, 2021. This indictment was assigned to the Honorable Joseph W. Oxley, J.S.C. (Pa16 to Pa19).<sup>1</sup>

Monmouth County Indictment No. 22-06-0899 charged Defendant with conduct that occurred on October 20, 2021. This indictment was assigned to the Honorable Christie L. Bevacqua. (Pa1 to Pa3).

The Bevacqua indictment proceeded to trial in May 2023. On May 11, 2023, the jury found Defendant guilty of second degree aggravated assault. (Pa4 to Pa7).

The Oxley indictment proceeded to trial on June 26, 2023. On July 7, 2023, the jury returned a verdict of guilty of the crime of second degree robbery. (Pa13).

On July 14, 2023, the State filed its motion for a mandatory extended term pursuant to N.J.S.A. 2C:43-7.1(b)(1). The State's motion listed as the

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<sup>1</sup> In order to avoid confusion, Defendant will refer to this indictment as "the Oxley indictment" and to Indictment No. 22-06-0899 as "the Bevacqua indictment" in accord with the procedure utilized by the State.

necessary second predicate conviction required by the statute the July 7, 2023 jury verdict on the Oxley indictment. (Pa13).

On September 29, 2023, Judge Oxley sentenced Defendant on the robbery charge to a term of 18 years subject to the No Early Release Act (NERA). (Pa16 to Pa19).

On May 1, 2024, Judge Bevacqua heard the State's motion for a mandatory extended term and conducted the sentencing of Defendant. Judge Bevacqua denied the State's motion. (Pa74; 3T:8-20 to 11-9).<sup>2</sup> Judge Bevacqua sentenced Defendant on Indictment No. 22-06-0899 to a term of 8 years subject to NERA, consecutive to the 18 year NERA sentence imposed by Judge Oxley. (Pa4 to Pa7).

On June 14, 2024, the State filed a Notice of Appeal to this Court. (Pa79 to Pa81).

The State's appeal was heard by a Sentencing Oral Argument panel of this Court on December 4, 2024. The panel removed the case to the plenary calendar.

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<sup>2</sup> 3T refers to the motion and sentencing transcript of May 1, 2024.

### **STATEMENT OF FACTS**

At the motion hearing, the State argued that the mandatory extended term of imprisonment must be imposed because Defendant stood before the court for sentencing having twice been convicted of robbery. (3T:4-18 to 5-23).

Counsel for Defendant argued that the extended term should not be imposed because court scheduling resulted in the adjournment of sentencing on the Bevacqua indictment until after sentencing on the Oxley indictment. (3T:7-1 to 8-19).

Judge Bevacqua found that the State's July 14, 2023 notice of motion for the extended term was "severely deficient," and that no good cause was shown to warrant the relaxation of the 14 day deadline set forth in R. 3:21-4(g). (3T:9-17 to 11-9). The court denied the motion for an extended term. (Pa74).

## **LEGAL ARGUMENT**

### **POINT ONE**

#### **THE TRIAL COURT’S ORDER DENYING THE STATE’S MOTION FOR THE IMPOSITION OF A MANDATORY EXTENDED TERM OF IMPRISONMENT PURSUANT TO N.J.S.A. 2C:43-7.1 SHOULD BE AFFIRMED**

(3T:8-20 to 11-9; Pa74)

The State sought the imposition of a mandatory extended term of imprisonment pursuant to N.J.S.A. 2C:43-7.1. Defendant had been previously convicted, on January 6, 1995, of a second degree robbery. (Pa20 to Pa22).

In 2023, Defendant faced two pending indictments in Monmouth County. Indictment No. 21-11-1514 (the Oxley indictment) charged Defendant with conduct that occurred on August 1, 2021. (Pa16 to Pa19). Monmouth County Indictment No. 22-06-0899 (the Bevacqua indictment) charged Defendant with conduct that occurred on October 20, 2021. (Pa1 to Pa3).

Defendant chose to go to trial on each indictment. Although it charged conduct which occurred after that at issue in the Oxley indictment, the Bevacqua indictment found its way to trial first. On May 11, 2023, the jury found Defendant guilty of second degree aggravated assault. (Pa4 to Pa7).

The Oxley indictment proceeded to trial on June 26, 2023. On July 7, 2023, the jury returned a verdict of guilty of the crime of second degree robbery. (Pa13).



On July 14, 2023, the State filed its motion for a mandatory extended term pursuant to N.J.S.A. 2C:43-7.1(b)(1). That statute provides that a person who is convicted of aggravated assault (or another of the enumerated crimes), and “has been convicted” of any of the enumerated crimes, including robbery, “committed on two or more prior occasions regardless of the dates of the convictions” shall be sentenced to an extended term of imprisonment.

R. 3:21-4(g) provides, in pertinent part, “A notice to impose sentence pursuant to N.J.S.A. 2C:43-7.1, N.J.S.A. 2C:43-7.2, or 2C:44- 5.1 shall be filed with the court and served upon the defendant by the prosecutor within 14 days of the entry of the defendant's guilty plea or return of the verdict.” “For good cause shown the court may extend the time for filing the notice.”

In its July 14, 2023 notice, the State listed as the necessary second predicate conviction required by the statute the July 7, 2023 jury verdict on the Oxley indictment. (Pa13). On September 29, 2023, Judge Oxley sentenced Defendant on the robbery charge to a term of 18 years subject to NERA. (Pa16 to Pa19).

Sentencing on the Bevacqua indictment was adjourned to May 1, 2024, at which time Judge Bevacqua heard argument on the extended term motion. The State argued that the mandatory extended term of imprisonment must be

imposed because Defendant stood before the court for sentencing having twice been convicted of robbery. (3T:4-18 to 5-23).

Counsel for Defendant argued that the extended term should not be imposed because court scheduling resulted in the adjournment of sentencing on the Bevacqua indictment until after sentencing on the Oxley indictment. (3T:7-1 to 8-19).

Judge Bevacqua denied the motion, finding that the State's July 14, 2023 notice of motion for the extended term was "severely deficient," and that no good cause had been shown to warrant the relaxation of the 14 day deadline set forth in R. 3:21-4(g). The trial judge stated that the deficiency was the belated filing of the motion, and the absence of proof of personal service of the motion on Defendant. (3T:9-17 to 11-9). Defendant submits that the trial court's Order denying the motion should be affirmed, both because notice of the motion was untimely, and because when the filing was made, the second predicate conviction required by the statute did not yet exist.

In this case, both Defendant (3T:7-1 to 8-19) and the State (State's brief, p. 8), seek to rely upon the vagaries of court scheduling as reasons why the extended term of imprisonment should or should not be imposed. The State concedes that its Notice of Motion was filed 43 days late (State's brief, p. 8), but argues that this couldn't be helped because "The Oxley indictment did not

ripen into defendant's second strike, which made him eligible for N.J.S.A. 2C:43-7.1(b)(1), and a conviction upon which the State could rely for the filing of its extended term motion, until the return of its verdict on July 7, 2023." On this basis, the State argues that its notice was timely. (State's brief, p. 8).

Unfortunately, the State's contention rests on flawed logic. The State acknowledges that Defendant was not eligible for the extended term set forth in N.J.S.A. 2C:43-7.1(b)(1) without reliance on the second strike of the Oxley indictment conviction. (State's brief, p. 8). However, the State's claim that the second strike of the Oxley indictment's robbery conviction was in existence at the time the State filed its Notice on July 14, 2023 is incorrect.

The jury hearing the Oxley indictment returned its guilty verdict on July 7, 2023, to be sure. However, the existence of the verdict alone was insufficient to satisfy the statutory requirements of N.J.S.A. 2C:43-7.1(b)(1), that the defendant "has been convicted" of predicate offenses "on two or more prior and separate occasions regardless of the dates of the convictions."

N.J.S.A. 2C:43-7.1(b)(1) employs the present perfect tense, applying the mandatory extended term to one who "has been convicted" of one of the enumerated offenses. The words and phrases of a statute are to be read and construed with their context, and unless inconsistent with the manifest intent

of the Legislature or unless another or different meaning is expressly indicated, must be given their generally accepted meaning, according to the approved usage of the language. State v. Italiano, 480 N.J.Super. 1, 8-9 (App.Div. 2024).

The use of the words, “has been convicted” refers to an event which occurred in the past and which already exists. Accordingly, when a defendant is to be put on notice of the State’s intention to seek such a mandatory extended term sentence, there must, at the time of the notice, exist two or more predicate convictions. In the instant case, when the State’s Notice was filed on July 14, 2023, only one predicate conviction existed.

The jury which tried the Oxley indictment had returned its verdict, however sentencing did not take place until September 29, 2023. A verdict alone does not represent a conviction. State v. Bishop, 350 N.J.Super. 335, 345 (App.Div.), certif. denied, 174 N.J. 192 (2002). A conviction does not exist until sentencing has occurred, the judge has signed the judgment of conviction, and the judgment has been entered by the clerk. County of Hudson v. State Dept. of Corrections, 208 N.J. 1, 17-18 (2011); Sassano v. BLT Discovery, Inc., 245 N.J.Super. 539, 545-547 (App.Div. 1991); State v. Moore, 178 N.J.Super. 417, 427 (App.Div.), certif. denied, 87 N.J. 406 (1981); R. 3:21-5.

In denying the State's motion, the trial judge found the State's Notice to be 'severely deficient.' (3T:9-17 to 11-9). In this, the trial judge referred to the fact that the Notice was filed 43 days beyond the 14 day deadline imposed by the Rules of Court. This deficiency alone was ample reason to deny the State's motion. However, Defendant submits that an even more compelling reason was that the Notice (Pa8) relied upon a conviction that did not then exist. At the time the Notice was filed, two predicate convictions did not exist, and Defendant was not subject to the mandatory extended term of N.J.S.A. 2C:43-7.1(b)(1), thus the Notice not only was "severely deficient," it was fatally deficient.

The State argues there was good cause for relaxation of the 14 day deadline, suggesting that court scheduling was responsible for any delays. (State's brief, pp. 6-7). The State suggests that it was court scheduling which prevented a timely filing, because "The Oxley indictment did not ripen into defendant's second strike, which made him eligible" for the extended term until the July 7 verdict. (State's brief, p. 8).

As has been detailed above, the notion that a verdict is a conviction is legally incorrect. Moreover, the State's argument ignores a pertinent fact. Extending the 14 day deadline an additional 43 days does not represent "good cause" for such a relaxation of the rules. The stark fact is that, at no time

within the 14 day deadline of R. 3:21-4(g) was Defendant eligible for the mandatory extended term as he had not been convicted of a second predicate crime. Extending the deadline 43 days in the name of “good cause” does not serve justice, it instead rewrites N.J.S.A. 2C:43-7.1(b)(1) and distorts its intent.

For the reasons set forth herein, Defendant submits that this Court should affirm the judgment of the trial court denying the State’s motion for a mandatory extended term of imprisonment.

## **POINT TWO**

### **IN THE EVENT OF A REMAND, THE DETERMINATION AS TO DEFENDANT’S ELIGIBILITY FOR AN EXTENDED TERM OF IMPRISONMENT WILL REQUIRE A JURY TO FIND THE NECESSARY FACTS (Not Raised Below)**

In Erlinger v. United States, 602 U.S. 821 (2024), the United States Supreme Court ruled that decisions as to the existence of the facts necessary for the imposition of an enhanced sentence based upon prior convictions is to be made by a jury, and not by a judge. *Id.* at 849. The Erlinger decision was interpreted by this Court in State v. Carlton, 480 N.J.Super. 311 (App.Div. 2024). The Carlton Court held that the rule set forth in Erlinger is to be retroactively applied to cases in the direct appeal “pipeline.” State v. Carlton, *supra*, 480 N.J.Super. at 337-338. The instant case is such a pipeline case.

Accordingly, Defendant agrees with the State’s judgment that, should this matter be remanded to the trial court for the imposition of an extended term of imprisonment, it will be necessary to empanel a jury to determine the appropriate facts. (State’s brief, pp. 1-13).

**CONCLUSION**

For the reasons set forth in Point One above, Defendant submits that the trial court's judgment denying the imposition of an extended term of imprisonment should be affirmed.

For the reasons set forth in Point Two above, Defendant submits that, in the event of a remand, a jury must be empaneled to find the necessary facts.

Respectfully submitted,

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ATTORNEY FOR THE  
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**BY: /s/ Frank M. Gennaro**

**Frank M. Gennaro, Esq.**

**March 19, 2025**