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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0997-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ALFRED McMILLIAN,

Defendant-Appellant.

Submitted January 31, 2017 - Decided March 10, 2017

Before Judges Reisner and Koblitz.

On appeal from the Superior Court of New
Jersey, Law Division, Camden County,
Indictment No. 92-07-1560.

Alfred McMillian, appellant pro se.

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Maura G. Murphy,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Alfred McMillian appeals from his amended June 23,
2014 judgment of conviction (JOC) after a 1994 conviction for a
murder that occurred in 1992. He argues that the belated

correction of the judgment violated his double-jeopardy rights. We agree and reverse.

This case has a complicated procedural history, which we must set forth in some detail to explain the result. A Camden County jury convicted defendant of: murder, N.J.S.A. 2C:11-3(a)(1), (2) (count one); third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) (count two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count three); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count four).

On June 3, 1994, the trial judge entered the original JOC. He merged count three into count one and sentenced defendant to life with no parole eligibility for 30 years on count one, murder. He mistakenly sentenced defendant to ten years with no parole eligibility for five years for third-degree aggravated assault, count two, to run consecutive to count one. Finally, he sentenced defendant to five years with two and one-half years of parole ineligibility for third-degree possession of a weapon, count four, to run consecutive to the other counts. Thus, defendant received a parole ineligibility term of thirty-seven and one-half years.

On December 9, 1994, the trial judge amended the JOC and corrected the sentence for count two, aggravated assault, to five years with two and one-half years of parole ineligibility. This

sentence continued to run consecutively to the sentence for the murder conviction, such that defendant was now sentenced to a thirty-five year term of parole ineligibility. On December 14, 1995, less than two years after defendant's conviction, we upheld defendant's conviction, but modified defendant's sentence so that the sentence for count two, aggravated assault, ran concurrent with count one, murder. State v. McMillian, No. A-6815-93 (App. Div. December 14, 1995). We remanded the case to the trial court to modify the JOC.

On February 16, 1996, the trial judge held a brief hearing to modify the JOC. He mistakenly ordered count four to run concurrent to the murder charge rather than count two. The trial judge stated that the sentence on count four was a five-year term of imprisonment, with three years of parole ineligibility pursuant to the Graves Act, N.J.S.A. 2C:43-6(c), thus increasing the period of parole ineligibility by six months. The judge then entered an amended JOC reflecting the incorrect modification just as he stated it on the record. Defendant thus received a mandatory minimum term of thirty-two and one-half years.

On April 15, 2011, defendant filed a motion to set aside the \$5,000 payment to the Victims of Crime Compensation Board. After the trial court dismissed defendant's motion, defendant appealed, and we affirmed. In our opinion, we recognized that the trial

judge "mistakenly modified the sentence on the weapons charge rather than on the aggravated assault charge." State v. McMillian, No. A-5984-10 (App. Div. August 10, 2012). We also added in a footnote that if the trial court did not modify the JOC correctly, defendant could request relief in the trial court.

On May 9, 2014, defendant filed a motion for correction of sentence and for a resentencing hearing. A new judge, the motion judge, explained that the trial judge had acknowledged our decision on the record, but "the JOC carried the wrong count numbers and that matter then continued to run forward." Further, the motion judge explained that he was merely correcting a technical error, stating, "it's clear the Court intended to run Count 2, not Count 4 concurrent to Count 1. As such, the [JOC] should be amended to reflect the Appellate Division's 1995 opinion making Counts 1 and 2 run concurrent and for Count 4 to run consecutive."

On June 23, 2014, nine and one-half years after defendant was originally sentenced, the motion judge issued an amended JOC reflecting the new sentence: count one, murder, a life term with thirty years of parole ineligibility; count two, aggravated assault, a five-year term with three years of parole ineligibility to run concurrent with count one; and count four, unlawful possession of a weapon, a five-year term with three years of parole ineligibility, to run consecutive to the murder charge. Thus the

motion judge not only ordered count four to run consecutive to count one, but also increased the mandatory minimum term of count four by six months, so that defendant was sentenced to a thirty-three year term of parole ineligibility.

In his pro se brief, defendant raises the following issues:

POINT I: [THE MOTION JUDGE] LACKED JURISDICTION WHEN HE IMPROPERLY AMENDED [THE JOC] BY RUNNING DEFENDANT'S ILLEGAL POSSESSION OF A WEAPON (2C:39-5B) COUNT 4, TO RUN CONSECUTIVE TO THE REMAINING CHARGES, WHICH IS CONTRARY TO THE [TRIAL JUDGE]'S SENTENCE RUNNING SAME COUNT CONCURRENT.

POINT II: [THE MOTION JUDGE] IMPROPERLY DENIED DEFENDANT'S ILLEGAL SENTENCE MOTION AND FOR A NEW SENTENCING HEARING.

This appeal involves questions of law, which we review de novo. State v. Harris, 181 N.J. 391, 415 (2004). The State argues that the motion judge merely corrected a clerical error.

Rule 1:13-1 states:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight and omission may at any time be corrected by the court on its own initiative or on the motion of any party, and on such notice and terms as the court directs, notwithstanding the pendency of an appeal.

"The protection against double jeopardy bars double punishment for the same conviction, but does not prevent correction of a clerical error so that the sentence actually intended by the initial exercise of judicial discretion may be given a defendant."

State v. Matlack, 49 N.J. 491, 502, cert. denied, 389 U.S. 1009, 88 S. Ct. 572, 19 L. Ed. 2d 606 (1967). Courts may correct "inadvertent clerical-type errors" so the defendant receives the sentence that the trial court intended. Ibid. An illegal sentence, however, cannot be corrected after it has been served, absent a "devious plot" on the part of defendant to engineer the illegality. State v. Schubert, 212 N.J. 295, 299, 309, 313 (2012) (holding that a court may not "amend a [JOC] after a defendant has finished serving the sentence imposed upon him to include a provision erroneously omitted at the time of sentencing that increases the punitive consequences of that sentence"). The Schubert court decided that adding to a defendant's sentence after it has been served constitutes an unconstitutional double punishment for the same offense. Id. at 304-05.

This is not a situation where the correct sentence was imposed on the record and the JOC alone was incorrect. When the JOC and the sentencing transcript conflict, "[i]t is firmly established that the sentencing transcript is 'the true source of the sentence.'" State v. Walker, 322 N.J. Super. 535, 556 (App. Div.) (quoting State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956)), certif. denied, 162 N.J. 487 (1999). Here, however, although the trial judge stated on remand that he was following our decision regarding running the aggravated assault sentence

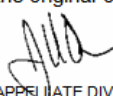
concurrent to the murder sentence, he then incorrectly stated that the aggravated assault charge was count four of the indictment. Thus, the trial judge's mistake was on the record as well as in the written judgement of conviction. As defense counsel argued at the resentencing, by the time the motion court heard the motion to correct the sentence, defendant had completed service of the entire five-year concurrent sentence for possession of a weapon.

Thus, we agree with defendant that as of the time he completed serving the term imposed for the weapons charge, he could no longer be required to serve that sentence over again. The extended resentencing process was not in any way created by defendant, nor does the State allege that defendant somehow instigated the various errors. Had the State been more vigilant defendant's sentence could have been properly corrected before he completed serving the weapons sentence.

We previously determined that the aggravated assault conviction could not result in a consecutive sentence. We therefore reverse and remand for the entry of an amended JOC reflecting that all three sentences run concurrent to each other, leaving defendant with a life sentence with a thirty-year mandatory minimum.

Reversed and remanded for the entry of a corrected JOC. 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