

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1967-16T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

NICHOLAS MASCE,

Defendant-Respondent.

APPROVED FOR PUBLICATION

November 16, 2017

APPELLATE DIVISION

Argued September 12, 2017 – Decided November 16, 2017

Before Judges Fisher, Fasciale and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Indictment
No. 16-01-0001.

John A. Nicodemo, Deputy Attorney General,
argued the cause for appellant (Christopher
S. Porrino, Attorney General, attorney; Mr.
Nicodemo, of counsel and on the brief).

Jaime B. Herrera, Assistant Deputy Public
Defender, argued the cause for respondent
(Joseph E. Krakora, Public Defender,
attorney; Ms. Herrera, of counsel and on the
brief).

The opinion of the court was delivered by
MOYNIHAN, J.S.C. (temporarily assigned).

The State of New Jersey appeals from the sentencing judge's
order denying its request to enter, as part of the plea
agreement reached between it and defendant, a civil consent

judgment for restitution due the victims of defendant's theft, and from an order denying reconsideration. We agree with the sentencing judge that he was without statutory authority to enter the judgment and affirm.

Defendant pleaded guilty to an amended charge of third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a), admitting he took \$85,131.18 in benefits directly deposited in his deceased mother's bank account after her death. The victims of the theft were two pension funds and the United States Social Security Administration.¹ The State recommended that, as part of the plea agreement, defendant pay restitution in the full amount due all victims, a payment schedule be set through probation, and the judge enter a civil consent judgment in favor of the victims.

Judge Kevin T. Smith entered the plea but expressed reservations about his ability to order the entry of a civil consent judgment. Prior to sentencing the State argued, inasmuch as N.J.S.A. 2C:44-2(f) provides that an order of restitution imposed by a sentencing judge does not bar the victim from seeking civil remedies, a sentencing judge is not precluded from entering a civil consent judgment to prevent the

¹ Defendant took funds deposited by the Social Security Administration in the amount of \$74,601 and by the two pension funds - \$6555.78 from one, \$3974.40 from the other.

victim's incurrance of further expense in pursuit of a civil recovery. Defendant took no position.

Judge Smith, in a written opinion, rejected the State's interpretation of N.J.S.A. 2C:44-2(f), holding that the Legislature intended that civil remedies be pursued in a civil court; the Legislature did not provide for recovery through the criminal sentencing process. The judge also took issue with the ethical propriety of requiring defendant to agree to a civil consent judgment as part of a plea agreement. He concluded it was "improper for the State to . . . threaten criminal prosecution to get an upper hand in a civil matter," citing RPC 3.4(g). The State argued in a motion for reconsideration that N.J.S.A. 2C:43-2(d) allowed "the court to . . . impose any . . . civil penalty" conferred by law at sentencing. Judge Smith again disagreed, ruling the penalties that may be imposed under that statute are those provided in the New Jersey Code of Criminal Justice (the Code), such as forfeiture of public office and limitation on Internet access, but a civil consent judgment was not included among those penalties.

On appeal, the State contends that the judge erred because the Code "clearly sets forth authority for a sentencing court to impose civil penalties at sentencing," and that a civil consent judgment is "a lawful means" conferred by law to ensure

remuneration of victims "above and beyond an order of restitution." The State also submits the entry of a consent judgment "raises no ethical considerations." Defendant counters that the judge was without authority to enter the judgment because a civil consent judgment "is a contractual agreement and not a 'penalty.'"

In determining the propriety of entering civil consent judgments in favor of crime victims at sentencing, it is necessary to analyze the applicable statutory provisions. We owe no deference to the sentencing judge's legal interpretation of those statutes, a purely legal issue, and conduct our review de novo. State v. Buckley, 216 N.J. 249, 260-61 (2015); Manalapan Realty LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"Our task in statutory interpretation is to determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009). The Supreme Court recognized the statutory directive we utilize to explicate a legislative enactment:

In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning,

according to the approved usage of the language.

[State v. Gandhi, 201 N.J. 161, 177 (2010) (quoting N.J.S.A. 1:1-1).]

"[W]e look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen." Pizzullo v. New Jersey Mfrs. Ins. Co., 196 N.J. 251, 264 (2008). If the statutory language is ambiguous, we turn to extrinsic evidence from "a variety of sources . . . [c]entral among [which] is a statute's legislative history." Richardson v. Bd. of Trs., P.F.R.S., 192 N.J. 189, 196 (2007).

Because there are a number of provisions in the Code that apply to our analysis, we heed the Court's direction that

[s]tatutes must be read in their entirety; each part or section should be construed in connection with every other part or section to provide a harmonious whole. When reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers' will. Statutes that deal with the same matter or subject should be read in pari materia and construed together as a unitary and harmonious whole.

[In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010) (citations omitted).]

Our analysis begins with the general principle that all sentences imposed by a court for any offense must comport with Chapter 43 of the Code, N.J.S.A. 2C:43-1 to -22. N.J.S.A.

2C:43-2(a). Courts, unless compelled by the Code to impose restitution,² have the discretion to sentence a defendant to pay restitution. N.J.S.A. 2C:43-2(b)(1), -2(b)(4), -3.

Courts cannot simply gauge the amount of restitution by a victim's loss. Although the amount of restitution may not exceed the amount of loss,³ N.J.S.A. 2C:43-3, "[i]n determining the amount and method of payment of restitution, the court shall take into account all financial resources of the defendant, including the defendant's likely future earnings, and shall set the amount of restitution so as to provide the victim with the fullest compensation for loss that is consistent with the defendant's ability to pay[,]" N.J.S.A. 2C:44-2(c)(2).

² See, e.g., N.J.S.A. 2C:44-2(b) (requiring a court to order restitution be paid by a defendant if the loss was incurred by the victim of a homicide – or by a victim's relative – and the defendant has the ability to pay, either at the time of sentencing or, "given a fair opportunity," thereafter). See also N.J.S.A. 2C:11-3c (mandating the court to order a person convicted of murder to pay restitution to the victim's nearest surviving relative); N.J.S.A. 2C:43-2.1 (mandating that a defendant convicted of motor vehicle theft or unlawful taking be ordered to pay restitution to the victim for any reasonable and necessary expense incurred in recovering the vehicle, and for the amount of damages sustained); N.J.S.A. 2C:43-3 (mandating the court to order restitution if the victim is a department or division of the State of New Jersey).

³ An exception exists for a defendant's failure to pay taxes to the State.

The distinction between restitution and civil remedies is clear from the stated purposes of restitution, as noted by the Supreme Court in State v. Harris, 70 N.J. 586, 591-92 (1976):

[W]e are of opinion that restitution is not only an appropriate but frequently a salutary technique in the criminal process, and in the purposes of the probation system contemplated by the statute.

And, necessarily without prejudice to the right of any aggrieved party to seek to recover damages in a civil action (because not a party to the criminal disposition), we regard it as preferable in the ordinary case, where feasible, to provide for restitution within the probation context. This for two main and coalescing reasons. One may be termed the "justice" factor. The court which orders restitution acts in the interest of repairing the harm done the aggrieved party. In meting out substantial justice in this fashion, the court is even more importantly motivated by another reason, which may be termed the "rehabilitation" factor — the predominant rehabilitative aspect of probationary restitution.

We therefore agree with the Appellate Division that:

Restitution in a proper case may oftentimes be a compelling reminder of the wrong done and meaningfully contribute to the rehabilitation process.

The entry of a consent judgment would run counter to both the court's statutory duty to determine a defendant's ability to pay and the rehabilitative purpose of restitution. If a judgment was docketed for the full amount of a victim's loss,

the victim could enforce the full amount of the judgment, without regard to the court's finding of the defendant's ability to pay. Enforcement would obviate any payment schedule set by the court, thwarting "the predominant rehabilitative aspect of probationary restitution." Id. at 592.

Further analysis of the statutory scheme of restitution reveals the Legislature made no provision for civil consent judgments in the sentencing provisions of the Code. It did provide, however, for the filing of an order or judgment of conviction in certain instances.

When a defendant is sentenced to pay restitution, the court may, under N.J.S.A. 2C:46-1(a), "grant permission for the payment to be made within a specified period of time or in specified installments." If permission is not granted, N.J.S.A. 2C:46-1(a) dictates, "restitution shall be payable forthwith, and the court shall file a copy of the judgment of conviction with the Clerk of the Superior Court who shall enter . . . information upon the record of docketed judgments" including, in pertinent part, naming the defendant as judgment debtor, N.J.S.A. 2C:46-1(a)(1); and "the amount of any restitution ordered and the name of any persons entitled to receive payment as judgment creditors in the amount and according to the priority set by the court[,]" N.J.S.A. 2C:46-1(a)(3).

A like aid to victims was also prescribed in N.J.S.A. 2C:43-2.1, which compels a court to order a defendant convicted of theft or unlawful taking of a motor vehicle to make restitution "for any reasonable and necessary expense incurred by the owner in recovering the motor vehicle and for any damage to the motor vehicle prior to its recovery." The statute directs the court to file a copy of the order compelling restitution with the Clerk of the Superior Court who must enter on the "record of docketed judgments the name of the convicted person as judgment debtor, and of the owner as judgment creditor," as well as the basis of the order, the amount of restitution and the date of the order. N.J.S.A. 2C:43-2.1. Such entry has "the same force as a judgment docketed in the Superior Court." N.J.S.A. 2C:43-2.1.

Though these provisions allow entry of documents tantamount to civil judgments, the procedures authorized by the Legislature do not include actual entry of a civil judgment.

The Legislature did not provide for entry of a civil judgment in favor of a victim even in the event of a default in payment of restitution by a defendant. Courts are not permitted to impose an alternative sentence in anticipation of a default; courts may respond only after non-payment, and then only in accordance with the statutory framework. N.J.S.A. 2C:44-2(d).

Upon default, and after a motion is filed, a hearing held, and a finding made by the court that the default was without good cause and willful,⁴ a court can take the actions set forth in N.J.S.A. 2C:46-2(a) and (b). Although a number of options are available under those sections, the entry of a civil judgment is not among them. The Legislature did provide, however, upon default, "execution may be levied and such other measures may be taken for collection of it or the unpaid balance thereof as are authorized for the collection of an unpaid civil judgment entered against the defendant in an action on a debt." N.J.S.A. 2C:46-2(b). A victim entitled to payment from a defaulting defendant is also permitted to institute summary collection proceedings authorized by N.J.S.A. 2C:46-2(b). N.J.S.A. 2C:46-2(c). The statute grants no power to a criminal judge to aid a victim in collecting the balance of restitution by entering a civil consent judgment.

Other statutes echo the legislative intent to allow a victim to pursue civil remedies, albeit without grant of any authority to a criminal court to aid the victim in seeking such remedies:

The ordering of restitution pursuant to this section shall not operate as a bar to

⁴ At the hearing, the defendant has the burden of proving good cause for the default by a preponderance of the evidence.

the seeking of civil recovery by the victim based on the incident underlying the criminal conviction. Restitution ordered under this section is to be in addition to any civil remedy which a victim may possess, but any amount due the victim under any civil remedy shall be reduced by the amount ordered under this section to the extent necessary to avoid double compensation for the same loss, and the initial restitution judgment shall remain in full force and effect.

[N.J.S.A. 2C:44-2(f).]

Our review of the plain language of the comprehensive laws regarding restitution to crime victims leads us to conclude that criminal courts are proscribed from entering civil consent judgments when sentencing a defendant ordered to make restitution. If all sentences must be imposed in accordance with the Code, and the Code makes no provision for a court to enter a civil consent judgment, the entry of such a judgment would contravene the parameters of the authority conferred on sentencing courts by the Legislature. Although resorting to legislative intent is unnecessary when the statutes' plain language is unambiguous, State v. Nance, 228 N.J. 378, 393 (2017), we elect to undertake a thorough review.

Most of the statutes we analyzed were enacted by the Legislature in 1991,⁵ in a comprehensive effort to make crime

⁵ L. 1991, c. 329.

victims whole after suffering a loss at the hands of a criminal defendant. The Assembly Judiciary, Law and Public Safety Committee recognized that the 1991 bill "amends various sections of law concerning victims of crime[,]" including "N.J.S.A. 2C:1-2 concerning the general purposes of the criminal code sentencing provisions to include the purpose to promote restitution to victims." Assembly Judiciary, Law and Pub. Safety Comm., Statement to A. 4819 (June 6, 1991). See also State v. Newman, 132 N.J. 159, 175 (1993). The Sponsor Statement and the Assembly Appropriations Committee Statement both provide the aim of the bill is to "require[] courts to order defendants to compensate their victims to the fullest extent possible" given their ability to pay. Sponsor's Statement to A. 4819 (enacted as L. 1991 c. 329); Assembly Appropriations Comm., Statement to A. 4819 (August 1, 1991).

The Appropriations Committee noted that the legislation

provides several measures to improve the State's ability to collect moneys owed by convicted persons: a court granting probation or imposing a suspended sentence must require, as a condition of the probation or suspended sentence, that the defendant make complete payment of restitution and assessments for victims and witnesses; the probationary term of any person who fails to meet these obligations must be extended; the Department of Corrections must withhold moneys owed from funds earned by and kept for inmates; and persons who default without good cause lose

the privilege of driving in this State until full payment is made.

[Assembly Appropriations Comm., Statement to A. 4819 (August 1, 1991).]

The measures enacted by the Legislature to foster collection of restitution, among other payments due from sentenced defendants, did not include civil consent judgments. Although the Legislature enacted sweeping changes to provide compensation to crime victims, it provided sparse civil relief – and none involving consent judgments. We are convinced the legislative intent was to limit the aid to a victim's civil recovery to that set forth in the statutes.

The State contends civil consent judgments are authorized by N.J.S.A. 2C:43-2(d), which provides that Chapter 43 of the Code – Authorized Disposition of Offenders – "does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence." It argues the judgment is a civil penalty which a court may order and enter.

The State's argument does not consider the qualifying language in the statute that the authority to impose a civil penalty must be conferred by law. As we have deduced, civil

consent judgments are not among the penalties conferred by law. We construe N.J.S.A. 2C:43-2(d) to mean that the court may impose those civil penalties specified in a statute. The civil penalties include, as set forth in N.J.S.A. 2C:43-2(d), suspension or cancellation of driving privileges as provided for in a number of statutes, including N.J.S.A. 2C:43-2(c) and 2C:46-2(a)(1)(a). Likewise, removal from office is a civil penalty expressly authorized by N.J.S.A. 2C:51-2.⁶

The two cases relied upon by the State in support of its argument are inapposite. Both Old Bridge Public Workers & Sanitation Union v. Township of Old Bridge, 231 N.J. Super. 205 (App. Div. 1989), and State v. Baber, 256 N.J. Super. 240 (Law Div. 1992), involved forfeiture of public office, a penalty expressly authorized by statute as a collateral consequence of conviction.

When the Legislature provided a statutory procedure to recover payment of fines, we declined to construe N.J.S.A. 2C:43-2(d) as conferring authority on a court to impose fines as a "civil penalty." In State v. McLaughlin, 310 N.J. Super. 242,

⁶ An example of one of the "other" civil penalties under N.J.S.A. 2C:43-2(d) is provided in N.J.S.A. 2C:43-3, which mandates "in any case involving the failure to pay any State tax, the amount of restitution to the State shall be the full amount of the tax avoided or evaded, including full civil penalties and interest as provided by law."

246 (App. Div.), certif. denied, 156 N.J. 381 (1998), defendant was both convicted of and pleaded guilty to crimes related to false claims and appraisals he submitted to defraud an insurance company. The trial judge imposed fines totaling \$270,000 pursuant to the New Jersey Fraud Prevention Act, N.J.S.A. 17:33A-1 to -30. McLaughlin, supra, 310 N.J. Super. at 261. Defendant appealed, arguing the trial court lacked authority to impose fines pursuant to the Act. Ibid. The State countered that the fines were properly imposed, notwithstanding language in the Act limiting imposition of civil penalties to persons who had been found guilty of violating the provisions of the Act by a court of competent jurisdiction pursuant to a claim initiated by the Commissioner of Insurance. Ibid. The State posited a criminal court has the power under N.J.S.A. 2C:43-2(d) to impose "any civil penalty." McLaughlin, supra, 310 N.J. Super. at 261. We found the trial court did not have authority pursuant to N.J.S.A. 2C:43-2(d) to impose fines as civil penalties under the Act because the Legislature specifically provided that the Commissioner was required to institute a civil action. McLaughlin, supra, 310 N.J. Super. at 261-63. Likewise, here, there is no law that allows the entry of a civil consent judgment as a penalty.

The legislative history of the 1991 amendments also convinces us that the Legislature did not intend to include civil consent judgments as penalties. The amendments removed "penalties" from provisions dealing with non-payment of restitution. Assembly Judiciary, Law and Pub. Safety Comm., Statement to A. 4819 (June 6, 1991). One of the amendments, L. 1991, c. 329, § 8, clarifying that payment of restitution may be a condition of probation, did not include payment of a penalty as a condition of probation. Assembly Judiciary, Law and Pub. Safety Comm., Statement to A. 4819 (June 6, 1991). The legislative intent to treat restitution and penalties separately is obvious.

All roads lead to the same conclusion. Judge Smith correctly recognized he was without authority to enter the civil consent judgment. Inasmuch as the court was without statutory authority to enter the judgment, we need not address the ethical implications regarding the use of such judgments in plea negotiations.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION