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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-2190-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHURQUAN SWEET,

Defendant-Appellant.

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Submitted March 16, 2017 – Decided July 27, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey,  
Law Division, Hudson County, Indictment No.  
14-05-0779.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Frank M. Gennaro, Designated  
Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,  
attorney for respondent (Erin M. Campbell,  
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Shurquan Sweet appeals from a December 21, 2015  
order denying his motion for reconsideration of his sentence.

Defendant pled guilty to second-degree unlawful possession of a weapon (handgun), N.J.S.A. 2C:39-5(b), and was sentenced to a five-year term of imprisonment, with a one-year period of parole ineligibility. He contends the court erred because it did not order a probationary sentence. We affirm.

I

Because the offense to which he pled guilty was a Graves Act offense, ordinarily a State prison sentence with a minimum parole disqualifier of forty-two months is required. See N.J.S.A. 2C:43-6(c). However, a provision in the Graves Act, N.J.S.A. 2C:43-6.2 (waiver provision), authorizes the State to move before the assignment judge for a waiver of the mandatory minimum terms of incarceration for certain first-time offenders. Defendant was a first-time offender.

Pursuant to a plea agreement, the State agreed to a waiver of the forty-two-month parole disqualifier and to recommend reduction, under the waiver provision, to one year of parole ineligibility. As the assignment judge's designee, the presiding judge of the Criminal Part authorized imprisonment with a reduction of the parole ineligibility term to one year. The matter was then returned to the sentencing court for disposition. Defendant has not challenged the presiding judge's decision.

At the sentencing hearing, defendant sought a probationary sentence. The court found applicable aggravating factors three, N.J.S.A. 2C:44-1(a)(3), risk of reoffending, and nine, N.J.S.A. 2C:44-1(a)(9), the need to deter. The court also found applicable mitigating factor ten, N.J.S.A. 2C:44-1(b)(10), the defendant is likely to respond affirmatively to probationary treatment. The court noted, "I believe . . . Mr. Sweet[] was in the process of turning his life around and I was willing to try and to give him that opportunity to do so."

Despite expressing its inclination to impose a probationary sentence, the court stated it was without discretion to order such a sentence because "this is a mandatory sentence by statute." The court then imposed a five-year term of imprisonment but, consistent with the plea agreement, reduced the forty-two-month period of parole ineligibility to one year.

Approximately three months after he was sentenced, we issued State v. Nance, 442 N.J. Super. 268 (App. Div. 2015). Defendant filed a motion for reconsideration of his sentence, arguing our decision held a sentencing court has the discretion to order a probationary sentence when a defendant has been convicted of a Graves Act offense as a first-time offender.

During argument on the motion, the sentencing court commented it would have ordered a probationary sentence if it

had the discretion to do so, but found the presumption of incarceration in light of defendant's conviction of a second-degree offense precluded it from doing so, pursuant to N.J.S.A. 2C:44-1(d). Specifically, the court noted it could not find, in accordance with N.J.S.A. 2C:44-1(d), that imprisonment would be a serious injustice which overrode the need to deter such conduct by others. In addition, the court found the mitigating factor did not substantially outweigh the aggravating ones, and the circumstances did not permit it to sentence defendant to a term of imprisonment for a third-degree offense. See N.J.S.A. 2C:44-1(f)(2).

## II

On appeal, defendant asserts the following for our consideration:

POINT I – N.J.S.A. 2C:43-6.2 PERMITS THE IMPOSITION OF A PROBATIONARY SENTENCE WITHOUT THE NECESSITY OF MEETING THE STANDARDS SET FORTH IN N.J.S.A. 2C:44-1(d) OR N.J.S.A. 2C:44-1(f)(2).

The Graves Act waiver provision provides in pertinent part:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under (a) subsection c. of [N.J.S.A.] 2C:43-6 for a defendant who has not previously been convicted of an offense under that subsection, or (b) subsection e. of [N.J.S.A.] 2C:39-10 for a defendant who has not previously been convicted of an offense

under chapter 39 of Title 2C of the New Jersey Statutes, does not serve the interests of justice, the assignment judge shall place the defendant on probation pursuant to [N.J.S.A. 2C:43-2(b)(2)] or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole.

[N.J.S.A. 2C:43-6.2.]

After filing his appeal, our Supreme Court affirmed in part and reversed in part our decision in Nance, *supra*, 442 N.J. Super. 268. *See State v. Nance*, 228 N.J. 378, 399 (2017). The Court made clear only the assignment judge (or the presiding judge of the Criminal Part acting as the assignment judge's designee) has the authority under N.J.S.A. 2C:43-6.2 to decide whether a defendant shall receive a term of imprisonment with a reduced period of parole ineligibility of one year, or, alternatively, a probationary sentence. *Id.* at 393-94. The sentencing judge has no discretion to elect either one of these two alternative sentences. *Id.* at 393. The Court stated:

We first consider who – the assignment judge or the sentencing judge – is authorized by section 6.2 to determine whether the defendant will be sentenced to a term of probation or a term of incarceration with a one-year period of parole ineligibility, following the grant of a prosecutor's motion for a waiver under section 6.2. The plain language of section 6.2 reveals a clear legislative intent that the assignment judge, not the sentencing judge, has the

statutory authority to make such a determination. N.J.S.A. 2C:43-6.2.

[Id. at 393-94.]

The Court also made clear that, if a defendant has been convicted of a first or second-degree Graves Act offense, the assignment or presiding judge, not the sentencing judge, bears the responsibility of applying the standards in N.J.S.A. 2C:44-1(d) when he or she is choosing between the probationary or one-year mandatory-minimum sentence provided in N.J.S.A. 2C:43-6.2. Id. at 386. The sentencing court's task is merely to impose a sentence that complies with the assignment or presiding judge's ruling. Id. at 394.


Here, as the assignment judge's designee, the presiding judge determined defendant was to receive a five-year term of imprisonment, with a one-year period of parole ineligibility. The sentencing judge had no authority to alter that decision, and thus could not order a probationary sentence for defendant.

On defendant's reconsideration motion, the sentencing court did consider the applicability of N.J.S.A. 2C:44-1(d) and N.J.S.A. 2C:44-1(f)(2), but that exercise turned out to be superfluous. Once the presiding judge determined defendant was to be incarcerated with a one-year period of parole ineligibility, the sentencing court's only obligation was to

order a sentence that comported with the presiding judge's determination. Here, ultimately, the sentencing court correctly carried out that task; it imposed the sentence chosen by the presiding judge.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION