

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."  
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-4993-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

V.

THOMAS G. LAHART,

Defendant-Appellant.

---

Submitted October 24, 2017 – Decided December 18, 2017

Before Judges Summers and Moynihan.

On appeal from Superior Court of New Jersey,  
Law Division, Atlantic County, Indictment No.  
12-11-2614.

Nino V. Tinari, attorney for appellant (Omid  
T. Force, of counsel and on the brief).

Damon G. Tyner, Atlantic County Prosecutor,  
attorney for respondent (Nicole L. Campellone,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant appeals from the sentencing judge's October 2, 2015  
order denying his application for a Graves Act waiver, N.J.S.A.

2C:43-6.2,<sup>1</sup> and from the same judge's order of June 28, 2016, denying defendant's motion to withdraw his guilty plea, arguing:

POINT I

THE TRIAL COURT ERRED IN DENYING THOMAS LAHART'S APPLICATION FOR A GRAVES ACT WAIVER, BECAUSE THE TRIAL COURT'S DECISION DID NOT GIVE SUFFICIENT WEIGHT TO ALL MATERIAL TERMS OF THE NEGOTIATED PLEA AND [THE] AMENDED OFFER FROM THE STATE TENDERED IN ITS MAY 26, 2015, DENIAL OF THOMAS LAHART'S FOURTH GRAVES WAIVER PETITION (WHICH WAS THE SUBJECT OF THOMAS LAHART'S APPLICATION FOR A GRAVES ACT WAIVER BEFORE THE TRIAL COURT AND INCORPORATED INTO THE TERMS OF THOMAS LAHART'S NEGOTIATED PLEA ON AUGUST 26, 2015) THAT THOMAS LAHART[ ]BE SENTENCED AS A "THIRD-DEGREE" OFFENDER-A DESIGNATION PER THE NEGOTIATED PLEA THAT ENTITLED THOMAS LAHART AT SENTENCING TO A

---

<sup>1</sup> N.J.S.A. 2C:43-6.2 provides:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under [the Graves Act] for a defendant who has not previously been convicted of [certain enumerated offenses], does not serve the interests of justice, the assignment judge shall place the defendant on probation . . . or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. The sentencing court may . . . refer a case of a defendant who has not previously been convicted of an offense under [the Graves Act] to the assignment judge, with the approval of the prosecutor, if the sentencing court believes that the interests of justice would not be served by the imposition of a mandatory minimum term.

PRESUMPTION OF NON-IMPRISONMENT UNDER N.J.S.A. 2C:44-1e (JUDGMENT OF CONVICTION [AND] ORDER FOR COMMITMENT DATED OCTOBER 2, 2015).

POINT II

THE TRIAL COURT ERRED IN DENYING THOMAS LAHART'S MOTION TO WITHDRAW GUILTY PLEA (ORDER DENYING MOTION TO WITHDRAW PLEA OF GUILTY DATED JUNE 28, 2016).

We agree that the sentencing judge erred by denying defendant's motion to withdraw his plea on procedural grounds and reverse.

Defendant was charged in a one-count indictment handed down on November 29, 2012, with second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), a Graves Act offense.<sup>2</sup> He petitioned the Atlantic County Prosecutor to move for a waiver of the Graves Act mandatory minimum term of incarceration,<sup>3</sup> and although the prosecutor denied that request, he concluded

that it is appropriate in this case to offer to allow your client to plead guilty to the single count of second[-]degree unlawful possession of a handgun . . . contained in the indictment, in return for the State's recommendation that he be sentenced as a

---

<sup>2</sup> The Graves Act, N.J.S.A. 2C:43-6(c), requires a mandatory minimum term of imprisonment be imposed on an offender who commits one of the crimes designated in the Act – including unlawful possession of a handgun – "who, while in the course of committing . . . the crime . . . was in possession of a firearm."

<sup>3</sup> The minimum term for a second-degree Graves Act offense at the time defendant was indicted was between one-third and one-half of the sentence imposed, or three years, whichever was longer. N.J.S.A. 2C:43-6(c) (2007).

third[-]degree offender to a term of three years in New Jersey State Prison with a one[-]year period of parole ineligibility.

After further negotiation, a plea agreement was finalized: in return for defendant's plea of guilty to the indictment, the State would recommend a three-year prison sentence with one year of parole ineligibility. The agreement contained the provision, "Defendant reserves [the] right to withdraw his plea if he is sentenced to a term of incarceration per the court."

After the plea was entered, but before sentencing, defendant filed a motion for relief from the Graves Act mandatory sentence, arguing that it would not serve the interests of justice if defendant received a custodial sentence, and requesting the sentencing court to impose a non-custodial probationary sentence.

The sentencing judge found defendant "failed to show that the prosecutor's decision to recommend a partial waiver rather than a recommendation for probationary treatment was an arbitrary denial amounting to a patent and gross abuse of discretion," and denied defendant's motion. The judge, however, "granted" the "Prosecutor's application<sup>[4]</sup> to sentence the [d]efendant under a 'partial waiver.'" Although the judge issued a written decision,

---

<sup>4</sup> We did not receive copies of an application "for a partial Graves waiver" referenced by the sentencing judge during the pre-sentencing proceedings on October 2, 2015.

he orally explained that he found the mitigating factors were "sufficient to warrant sentencing a degree lower, [but] they are not sufficient to show a manifest denial of justice" so as to warrant a probationary sentence. The judge stated his intention to release defendant on his own recognizance pending an apparently anticipated appeal, and to have the defendant return for status conferences every sixty days "or so." He thereafter sentenced defendant to three years in prison with a one-year period of parole ineligibility.

Defendant obtained new counsel who was admitted pro hac vice on April 11, 2016; he filed a motion to withdraw defendant's plea.<sup>5</sup> The sentencing judge decided the motion without a hearing. In a June 28, 2016 letter opinion, he recognized defendant reserved the right to withdraw his plea, but said that at defendant's sentencing in October 2015

the [c]ourt noted that "[d]efendant reserved the right to withdraw his guilty plea based on the outcome. Defendant has decided to accept the [P]rosecutor's recommendation for partial waiver." Thereafter, the [c]ourt imposed the negotiated sentence, but stayed execution of such pending appeal. It appears, however, [d]efendant did not file a timely appeal with the Appellate Division. Because [d]efendant failed to exercise his right to

---

<sup>5</sup> We received an unfiled copy of the motion dated April 6, 2016. We do not know when it was filed.

withdraw his plea at sentencing, and following imposition of sentence failed to perfect an appeal,<sup>6</sup> the [c]ourt determines that sentence should now be ordered into effect.

The State now argues that defendant did not file his motion within the time frame set by the sentencing judge. In the last two sentences of the sentencing judge's eleven-page single-spaced decision regarding the Graves Act waiver application, he wrote:

The [d]efendant should notify the [c]ourt and the Prosecutor by October 16, 2015[,] whether he intends to abide by the plea agreement and be sentenced accordingly or whether he intends to withdraw his retraxit plea and proceed to trial. The State will prepare an [o]rder consistent with this letter decision under the [f]ive[-][d]ay [r]ule.

The language in the judge's decision, acknowledging defendant had to advise the court if he accepted the plea or intended to withdraw it, contradicts that part of his decision on the motion to retract that announced defendant accepted the State's recommended sentence. Further, there is no indication in the record that defendant accepted the State's prison offer; the plea, as the judge noted in his plea-retraction decision, clearly provided he did not. Further, the judge denied the motion to withdraw because defendant had not filed a timely appeal, not

---

<sup>6</sup> On September 15, 2015, we granted defendant's motion to file a notice of appeal as within time. The notice of appeal was filed on July 21, 2016, by defendant's most recent counsel.

because he failed to file his motion within the time frame set forth in the judge's written decision. And, although the sentencing record indicates the judge handed out his written decision to counsel just after placing his oral decision on the record and just prior to sentencing, there was no pause in the proceedings, or any indication that defendant was apprised of the scheduling deadline imposed by the judge in his written decision. Nor is there any indication defendant received a copy of the order prepared by the State memorializing the judge's decision.

We recognize a motion to withdraw a guilty plea is committed to the judge's sound discretion. State v. Slater, 198 N.J. 145, 156 (2009); State v. Phillips, 133 N.J. Super. 515, 518 (App. Div. 1975). We will only overturn a judge's decision if there was an abuse of discretion causing the decision to be clearly erroneous. The Court finds an abuse of discretion when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007).

Inasmuch as it was anticipated all along that defendant would be able to retract his plea if he was "sentenced to a term of incarceration," we conclude the sentencing judge erred by denying the motion to withdraw. There is no record that defendant was

advised directly of any deadline for filing.<sup>7</sup> He expected to be brought back to court periodically pending appeal; we have no record that any such proceedings were held. And the judge denied the application based on defendant's failure to file an appeal, which was never a condition imposed by the judge.

Although the State contends defendant would not be entitled to relief under Slater,<sup>8</sup> we will not entertain that argument because it was not addressed by the sentencing judge. State v. Robinson, 200 N.J. 1, 18-22 (2009).

This is not a case where defendant's reasons for withdrawal were unknown prior to the filing of his motion. All parties were

---

<sup>7</sup> Defendant now contends his sentencing counsel was relieved following the sentencing, and failed to communicate any deadlines to him. This is a factual contention that was not considered by the sentencing judge. We leave that issue to be explored on remand.

<sup>8</sup> The Slater Court instructed trial courts to utilize a four-factor balancing test in determining a defendant's motion to withdraw a plea. A court is to consider: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawing the plea; (3) the existence of a plea bargain; and (4) whether any prejudice would result to the State if the withdrawal is permitted. Slater, 198 N.J. at 157-58. Different weight may be given to each of the factors, and the court should assess them all to achieve a just result. Id. at 158. The timing of the motion determines the standard to be applied to the court's review. A pre-sentence motion is governed by the "interest of justice" standard in R. 3:9-3(e), while a post-sentence motion is viewed under a "manifest injustice" standard pursuant to R. 3:21-1. Slater, 198 N.J. at 158.



aware of his desire to withdraw the plea if a custodial sentence was imposed. We reverse the denial of defendant's motion to withdraw and remand the case for the judge to consider the motion anew, utilizing an evidentiary hearing if deemed necessary. We do not retain jurisdiction.

In light of our remand, we need not address defendant's contentions with regard to the sentencing judge's decision regarding the Graves Act waiver. We note, however, our Supreme Court's recent holding in State v. Nance, 228 N.J. 378 (2017), that provides guidance to the parties if the Graves-waiver issue is raised. We see no provision in N.J.S.A. 2C:43-6.2, as interpreted by the Nance Court, that allows "partial waivers." If the prosecutor moves before the assignment judge or the assignment judge's designee, the judge has the authority to choose to impose a probationary sentence or a one-year mandatory prison term. Nance, 228 N.J. at 394. The prosecutor may argue in favor of one sentence recommendation or another, but the judge need not accept that recommendation. Ibid. Further, contrary to defendant's argument, the acceptance of a Graves Act waiver does not exempt defendant – on a second-degree crime – from the presumption of incarceration. Id. at 395-96.

Reversed.

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

  
CLERK OF THE APPELLATE DIVISION