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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0622-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EVERETT DOLLAR,

Defendant-Appellant.

Argued January 22, 2018 - Decided February 23, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 12-
09-2216.

Alison Perrone, Designated Counsel, argued the
cause for appellant (Joseph E. Krakora, Public
Defender, attorney; Andrew J. Shaw, Designated
Counsel, on the brief).

Kayla Rowe, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for respondent (Robert D. Laurino,
Acting Essex County Prosecutor, attorney;
Camila A. Garces, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

Defendant Everett Dollar appeals from an August 22, 2016 order denying his petition for post-conviction relief ("PCR"). Defendant contends his sentence for fourth-degree contempt is illegal because he already was otherwise punished for violating the consent order at issue. Having reviewed defendant's arguments in light of the record and applicable legal principles, we reverse and vacate defendant's conviction.

I.

We glean the facts and procedural history pertinent to this appeal from the record. Following the completion of a sentence served at the Adult Diagnostic and Treatment Center for an unspecified sexual offense, defendant was civilly committed to the Special Treatment Unit ("STU"), pursuant to the Sexually Violent Predator Act ("SVPA"), N.J.S.A. 30:4-27.24 to -27.38. On January 22, 2010, Judge Philip H. Freedman, issued a consent order conditionally discharging defendant from the STU by January 27, 2010. Among other conditions, defendant agreed to "comply with all terms and conditions of [p]arole as if he were on community supervision for life." One of these conditions included GPS monitoring.

On April 10, 2012, defendant was incarcerated at the Essex County Jail ("ECJ") on charges not reflected in the record, and the GPS monitoring bracelet was removed by jail authorities.

Defendant was released from the ECJ on May 22, 2012, but failed to report to parole authorities to enable them to reattach the GPS monitoring device. On May 24, 2012, Judge Freedman entered an order vacating defendant's conditional discharge, and ordering his return to the STU, upon his arrest, for temporary commitment pending a hearing.

On September 10, 2012, defendant was charged in Indictment No. 12-09-02216-I with fourth-degree contempt, N.J.S.A. 2C:29-9(b) (count one), and third-degree failure to comply with GPS monitoring, N.J.S.A. 30:4-123.89 and N.J.S.A. 30:4-123.94 (count two). Defendant was arrested for these charges in New York on August 14, 2013, and returned to the ECJ on or about August 30, 2013.

On February 10, 2014, defendant pled guilty to fourth-degree contempt, as amended.¹ On February 18, 2014, defendant was released from the ECJ and returned to the STU. On June 25, 2014, Judge Freedman entered an order continuing defendant's civil commitment pursuant to the SVPA.

¹ Prior to entry of his guilty plea, the State amended count one of Indictment No. 12-09-02216-I from N.J.S.A. 2C:29-9(b) to N.J.S.A. 2C:29-9(a). As part of the plea agreement, the State agreed to recommend noncustodial probation at sentencing, and dismiss count two of Indictment No. 12-09-02216-I, and Indictment No. 12-06-1504-I that charged defendant with a single count of third-degree failure to comply with GPS monitoring.

On September 19, 2014, the trial court sentenced defendant to a probationary term of four years, and 130 hours of community service, to commence upon his release from custody at the STU. Defendant appealed the excessiveness of his sentence. We rejected his argument and affirmed the sentence on June 1, 2015. Defendant remains committed at the STU.

On appeal, defendant raises the following points for our consideration:

POINT ONE

THE PCR PETITION SHOULD BE GRANTED BASED UPON AN ILLEGAL SENTENCE.

POINT TWO

THE PCR COURT ERRED IN DENYING THE PCR PETITION [WITHOUT] HOLDING AN EVIDENTIARY HEARING.

A. Trial Counsel Was Ineffective By Failing to Object To The Illegal Sentence While Appellate Counsel Was Ineffective By Failing To Raise The Issue On Appeal.

B. Trial Counsel Was Ineffective By Coercing The Defendant Into Pleading Guilty.

C. Trial Counsel Was Ineffective By Failing to Object To [] Defendant's Inadequate Factual Basis.

(Not Raised Below)

D. Trial and Appellate Counsels' Cumulative Errors.

(Not Raised Below)

II.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Pursuant to Rule 3:22-2(a), a criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey." Ibid. "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Ibid. Unlike factual findings, a PCR court's legal conclusions do not receive any deference. A PCR court's interpretations of law, therefore, are reviewed de novo. State v. Nash, 212 N.J. 518, 540-41 (2013) (citing State v. Harris, 181 N.J. 391, 415 (2004)). Because defendant claims his sentence for fourth-degree contempt was illegal, the PCR judge's decision is subject to our de novo review.

We acknowledge that a court may correct an illegal sentence "at any time before it is completed." State v. Schubert, 212 N.J. 295, 309 (2012) (quoting State v. Murray, 162 N.J. 240, 247 (2000); see also, R. 3:21-10(b)(5) (providing that, "an order may be entered at any time . . . correcting a sentence not authorized by law including the Code of Criminal Justice"). "There are two categories of illegal sentences: (1) those that exceed the

penalties authorized by statute for a particular offense and (2) those that are not in accordance with the law, or stated differently, those that include a disposition that is not authorized by our criminal code." Schubert, 212 N.J. at 308 (citing Murray, 162 N.J. at 246-47).

Here, defendant contends the sentence imposed for contempt by the trial court was illegal because it enhanced the punishment he received pursuant to the SVPA for the same conduct. Specifically, the SVPA provides a procedure for failure to comply with the terms of a conditional discharge order:

A designated staff member on the person's treatment team shall notify the court if the person fails to meet the conditions of the discharge plan, and the court shall issue an order directing that the person be taken to a facility designated for the custody, care and treatment of sexually violent predators for an assessment. The court shall determine, in conjunction with the findings of the assessment, if the person needs to be returned to custody and, if so, the person shall be returned to the designated facility for the custody, care and treatment of sexually violent predators. The court shall hold a hearing within 20 days of the day the person was returned to custody to determine if the order of conditional discharge should be vacated.

[N.J.S.A. 30:4-27.32(c)(3).]

Because defendant violated the conditions of the civil consent order, he was recommitted to the STU. Nevertheless, defendant was

also charged with, and convicted of, contempt for the same conduct.

The relevant contempt statute provides:

A person is guilty of a crime of the fourth degree if he purposely or knowingly disobeys a judicial order or . . . hinders, obstructs or impedes the effectuation of a judicial order or the exercise of jurisdiction over any person, thing or controversy by a court, administrative body or investigative entity.

[N.J.S.A. 2C:29-9(a).]

We are persuaded defendant's contempt conviction constituted an additional punishment, in light of the SVPA's prescribed consequences. We find persuasive defendant's reliance on State v. Williams, 234 N.J. Super. 84, 93 (App. Div. 1989), where we affirmed an order vacating the defendant's conviction for fourth-degree contempt. In that case, the defendant pled guilty to several contempt charges and was sentenced to a probationary term. Id. at 86. As a condition of his probation, the judge ordered the defendant to avoid all contact with the complaining witnesses involved in the original complaint. Ibid.

The defendant, however, violated the court's order by making threatening telephone calls to the individuals he was barred from contacting. Id. at 87. He was subsequently indicted, and found guilty by a jury of fourth-degree contempt. Id. at 87-88. The trial judge, however, vacated the conviction because "[t]he defendant may not be charged now with an entirely new offense of

violating the special conditions of probation when that conduct in and of itself is not inherently violative of the law.” Id. at 88-89. The original judge's directive to avoid contact with the complaining witnesses was solely a condition of probation and not an independent judicial order. Id. at 90.

On appeal, we noted that prior reported decisions did not consider violations of probationary conditions as a basis for contempt of court. Rather, these violations give rise to probation hearings governed by the procedure set forth in N.J.S.A. 2C:45-3(a). We thus construed conditions of probation as statutory conditions rather than independent provisions of a judicial order. Id. at 90-91. Further, N.J.S.A. 2C:45-3(a) specifies that, after a hearing, the consequence for a violation of a condition of probation may be revocation of probation. Thus, we

dr[e]w a distinction between an order directed to a defendant or another to do or refrain from doing a particular act (the violation of which could be the basis of a contempt of court citation by a judge or indictment by a grand jury), and a conditional order which either states the ramifications of its violation or has such consequences established by law.

[Id. at 91.]

The Williams panel reasoned further that holding otherwise would raise disorderly persons offenses for individuals serving a term of probation to fourth-degree offenses, and even criminalize

non-criminal acts. Ibid. It added that the Legislature intended that the sanction for violation of a condition of probation was revocation, and not contempt. Id. at 93. We thus affirmed the trial court's order vacating the defendant's conviction for contempt. Ibid.

Although not cited by the parties, we have likewise recognized this concept in a juvenile delinquency case. In State ex rel. S.S., 367 N.J. Super. 400, 403-04 (App. Div. 2004), a juvenile was charged with contempt, pursuant to N.J.S.A. 2C:29-9(a), after violating a court's order that she obey the rules of her home and school. She violated these rules by running away from her home. Id. at 403. In reversing the juvenile adjudication for contempt, we noted the "goal of the juvenile justice system is rehabilitation, not punishment." Id. at 407. The relevant sections of the Code of Juvenile Justice and related legislative history indicate that the remedy for a juvenile's actions should not be criminal proceedings when the actions are not otherwise criminal. Id. at 409-10. Applying Williams to the juvenile-family crisis context, we concluded the appropriate remedy is to "bring the juvenile and her parents back before the Family Part and to reconsider the placement and conditions originally imposed, but not to charge her with criminal contempt of court for conduct

that 'itself is not otherwise criminal.'" Id. at 413 (quoting Williams, 234 N.J. Super. at 91).

Here, defendant admits he violated the terms of Judge Freedman's January 22, 2010 civil consent order by failing to have his GPS monitoring bracelet reattached upon release from the ECJ. Per Judge Freedman's May 24, 2012 order, defendant's conditional discharge was vacated. The judge also ordered defendant's return to the STU, and he was ultimately re-committed at the STU following a hearing.

We are persuaded our holding in Williams applies in the present case. In Williams, the consequences for a violation of a condition of probation were set forth in N.J.S.A. 2C:45-3(a). Williams, 234 N.J. Super. at 93. Analogously, violation of the terms of Judge Freedman's conditional consent order was governed by the SVPA, that is, defendant was arrested and re-committed to the STU. N.J.S.A. 30:4-27.32(c)(3). This section requires the individual's return to the STU and a hearing held within twenty days to determine if the conditional discharge should be vacated. Two days after defendant violated the terms of Judge Freedman's consent order, defendant's conditional discharge was vacated, he was ordered to be returned to the STU for temporary commitment pending a hearing, and he was ultimately re-committed under the SVPA.

The consequence of defendant's violation of the consent order is similar to Williams, where the proper sanction was revocation of probation. In both cases, the punishment for violation of the orders at issue is provided by law. As such, an additional contempt charge is inappropriate.

We are satisfied defendant's conviction for contempt constituted an additional penalty to that provided under the SVPA for violation of the same order. As such, defendant's sentence for contempt is illegal and the PCR court erred by denying his petition on this ground. In light of our decision, we need not reach defendant's remaining PCR claims.

Reversed and vacated.

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



CLERK OF THE APPELLATE DIVISION