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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-2673-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GERALD J. EVANS, JR.,
a/k/a GERALD J. EVANS,
and GERALD J. EVAN,

Appellant-Defendant.

Argued October 17, 2022 – Decided December 27, 2022

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey,
Law Division, Burlington County, Indictment No. 18-
12-1610.

Robert M. Perry argued the cause for appellant
(Rosenberg Perry & Associates, LLC, attorneys;
Robert M. Perry and Stephen J. Bodnar, on the brief).

Jennifer B. Paszkiewicz, Assistant Prosecutor, argued
the cause for respondent (LaChia L. Bradshaw,
Burlington County Prosecutor, attorney; Jennifer B.
Paszkiewicz, of counsel and on the brief).

PER CURIAM

Defendant Gerald J. Evans, Jr. appeals from an order denying his motion to apply jail credits to his sentence. Defendant pled guilty to operating a motor vehicle during a period of license suspension in violation of N.J.S.A. 2C:40-26, a fourth-degree crime. Defendant was sentenced to probation conditioned upon 180 days in county jail, with probation to terminate upon completion of the custodial sentence. Defendant argues his time spent on supervisory probation after a COVID-19 related suspension of his custodial sentence was an additional punishment, and a violation of double jeopardy. Defendant also contends the court should have converted his sentence to time served. We affirm.

I.

A grand jury indicted defendant, charging him with operating a motor vehicle while his driver's license was suspended, N.J.S.A. 2C:40-26(b). Defendant pled guilty, and on January 24, 2020, the trial court sentenced him to one year probation, with probation to terminate upon the completion of the 180-day custodial sentence.

At sentencing, the court found aggravating factors three and nine, N.J.S.A. 2C:44-1(a)(3) and (9), as well as mitigating factor ten, N.J.S.A. 2C:44-1(b)(10). The court then awarded defendant five days of jail credit.

On March 22, 2020, the Supreme Court issued a Consent Order¹ in response to a request for relief filed by the Office of the Public Defender stemming from the public health crisis caused by COVID-19. The Consent Order stated that, "any inmate currently serving a county jail sentence (1) as a condition of probation . . . shall be ordered released." Consent Order: In the Matter of the Request to Commute or Suspend County Jail Sentences ¶ 7. In addition, the order created alternative sentencing options for the court to consider at the conclusion of probation:

For inmates serving a county jail sentence as a condition of probation, the custodial portion of the sentence shall either be served at the conclusion of the probationary portion of the sentence or converted into a "time served" condition, at the discretion of the sentencing judge, after input from counsel.

[Id. at ¶ 8.]

On March 24, 2020, defendant was released from county jail pursuant to the Supreme Court's order, and his sentence was suspended. He was placed on

¹ Consent Order: In the Matter of the Request to Commute or Suspend County Jail Sentences ¶ 8 (Mar. 22, 2020).

supervisory probation during the suspension period. At the time of the suspension, defendant had served sixty-one days of his 180-day sentence.

On January 21, 2021, defendant's probation officer recommended probation supervision be terminated, as he had complied with all conditions. Defendant moved to modify his sentence to time served, making two arguments: he faced double jeopardy if he served the remainder of his mandatory jail sentence; and the Supreme Court consent order gave the trial court discretion to convert defendant's sentence to "time served."

Defendant contended the remedy for double jeopardy was an award of jail credits for the non-custodial probation time defendant served during his COVID-19 release. The State opposed, arguing the "mandatory period of parole ineligibility in N.J.S.A. 2C:40-26 prohibited the conversion of his sentence to time served."

The trial court placed its reasons on the record, finding "this is a sentence that has been handed down pursuant to the statutory scheme as enacted by the Legislature." The court further found State v. Rodriguez, 238 N.J. 105 (2019), "made it clear to all . . . trial courts . . . pursuant to [N.J.S.A. 2C:40-26] that the 180 days that must be served . . . are a continuous 180 days." The court concluded that in addition to the Rodriguez mandate, State v.

Toussaint, 440 N.J. Super. 526 (App. Div. 2015), required trial courts to follow sentences mandated by the Legislature unless it could identify an express exception. The trial court went on to state it could find no exceptions that would permit a deviation from N.J.S.A. 2C:40-26(c).

The court distinguished State v. Williams, 81 N.J. 498 (1980), and State v. Williams, 167 N.J. Super. 203, 209 (App. Div. 1979), which defendant argued supported his theory of double jeopardy. The court found Williams involved an illegal sentence, and contrasted the facts with this case, where defendant's sentence was mandated by statute, and his release mandated by Supreme Court order. The court also rejected defendant's argument that the Supreme Court order mandating his release due to the COVID-19 emergency modified Rodriquez in such a way as to permit a time served sentence for him.

The trial court denied the motion but stayed the custodial portion of defendant's remaining sentence pending appeal. On appeal, defendant reprises his double jeopardy argument, as well as his argument that the award of jail credits both satisfies the remaining custodial sentence and is consistent with Rodriquez.

II.

"[T]rial judges are given wide discretion so long as the sentence imposed is within the statutory framework." State v. Dalziel, 182 N.J. 494, 500 (2005). "Appellate review of a criminal sentence is limited; a reviewing court decides whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). Generally, an appellate court should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Natale, 184 N.J. 458, 489 (2005)). However, an appellate court's review of rulings of law and issues regarding the applicability, validity (including constitutionality) or interpretation of laws, statutes, or rules is de novo. State v. Courtney, 243 N.J. 77, 85 (2020) (interpreting sentencing provisions in the criminal code).

III.

We turn first to defendant's double jeopardy argument, contending that the Supreme Court ordered supervisory probation in the midst of his statutorily mandated 180-day jail sentence constituted multiple punishments for the same offense.

N.J.S.A. 2C:40-26(c) states "if a person is convicted of a crime under this section the sentence imposed shall include a fixed minimum sentence of not less than 180 days during which the defendant shall not be eligible for parole." Our Supreme Court has held the plain language of N.J.S.A. 2C:40-26(c) requires the mandatory period of incarceration must be served continuously. Rodriguez, 238 N.J. at 116-17. Rodriguez held defendants are prohibited from serving their sentences intermittently "despite generic language in the Criminal Code at N.J.S.A. 2C:43-2 allowing intermittent sentencing on a discretionary basis for certain offenses." State v. Pimentel, 461 N.J. Super. 468, 479-80 (App. Div. 2019).

However, the Supreme Court issued a Consent Order as a response to the unprecedented public health state of emergency declared by the Governor. The order temporarily suspended certain custodial sentences, including defendant's sentence. The circumstances under which the Court issued the Consent Order were, as we know in hindsight, quite dire.²

² COVID-19 has now killed more than 900,000 and hospitalized about 4,000,000 Americans. See Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, [Occupational Safety & Health Admin.], ___ U.S. ___, 142 S. Ct. 661, 670 (2022) ([Breyer, Sotomayor, & Kagan, JJ., dissenting]). At least 75,000,000 Americans have been

The Consent Order states in pertinent part:

Any inmate currently serving a county jail sentence (1) as a condition of probation, or (2) as a result of a municipal court conviction, shall be ordered released
.....

.....

[T]he custodial portion of the sentence shall either be served at the conclusion of the probationary period of

infected since the virus hit our shores. The fatalities include more than 31,000 New Jerseyans. Nearly 20% of all New Jerseyans have contracted COVID-19 during the pandemic's course and, because it is a circumstance of importance here, 54% of those incarcerated in New Jersey have contracted COVID-19. We need not recount the countless ways the virus has had a devastating and drastic impact on our economy and our way of life, N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 580-81 (2020) (observing that "laypeople, scientists, and legal scholars alike would agree that COVID-19 is a true disaster with widespread consequences"), as recognized in the emergency declarations issued by President Joseph R. Biden, [Jr.], Governor Philip D. Murphy, and our Chief Justice, that we alluded to in recently upholding Newark's imposition of a vaccination mandate for its employees. See In re City of Newark, 469 N.J. Super. 366, 387-89 (App. Div. 2021).

[N.J. State Policemen's Benevolent Ass'n v. Murphy, 470 N.J. Super. 568, 271 (App. Div. 2022).]

the sentence or converted into a "time served" condition, at the discretion of the sentencing judge, after input from counsel.

The double jeopardy clauses of the Federal and New Jersey Constitutions provide that no person shall be tried twice for the same criminal offense. U.S. Const. amend. V; N.J. Const. art. I, ¶ 11.

Our Supreme Court "has consistently interpreted the State Constitution's double [] jeopardy protection as coextensive with the guarantee of the Federal Constitution." State v. Miles, 229 N.J. 83, 92 (2017) (citing State v. Schubert, 212 N.J. 295, 304 (2012)). "The Double Jeopardy Clause contains three protections for defendant. It protects against (1) 'a second prosecution for the same offense after acquittal,' (2) 'a second prosecution for the same offense after conviction,' and (3) 'multiple punishments for the same offense.'" Ibid. (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). The third protection applies to the imposition of multiple criminal punishments for the same offense. Hudson v. United States, 522 U.S. 93, 99 (1997); State v. Eisenman, 153 N.J. 462, 468 (1998).

This court has previously "stressed the substantive differences between a probationer's condition of relative freedom of movement and a custodial prisoner's confinement[.]" concluding "the statutory scheme and prevailing

case law recognize those differences in declining to equate probation and prison time." State v. Ryan, 86 N.J. 1, 5 (1981).

Here, our criminal justice system was faced with a once in a generation pandemic that swept the state and impacted our population confined in county jails and state prisons. To ameliorate the spread of infection, the Supreme Court took extraordinary measures to craft an order temporarily releasing certain persons remanded to custody after being convicted of crimes. The consent order gave trial courts discretion to grant time served at the end of the probationary period. Given the extraordinary and unique circumstances under which defendant was released, we decline to equate his release on supervised probation with jail time. Ryan, 86 N.J. at 5. The double jeopardy principles espoused in Williams are inapposite, given the unique and dramatically different nature of its facts and procedural history. Consequently, we reject defendant's claim he has received multiple punishments for the same offense.

Defendant next contends the jail credits he says he is entitled to satisfy his custodial sentence and can be awarded by the trial court consistent with Rodriguez. We are not persuaded.

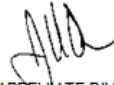
While we appreciate the very difficult choice that defendant had to make, he accepted the temporary suspension of his sentence knowing that he

was obligated to serve a 180-day mandatory sentence. Defendant's sentence is subject to N.J.S.A. 2C:40-26(c), and a plain reading of the statute clearly shows the sentence may not be shortened. Had defendant's crime not been subject to a mandatory minimum sentence, the trial court would have the authority to exercise discretion to convert his sentence to time served. However, as the Court emphasized in Rodriguez, the statute requires a mandatory "fixed" period of incarceration and "[t]here is simply no interpretative basis for a sentencing judge to have the discretion to impose a lesser sanction." Pimentel, 461 N.J. Super. at 493.

We find no basis to disturb the trial court's order remanding defendant to custody to complete his 180-day sentence. To the extent that we have not addressed any remaining arguments by defendant, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirm.

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


CLERK OF THE APPELLATE DIVISION