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July 23, 2019

SUPREME COURT  
OF NEW JERSEY

Honorable Chief Justice and  
Associate Justices of the  
Supreme Court of New Jersey  
P.O. Box 970  
Trenton, NJ 08625-0970

Re: State v. Mark Melvin  
App. Div. Docket No. A-4632-17

Please accept this letter in lieu of a more formal petition for review of the Appellate Division's unpublished decision affirming defendant Mark Melvin's sentence. State v. Mark Melvin, No. A-4632-17 (App. Div. July 8, 2019) (Pa 1 to 10) ("Melvin II").<sup>1</sup> Mr. Melvin is seeking review of the points raised in his Appellate Division briefs and incorporates those arguments by reference.

Certification must be granted because the Appellate Division decision is an overreading of this Court's recent decision in State v. Tillery, \_\_ N.J. \_\_, 2019 N.J. LEXIS 851

<sup>1</sup> Pa - Appendix to defendant-appellant's petition  
2T - June 7, 2018 (resentence)

FILED

JUL 24 2019

Heather J. Baker  
CLERK

(2019). This Court must ensure that the Appellate Division does not apply Tillery, which approved of a sentencing court considering charges upon which a jury had hung, to the fundamentally different situation of charges upon which a defendant is acquitted. The interests of justice require that this Court correct the unfair result of the misapplication of Tillery: Mark Melvin is serving 16 years in prison for possessing a weapon without a license solely because the sentencing judge believed Mr. Melvin committed the double homicide that he was acquitted of committing.

Mark Melvin has been incarcerated since September 27, 2012. On that date, he was arrested for allegedly shooting and killing two people and injuring a third in a Newark restaurant. On June 24, 2014, a jury convicted him of possessing a weapon without a license, but did not reach a verdict on the murders or assault. On October 27, 2014, Mr. Melvin was sentenced for the first time. The sentencing court relied on his own belief that Mr. Melvin was the shooter to sentence him to the maximum, discretionary extended term: 20 years in prison with a 10-year parole disqualifier. On August 8, 2016, after a second trial, Mr. Melvin was acquitted of the murders. On March 1, 2017, the Appellate Division affirmed Mr. Melvin's convictions but remanded the case for resentencing. The Court held that the sentencing judge "abused his discretion by finding defendant was

the shooter by a preponderance of the evidence and considering that conduct in his sentencing decision." State v. Melvin, No. A-3003-14T1, 2017 N.J. Super. Unpub. LEXIS 480, at \*14 (App. Div. Mar. 1, 2017) ("Melvin I"). This Court denied the State's petition for certification.

Undeterred by Melvin I, at the resentencing the same judge again explicitly sentenced Mr. Melvin for committing the crimes he was acquitted of committing. The judge "recounted the evidence at trial that convinced him '[d]efendant was the shooter of the two individuals'" that were killed and the third that was injured." Melvin II, slip op. at 3 (Pa 3). The sentencing judge stated that he was using "that evidence to determine 1) the aggravating and mitigating factors for sentencing, 2) whether to . . . apply an extended term of imprisonment, and 3) where within the extended term should Mr. Melvin be sentenced." (2T 65-10 to 24) In determining that he was permitted to do this, the judge relied on United States v. Watts, 519 U.S. 148 (1997).

Thus, the sentencing judge found aggravating factor (3) in part because Mr. Melvin, "has accepted no responsibility even for the possession of a weapon, let alone any other conduct that preceded his arrest with the weapon in the car"—in other words, for the shooting he was acquitted of. (2T 68-17 to 20) The sentencing judge found aggravating factor (6) in part because

"the facts adduced at the trial which this Court finds reliable, [show] not only did he possess said weapon, but he used it to shoot upon three other human beings." (2T 69-17 to 19) And the sentencing judge found aggravating factor (9) in part because of the "evidence supporting its conclusion that Mr. Melvin not only possessed the weapon, but also utilized it to shoot 3 other individuals." (2T 72-20 to 23) In imposing the final sentence, the judge took account of Mr. Melvin's extensive rehabilitative efforts while in prison and the fact that Mr. Melvin has not been disciplined even once while incarcerated. (2T 33-2 to 44-3) The judge resentenced Mr. Melvin to an extended term of 16 years in prison with a parole disqualifier of 8 years.

Mr. Melvin filed a petition for direct certification, which was denied by this Court. The case was then resolved by the Appellate Division, which held that the Court's opinion in Tillery "disposes of defendant's argument." Melvin II, slip op. at 8 (Pa 8). The Appellate Division affirmed Mr. Melvin's sentence.

There are two related reasons certification must be granted in this case. First, the Appellate Division decision is an overreading of Tillery. Second, because Tillery was not about acquitted conduct, arguments raised by Mr. Melvin regarding the inappropriateness of the sentencing court's decision have not been decided by this Court. Thus, Tillery does not "dispose" of

any of the novel issues raised by Mr. Melvin before the Appellate Division.

First, contrary to the Appellate Division's opinion, Tillery does not control this case. In Tillery, this Court held that it was not error for a sentencing court to consider "evidence presented as to offenses on which the jury deadlocked." Tillery, 2019 N.J. LEXIS 851 at \*50. But in the above-captioned case, the jury did not deadlock. Instead, the jury acquitted Mr. Melvin of the very offenses that the sentencing judge relied upon in order to render its sentencing decision. Nowhere in Tillery does this Court say that acquitted conduct can be considered at sentencing. To the contrary, in Tillery, this Court specifically made clear that State v. Tindell, 417 N.J. Super. 530, 538 (App. Div. 2011), a case in which this Court held that it was error for the sentencing court to rely in sentencing on its personal belief that the defendant had committed crimes of which he was acquitted, was still good law. Tillery, 2019 N.J. LEXIS 851 at \*51, n.7. This Court also declined the State's request to embrace United States v. Watts, 519 U.S. 148 (1997), the case which the trial court relied upon in this case to justify its behavior at sentencing. Id. at 52. In short, Tillery addressed a distinct issue and does not control this case.

The body of law that actually controls this case, which was not applicable in Tillery, demonstrates that this sentence is unlawful. First is the Sixth Amendment. In Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000), the United States Supreme Court held that findings of fact that increase the range of punishment to which a defendant is subject for a given crime must be charged in the indictment, submitted to a jury (or admitted by the defendant), and proven beyond a reasonable doubt. Any judicial factfinding (other than factfinding related to a defendant's criminal history) that increases a defendant's sentence violates the Sixth Amendment. Mr. Melvin's sentence is justified by judicial factfinding, not by facts found by the jury beyond a reasonable doubt. Therefore, it violates Apprendi.

That Mr. Melvin's sentence was within the legal range does not remove it from Apprendi's purview; the Supreme Court of the United States has already made clear that the relevant maximum is not what is technically, statutorily allowed for a specific type of felony, but what is allowed by the actual jury finding. Blakely v. Washington, 542 U.S. 296, 299 (2004). This case calls upon this Court to address Apprendi and the doctrine of substantive unreasonableness. Jones v. United States, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of petition for certiorari) ("[T]he Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be

reversed for substantive unreasonableness." ). The sentencing judge explicitly relied on his own findings that Mr. Melvin committed murder to reach this sentence; had he not been able to use his findings that Mr. Melvin committed a much more serious offense, logic would dictate that a lower sentence would be the only appropriate option to reflect Mr. Melvin's culpability for the significantly less severe offense of possessing a weapon without a license. Thus, the judicial factfindings, which contradicted the jury's findings, were necessary to justify this sentence. Therefore, the sentence violates Apprendi and is substantively unreasonable.

Second is the doctrine of fundamental fairness, which is applicable to this case due to the special significance of acquittals in our legal system, a significance not present in the case of a hung jury. An acquittal has special significance in our legal system. It is a basic tenet of our jurisprudence that "the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime." Barry L. Johnson, If at First You Don't Succeed—Abolishing the Use of Acquitted Conduct in Guidelines Sentencing, 75 N.C.L. Rev. 153, 193 (1996) (internal quotation marks omitted). Yet, Mr. Melvin was made to answer at sentencing for crimes he was acquitted of, violating fundamental fairness.

Third is the right to trial by jury. Punishing a defendant for acquitted conduct not only violates the protection an acquittal affords a defendant, but it undermines the very point of the right of trial by jury: to protect the defendant from government overreach. Lay juries "guard against a spirit of oppression and tyranny on the part of rulers," United States v. Gaudin, 515 U.S. 506, 510-11 (1995). "[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed." Duncan v. Louisiana, 391 U.S. 145, 157 (1968). That purpose must be honored by judges, not undermined. See also Jones v. United States, 526 U.S. 227, 245 (1999) (at common law, it was accepted that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power"). By essentially overriding the jury's verdict, the sentencing judge prevented the jury from serving as the check on judicial power it was designed to be.

Last is double jeopardy. Our double jeopardy clause "provide[s], in essence, three forms of protection to a defendant." State v. Schubert, 212 N.J. 295, 305 (2012). It prohibits (1) prosecuting a defendant for the same offense after an acquittal, (2) prosecuting a defendant for the same offense after a conviction, and (3) imposing on a defendant multiple



punishments for the same offense. Ibid. The sentencing in this case violated the first prohibition, which was clearly not at issue in Tillery. After Mr. Melvin was acquitted of the murders, the State is clearly precluded from prosecuting him again for those murders, obtaining a conviction for those murders, and then sentencing him for committing those murders. For the court to punish Mr. Melvin at sentencing for committing the murders he was acquitted of committing is functionally the same.

Each of these arguments is unique to acquittals. By applying Tillery, which had nothing to do with acquittals, to this unique situation, the Appellate Division overread this Court's decision and allowed an injustice to stand: Mr. Melvin is serving a sentence for two murders that the jury acquitted him of committing. Certification must be granted to clarify the proper scope of Tillery and in the interests of justice. Rule 2:12-4.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "TAMAR Y. LERER". The signature is stylized and written in all caps.

TAMAR Y. LERER  
Assistant Deputy  
Public Defender  
Attorney ID: 063222014

CERTIFICATION

I hereby certify that the foregoing petition presents a substantial issue of law and is filed in good faith and not for purposes of delay.

  
TAMAR YAEL LERER

Cc: Matthew E. Hanley, Essex County Prosecutor's Office

INDEX TO APPENDIX

State v. Mark Melvin, unpub. op., No. A-4632-17  
(App. Div. July 8, 2019) ..... Pa 1-10

**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-4632-17T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK MELVIN,

Defendant-Appellant.

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Argued March 4, 2019 – Decided July 8, 2019

Before Judges Messano, Fasciale and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 13-05-1257.

Tamar Y. Lerer, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Tamar Y. Lerer, of counsel and on the brief).

Matthew E. Hanley, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Theodore N. Stephens II, Acting Essex County Prosecutor, attorney; Matthew E. Hanley, of counsel and on the brief).

PER CURIAM

As we explained in our prior opinion, a jury convicted defendant Mark Melvin of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b), but deadlocked on the remaining counts of the indictment, including two counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2). State v. Melvin, No. A-3003-14 (App. Div. Mar. 1, 2017) (slip op. at 5). The judge granted the State's motion to impose a discretionary extended term, N.J.S.A. 2C:44-3(a), and sentenced defendant to the maximum term of twenty years' imprisonment with a ten-year period of parole ineligibility. Ibid.

Although we affirmed defendant's conviction, we remanded the matter for resentencing. Id. at 2. In particular, we rejected the trial judge's reliance upon United States v. Watts, 519 U.S. 148 (1997), to permit his consideration of evidence adduced at trial that defendant committed the murders in finding and weighing the aggravating and mitigating sentencing factors. Melvin, slip op. at 12-14. Citing our decision in State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011), we said:

Here, the judge also substituted his judgment for that of the jury. He considered the charges on which the jury was hung even though a new trial would occur. Defendant could later be punished again if convicted of these crimes, implicating double jeopardy issues. The judge improperly found aggravating factor two, the

gravity and seriousness of the harm inflicted on the victim, because there is no victim named in the unlawful possession of a weapon offense. The judge abused his discretion by finding defendant was the shooter by a preponderance of the evidence and considering that conduct in his sentencing decision.

[Melvin, slip op. at 14-15 (emphasis added) (citation omitted).]

The Supreme Court denied cross-petitions for certification. State v. Melvin, 230 N.J. 597, 600 (2017).

While the appeal was pending, the State retried defendant on the deadlocked charges before the same judge. The second jury could not reach a verdict on certain controlled dangerous substance-related offenses, which the State subsequently dismissed, and acquitted defendant of the murders and related offenses. Defendant again faced the judge for resentencing on the original conviction of unlawful possession of a handgun.

After reviewing our prior decision, and again relying on Watts, the judge concluded that if proven by a preponderance of the evidence, he could consider defendant's conduct even though the jury acquitted defendant of the underlying crimes. The judge then recounted the evidence at trial that convinced him "[d]efendant was the shooter of the two individuals" that were killed and the third that was injured. Following the Court's guidance in State v. Pierce, 188

N.J. 155 (2006), the judge granted the State's motion for a discretionary extended term. The judge found aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3), (6) and (9), and no mitigating factors. N.J.S.A. 2C:44-1(b). He sentenced defendant to a sixteen-year term of imprisonment, which, in accordance with our judgment, reflected the elimination of aggravating factor two in the sentencing calculus and consideration of defendant's rehabilitative conduct while incarcerated. Melvin, slip op. at 14-15. The judge imposed an eight-year period of parole ineligibility.

Defendant filed this appeal, listed originally on our Excessive Sentence Oral Argument calendar. However, given the nature of defendant's arguments, we placed the appeal on the plenary calendar for full briefing. Defendant raises the following points:

POINT I

DEFENDANT HAS TWICE BEEN UNLAWFULLY PUNISHED FOR COMMITTING CRIMES A JURY DID NOT FIND HE COMMITTED. THE MATTER MUST BE REMANDED FOR RESENTENCING IN FRONT OF A JUDGE WHO IS NOT FIRMLY CONVINCED OF DEFENDANT'S GUILT OF CRIMES HE HAS BEEN ACQUITTED OF AND WHO IS NOT COMMITTED TO SENTENCING DEFENDANT FOR THOSE CRIMES.

POINT II

DEFENDANT'S SENTENCE IS EXCESSIVE AND THE RESULT OF IMPROPER DOUBLE-COUNTING, AND THE BASIS FOR THE LENGTH OF PAROLE DISQUALIFIER WAS INADEQUATELY EXPLAINED.

POINT III

THE JUDGMENT OF CONVICTION MUST BE AMENDED TO REFLECT THE APPROPRIATE DISTRIBUTION OF JAIL CREDITS AND PRIOR SERVICE CREDITS.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

"Appellate review of the length of a sentence is limited[,]" State v. Miller, 205 N.J. 109, 127 (2011), "and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)).

The appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."



[State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).]

However, "a sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Id. at 74-75 (citing State v. Yarbough, 100 N.J. 627, 645 (1985)).

Defendant contends the judge failed to abide by our prior judgment, as well as our decision in Tindell, because he once again considered evidence of conduct for which the jury acquitted defendant. Defendant argues this violated principles of due process, fundamental fairness and the right to trial by jury, as expressed in Apprendi v. New Jersey, 530 U.S. 466, 489-90 (2000), and Blakely v. Washington, 542 U.S. 296, 299 (2004).

We reject any comparison between this resentencing proceeding and the sentencing proceeding in Tindell. In that case, the judge imposed five consecutive maximum sentences, including maximum periods of parole ineligibility. 417 N.J. Super. at 570. We cited extensively to the judge's inappropriate comments at sentencing, id. at 568-70, and concluded his "personal views as to the propriety of the jury's verdict irreparably tainted the sentence he imposed on defendant." Id. at 572. Simply put, our review of the

transcript convinces us that the sentence here was not the result of similar judicial pique or obvious abuse of judicial discretion.

We also reject the contention that our prior judgment necessarily compelled the judge to ignore trial evidence that was probative of defendant's conduct, even though the State proffered that evidence to prove offenses for which the jury acquitted defendant. As noted above, because defendant faced retrial on the deadlocked counts, our prior decision was firmly rooted in double jeopardy concerns, which no longer existed at resentencing because the jury acquitted defendant of some charges and the State dismissed all other counts of the indictment.

In State v. Tillery, decided after the briefs were filed and the appeal argued before us, the Court addressed whether when imposing sentence, a court should consider trial evidence pertaining to charges on which the jury deadlocked, but which were still pending. \_\_\_ N.J. \_\_\_ (2019) (slip op. at 37-38). Distinguishing Watts, "which involved a sentencing court's reliance on evidence presented as to a charge on which the defendant was acquitted," the Court "caution[ed] courts not to consider evidence pertaining to charges as to which a jury deadlocked in sentencing unless and until the defendant no longer faces the prospect of prosecution for those charges." Id. at 38 (emphasis added).

Without expressly approving Watts's rationale, however, the Court clearly

stated:

When a judge presides over a jury trial regarding multiple offenses, he or she has the opportunity to evaluate the credibility of witnesses and to assess the evidence presented as to each of those offenses. If a jury is unable to return a verdict as to some offenses and convicts the defendant of others, and the State requests that the court consider evidence presented as to offenses on which the jury deadlocked, such information may constitute competent, credible evidence on which the court may rely in assessing the aggravating and mitigating factors. No Sixth Amendment or other constitutional principle, or statutory provision, generally bars a court from considering such evidence. And consideration of competent evidence presented in support of charges — even if the jury does not go on to convict defendant on those charges — does not raise concerns about drawing inferences from the mere fact that charges had been brought . . . .

[Id. at 37 (citation omitted).]

The Court's opinion disposes of defendant's argument. In light of the above, we also reject the argument that the judge double-counted by considering evidence of the homicides and aggravated assault in finding the aggravating sentencing factors.

Defendant also argues the judge double-counted by using defendant's prior criminal record to both impose an extended term and calculate the length

of the sentence. See, e.g., State v. Vasquez, 374 N.J. Super. 252, 267 (App. Div. 2005) (reversing extended term sentence, "both allowed and required" by the defendant's single prior conviction, because the judge used that prior conviction to impose a sentence greater than the "presumptive" midpoint). We again disagree.

The judge properly determined defendant was eligible for an extended term based upon his four prior convictions. The judge then weighed the aggravating sentencing factors by considering not only defendant's prior record, but also the nature of the offense and "other aspects of . . . defendant's record." State v. Dunbar, 108 N.J. 80, 92 (1987). We find no mistaken exercise of discretion in imposing a sixteen-year sentence of imprisonment.

Defendant also argues the judge failed to explain the imposition of an eight-year period of parole ineligibility. At the time of the offense, N.J.S.A. 2C:43-6(c) (2012) required the imposition of a minimum term "between, one-third and one-half of the sentence." Considering the entire sentencing proceeding, which reflects the judge's thoughtful and comprehensive reasoning, we find no basis to disturb the sentence imposed.

Lastly, we agree with defendant that the judgment of conviction (JOC) incorrectly includes the time defendant spent serving his sentence prior to the

date of resentencing as jail credit instead of prior service credit. See State v. Rippy, 431 N.J. Super. 338, 354 (App. Div. 2013) (time spent serving a sentence should be reflected in the JOC as prior service credit). The State also agrees. We therefore remand the matter to the judge to file a corrected JOC reflecting that defendant earned prior service credit, not jail credit, from October 27, 2014 to the date of his resentencing.

Affirmed; remanded to file a corrected JOC.

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

  
CLERK OF THE APPELLATE DIVISION