



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LARRY MARTIN, )  
Defendant-Below, )  
Appellant, )  
 )  
v. )  
 )  
STATE OF DELAWARE )  
 )  
Plaintiff-Below, )  
Appellee. )

No. 386, 2022

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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## NATURE AND STAGE OF THE PROCEEDINGS

The State consolidated five cases into one indictment against Larry Martin because he wished to resolve the cases early.<sup>1</sup> Days later, Martin pled guilty to one count of Stalking and two counts of Non-Compliance with Bond, (“NCB”). On August 12, 2022, the trial court sentenced him to 5 years Level V suspended after 1 year for probation on the Stalking conviction. For each conviction NCB, the judge ordered a \$100 fine which was immediately suspended.<sup>2</sup>

The maximum lawful sentence for Stalking is 3 years Level 5. So weeks later, at defense counsel’s request, the judge corrected Martin’s sentence on that conviction and modified the two NCB sentences by adding 1 year at Level V (suspended for probation) to the suspended fines on each sentence.<sup>3</sup> However, Martin had completed his sentences for those two convictions on August 12, 2022 when the fines were immediately suspended. Thus, resentencing him on those convictions violated the principles of double jeopardy.

This is Martin’s Opening Brief in support of is timely-filed appeal.

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<sup>1</sup> A1, 3.

<sup>2</sup> August 12, 2022 Sentence Order, Ex. A.

<sup>3</sup> September 8, 2022 Corrected Sentence Order, Ex. B; September 21, 2022 Corrected Sentence Order, Ex. C. October 17, 2022 Corrected Sentence Order, Ex. D

## **SUMMARY OF THE ARGUMENT**

1. When the judge corrected the sentence for Martin's Stalking conviction, she had no authority to also modify the sentences lawfully imposed on the two Non Compliance with Bond convictions. While there may be circumstances where a resentencing judge is permitted to increase one portion of a sentencing package in order to conform the overall structure with the judge's original sentencing intent, "double jeopardy principles bar resentencing on any conviction for which the defendant has already fully served his sentence." The principles of double jeopardy barred resentencing on the Non Compliance with Bond convictions in our case because Martin had already completed his original sentences for those convictions.

## STATEMENT OF FACTS

On May 26, 2022, Larry Martin entered into a plea agreement resolving five cases.<sup>4</sup> He pled guilty to one count of Stalking, a felony, and two counts of a misdemeanor Non Compliance with Bond, (“NCB”).<sup>5</sup> A *nolle prosequi* was entered on the remaining charges.<sup>6</sup> The State agreed to cap its recommendation for unsuspended Level V time to 18 months. Both parties requested a presentence investigation and agreed to other conditions.<sup>7</sup>

During the colloquy, the judge explained to Martin that

Stalking has a range of penalties of six months to three years in prison. That six months is the minimum sentence that the Court has to impose, the guidelines call for up to seven months at Level V, and there’s a possibility of a fine at the Court’s discretion. Each of the breach of release charges carries punishment up to a year in prison. There is no minimum mandatory period of incarceration for them, and the guidelines call for a fine and costs of prosecution and there’s a possibility of a fine of up to \$500 in each. The guidelines, I tell you, are simply recommendations to the Court and legally the Court cannot [sic] follow, and sentence you up to the maximum of – that each charge provided.<sup>8</sup>

Martin acknowledged the potential penalties. The judge then ordered a presentence investigation, revoked Martin’s bail and set a date for sentencing.

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<sup>4</sup> A11-12.

<sup>5</sup> A12, 20, 23-24.

<sup>6</sup> A12.

<sup>7</sup> A12-13.

<sup>8</sup> A16-17.

After a presentence investigation was completed, sentencing was conducted on August 12, 2022. The parties informed the judge that the charges to which Martin pled stemmed from incidents involving Deanna Bond. In particular, there were two separate occasions when Martin was with Bond when she was at the hospital for procedures related to her pregnancy with the child she shared with Martin. On each occasion, Martin was prohibited from having contact with Bond, an argument erupted, and Martin ended up being charged with various misdemeanors, including NCB.<sup>9</sup>

Bond also alleged that, months later, Martin sent her harassing communications despite there being a protection from abuse order in place protecting her and their mutual child from him. As a result of these claims, Martin was charged with Stalking, Harassment and additional NCB charges.<sup>10</sup>

At sentencing, Martin accepted responsibility for his conduct and expressed remorse.<sup>11</sup> He explained that he mishandled a child visitation dispute. He went to the hospital because he thought Bond wanted him there and he then became frustrated when he learned the child was born addicted to illegal substances.<sup>12</sup> He acknowledged that “[h]e should not have said the

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<sup>9</sup> A34-37.

<sup>10</sup> A36-37.

<sup>11</sup> A45.

<sup>12</sup> A43-44.

thing[s] he did to the mother of [his] child. He should have gone through family court or sought help with his mother.”<sup>13</sup>

The State recommended a total of five years at Level V suspended after 18 months for six months at Level IV probation followed by 1 year at Level III with GPS monitoring. The prosecutor cited a few aggravating circumstances in support of her recommendation.<sup>14</sup> Martin responded with a request for time served, (i.e. 9 months), followed by Level III with GPS monitoring. He was in agreement with the remainder of the State’s requested conditions. In support thereof, he submitted a sentencing memorandum, a letter from his mother and documentation from his employer.<sup>15</sup>

After considering the parties’ recommendations,<sup>16</sup> the judge issued the following order on the Stalking conviction: effective November 13, 2021, 5 years at Level V, suspended after 1 year for 6 months at Level III GPS monitoring, followed by 18 months at Level III. For each NCB conviction, the judge imposed a \$100 fine “of which \$100.00 is suspended.”<sup>17</sup>

Thereafter, defense counsel recognized that the Stalking sentence was illegal in that it imposed “5 years at Level 5” and the maximum permitted

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<sup>13</sup> A43.

<sup>14</sup> A38-39.

<sup>15</sup> A41-42.

<sup>16</sup> A50.

<sup>17</sup> Ex. A.

under the law is only “3 years at Level 5.” Seeking to have the sentence corrected, defense counsel explained the following to the court:

[i]n the State's sentencing recommending the State did request a total of 5 years back time. However, that back time should have been broken up to 3 years on the Stalking charge and 1 year on each of the misdemeanor Non Compliance with Bond charges. It appears it was the Court's intent to give the 5 years back time, it just needs to be distributed appropriately.<sup>18</sup>

In response, on September 18, 2022, the judge corrected the Stalking sentence as follows: effective November 13, 2021, 3 years at Level V, suspended after 1 year for 6 months at Level III GPS monitoring, followed by 18 months at Level III. And, the judge modified the NCB sentences adding 1 year Level V suspended for 1 year Level I to the original \$100 suspended fines. However, Martin had already satisfied his sentences on the NCB convictions when those fines had been suspended.<sup>19</sup>

A corrected order was issued on September 21, 2022 to clarify that the probationary portion of the sentences for the convictions of NCB are to follow that for the Stalking.<sup>20</sup> Finally, another corrected order was issued on October 17, 2022 to clarify that other charges were *nolle prossed*.<sup>21</sup>

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<sup>18</sup> A53.

<sup>19</sup> Ex. B.

<sup>20</sup> Ex. C.

<sup>21</sup> Ex. D.

**I. THE TRIAL COURT VIOLATED THE PRINCIPLES OF DOUBLE JEOPARDY WHEN IT RESENTENCED MARTIN ON TWO CONVICTIONS FOR WHICH HE HAD ALREADY FULLY COMPLETED HIS SENTENCE.**

*Question Presented*

Whether the sentencing court violated Martin’s protection against double jeopardy when it resentenced him on two convictions adding prison time after his sentences for those convictions were already completed.<sup>22</sup>

*Standard and Scope of Review*

This Court will review a sentence to determine its constitutionality, whether it is within the statutory limits prescribed by the legislature or for other illegality.<sup>23</sup> Generally, a defendant cannot waive his right to appeal an illegal sentence. Even if this Court finds that there has been a waiver, it will excuse waiver if it finds that the trial court committed plain error or if the interest of justice requires it.<sup>24</sup>

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<sup>22</sup> Delaware Supreme Court Rule 8.

<sup>23</sup> *Wynn v. State*, 23 A.3d 145, 148–49 (Del. 2011).

<sup>24</sup> Delaware Supreme Court Rule 8. *United States v. Williams*, 597 F. App'x 99, 101 n.3 (3d Cir. 2015) (citing cases).

## *Argument*

When the judge corrected the sentence for Martin's Stalking conviction, she had no authority to also modify the sentences lawfully imposed on the two NCB convictions. While there may be circumstances where a resentencing judge is permitted to increase one portion of a sentencing package in order to conform the overall structure to the judge's original sentencing intent,<sup>25</sup> "double jeopardy principles bar resentencing on any conviction for which the defendant has already fully served his sentence."<sup>26</sup> Here, Martin completed the two NCB sentences, thus the principles of double jeopardy barred resentencing on those convictions.

When a person is convicted of any offense other than a class A felony the court may impose sanctions "includ[ing] imposition of a fine as provided by law for the offense or placement of the offender upon unsupervised probation with or without special conditions, or with or without the imposition

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<sup>25</sup> *White v. State*, 576 A.2d 1322, 1329 (Del. 1990).

<sup>26</sup> *Commonwealth v. Sallop*, 36 N.E.3d 529, 531–32 (2015). See *Commonwealth v. Parrillo*, 14 N.E.3d 919 (Mass. 2014) (citing *Commonwealth v. Cumming*, 995 N.E.2d 1094 (Mass. 2013) (remanding with instructions not to resentence on convictions for which sentence had been fully served); *Commonwealth v. Cole*, 10 N.E.3d 1081 (Mass. 2014) (where sentenced already served, "any resentencing ...necessarily would violate principles of double jeopardy").

of a fine[.]”<sup>27</sup> The court may then [s]uspend the imposition or execution of sentence, or suspend a portion thereof[.]”<sup>28</sup> Where the court orders the defendant to pay a fine then immediately suspends it without sentencing him to any period of incarceration or probation for that conviction” the sentence is completed as “[t]here is no set of circumstances, therefore, under which [the defendant] can be required to pay any fine for his conviction[.]”<sup>29</sup>

On August 12, 2022, the judge illegally sentenced Martin to “5 years at Level V” rather than “3 years at Level V” on the Stalking conviction. The judge also lawfully sentenced him to a \$100 fine on each NCB conviction. The order reveals the NCB fines were suspended immediately. The attachment reflects that, as of sentencing, no fines were owed.<sup>30</sup> Thus, Martin’s sentences on those two convictions were completed on August 12, 2022.

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<sup>27</sup> 11 Del. C. § 4204; 11 Del. C. § 4206.

<sup>28</sup> 11 Del. C. § 4204. *State v. Anderson*, 2010 WL 4513029, at \*6 (Del. Super. Ct. Nov. 1, 2010).

<sup>29</sup> *Kelsch v. State*, 2016 WL 4059233, at \*1 (Del. Super. Ct. July 28, 2016) (concluding that when defendant was ordered to pay a fine, of which all was suspended, he could not have the fine re-imposed as he was “not sentenced to any period of incarceration or probation for that conviction”). See *Harvey v. State*, 692 A.2d 412 (Del. 1996) (“In any event, the fine and the surcharge were suspended, thus divesting this Court of appellate jurisdiction over the conviction for walking drunk on the highway.”).

<sup>30</sup> Ex. A.

Subsequently, when defense counsel brought the illegality of the Stalking sentence to the court’s attention, the judge was required to and had authority to correct the illegal Stalking sentence to “3 years at Level V.” However, contrary to what defense counsel believed, the judge did not have the authority to modify the sentences for the NCB convictions and add “1 year at Level V” to each one.<sup>31</sup> “[T]he sentence had already been served, precluding imposition of second sentence in violation of double jeopardy.”<sup>32</sup> Thus, when the judge vacated that sentence and replaced it with Level time, the principles of double jeopardy were violated.<sup>33</sup>

That defense counsel asked the court to modify the NCB sentences is of no moment because, generally a defendant cannot waive his right to appeal an illegal sentence.<sup>34</sup> To the extent this Court concludes that defense counsel’s

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<sup>31</sup> See *Longford-Myers v. State*, 213 A.3d 556, 560 (Del. 2019).

<sup>32</sup> *Sneed v. State*, 749 So. 2d 545 (Fla. Dist. Ct. App. 4th Dist. 2000) (“By the time the trial court realized its mistake in sentencing defendant to time served on a drug offense that it mistakenly believed was a misdemeanor and not a felony, the sentence had already been served, precluding imposition of second sentence in violation of double jeopardy.”).

<sup>33</sup> *Sallop*, 36 N.E.3d at 531–32.

<sup>34</sup> *Williams*, 597 F. App’x at 101 n.3 (3d Cir. 2015). See *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir.2000) (concluding that “waivers are not absolute.... [f]or example, defendants cannot waive their right to appeal an illegal sentence or a sentence imposed in violation of the terms of an agreement.”). *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir.2007) (“[a]n appeal waiver will not apply if ... the sentence violates the law”); *United States v. Andis*, 333 F.3d 886, 892 (8th Cir.2003) (“the illegal exception to the

e-mail to the court in a good faith effort to correct the illegal nature of the lead charge does amount to waiver by Martin, this Court should follow the Federal Courts by applying a “miscarriage of justice” exception to allow Martin a right to appeal this illegal sentence.<sup>35</sup> The exception is narrow and applies to the circumstances such as ours where the sentence is constitutionally invalid.

To vacate the illegal sentences on the two NCB convictions and reimpose the original sentences is consistent with the interest of justice and this Court’s recent admonition that:

it is critical that the parties and sentencing judges, whether in the context of a contested sentencing or one where the State and defendant have agreed to a sentencing recommendation, take care on the front end to fashion sentences that are within the bounds of the law and that reflect a reasoned exercise of discretion within those bounds. Permitting a do-over of every component of a sentence that involves multiple convictions because the parties and the sentencing judge have misapplied the law as to one of those convictions decreases the incentive to design sentencing orders carefully in the first instance and encourages parties to think that mistakes, if and when discovered, can easily be fixed later on.<sup>36</sup>

Accordingly, the modified sentences on the two convictions of NCB must be vacated and the August 12, 2022 sentences reimposed.

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general enforceability of an appeal waiver is an extremely narrow exception.”).

<sup>35</sup> *Andis*, 333 F.3d at 891-892.

<sup>36</sup> *Longford-Myers*, 213 A.3d at 560.

## CONCLUSION

For the reasons and upon the authorities cited herein, Larry Martin's sentences on the two counts of Non Compliance with Bond must be vacated and the original sentence imposed.

Respectfully submitted,

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