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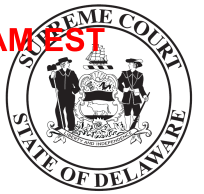

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LARRY MARTIN,	§	
	§	No. 386, 2022
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

STATE'S ANSWERING BRIEF

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Date: February 13, 2023

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NATURE OF PROCEEDINGS

On May 23, 2022, a Superior Court grand jury returned a 14-count indictment against Larry Martin.[1] Three days later, Martin pled guilty to one count of stalking, a class F felony punishable by up to three years in prison, and two counts of noncompliance with bond conditions, misdemeanors each punishable by up to one year in prison and up to a $500 fine.[2] The State agreed to enter a *nolle prosequi* on the remaining charges.[3] The court accepted the guilty plea and ordered a pre-sentence investigation.[4] On August 12, 2022, the court sentenced Martin: (i) for stalking, to 5 years at Level V incarceration, suspended after 1 year for 24 months at Level III probation with 6 months of GPS monitoring; and (ii) for each count of noncompliance with bond conditions, a $100 fine, which was suspended.[5]

On August 29, 2022, Martin's trial counsel alerted the Superior Court by email that it had imposed a five-year sentence on the stalking conviction even though the maximum statutory penalty was three years.[6] On September 8, 2022, the court issued and docketed a corrected order, sentencing Martin: (i) for stalking,

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[1] A1, at Docket Item ("D.I") 5; A3–9.
[2] 11 *Del. C.* §§ 1312(c), 2113(c), 4205(b)(6); A1, at D.I 6; A3; A26–27.
[3] A27.
[4] A1–2, at D.I. 6.
[5] Opening Br. Ex. A, at 1–2.
[6] A53–54.

to 3 years at Level V, suspended after 1 year for 24 months at Level III with 6 months of GPS monitoring; and (ii) for each count of noncompliance with bond conditions, to 1 year at Level V, suspended for 1 year at Level I probation, and a $100 fine, which was suspended.[7]

On September 21, 2022, the Superior Court issued a second corrected sentence order to remove language that "[p]robation is concurrent to any probation now serving."[8]

Martin filed a notice of appeal on October 18, 2022. He filed an opening brief on January 10, 2023. This is the State's answering brief.

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[7] Opening Br. Ex. B, at 1–2; A2, at D.I. 10.

[8] Opening Br. Ex. C, at 3. The court issued a third corrected sentence order on October 17, 2022, to note that a *nolle prosequi* was entered on all other charges in the case. Opening Br. Ex. D, at 3. It was not docketed until October 24, 2022—six days after Martin filed his notice of appeal. *See* A2, at D.I. 14.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. As an initial matter, this Court lacks jurisdiction to hear Martin's appeal because it is untimely. In any event, the Double Jeopardy Clause did not bar the Superior Court from redistributing Martin's suspended prison term when he requested a sentence correction. Regardless of whether Martin technically completed his sentences for noncompliance with conditions of bond, he had not yet developed a legitimate expectation of finality in them for double jeopardy purposes. Martin requested the correction himself, in the window for the State to file an appeal, and apparently acquiesced to the solution. The Double Jeopardy Clause is not inflexibly applied so that defendants may receive a windfall from a sentencing court's mistake.

STATEMENT OF FACTS

At the sentencing hearing, the prosecutor described the conduct underlying Martin's convictions:

> In September of 2019[, Deanna Bond] . . . was living in an apartment above an attached garage in New Castle, Delaware. While she was out of town[,] she had somebody housesitting and watching her dogs. On the evening of September 28th[,] this witness observed lights on in the apartment, and . . . the next morning when he was coming out to the property[,] he observed [Martin] enter the backyard of the property through a fence and enter . . . the apartment. The witness confronted [Martin] and he fled . . . .
>
> Three months later in December of 2019[,] police responded to Christiana Hospital. At this time[, Bond] was 17 weeks pregnant with [their] child. She was experiencing complications[,] and [Martin] accompanied her to the hospital. While she was in the bathroom[,] he observed something on her phone which upset him, an argument started, he grabbed her car keys and left.
>
> [Martin] then keyed the word *whore* into the side of her vehicle. He later returned to the hospital and told [Bond]: I destroyed your truck. At this time[,] he had an active no-contact order with [Bond] . . . .
>
> In May of 2020[,] police again responded to Christiana Hospital. [Bond] was giving birth to [their] child when an argument started because [Bond] did not want to put [Martin's] name on the birth certificate. [Martin] got in [Bond's] face, began screaming at her until a nurse stepped in, and he left the hospital.
>
> After [Martin] fled, [Bond] noticed that her debit cards and her coin purse were missing from her purse. There were two active no-contact orders at this time . . . .
>
> In November of 2021, . . . [Bond] reported to the police that [Martin] had been continuing to contact her in violation of three active no-contact orders. He was contacting her via email and video chat. He was also posting TikTok videos regarding the custody of [their] mutual child, which included photos of [Bond] . . . .

. . . .

The messages sent from [Martin] were harassing in nature. He called [Bond] multiples names, talked about how much he hated her, and blamed her from him not being allowed to see his daughter.

. . . [A]t this time, . . . there was an active PFA in place against Mr. Martin for [Bond] and their mutual daughter, . . . [and Bond] had full custody of the child . . . .

. . . .

Three days later . . . , [Bond] reported continuous contact via email from [Martin] in violation of multiple no-contact orders. Again[,] these were harassing in nature. . . .[9]

[9] A34–37 (emphasis added). Because Martin pled guilty, this is the best record of the facts supporting Martin's convictions. During his allocution, Martin provided his version of the context surrounding some of these acts, but he did not dispute they occurred. *See* A47–49.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE DID NOT BAR THE SUPERIOR COURT FROM REDISTRIBUTING MARTIN'S SUSPENDED PRISON SENTENCE.

Question Presented

Whether the Double Jeopardy Clause bars the Superior Court from redistributing, during the window for taking a direct appeal and upon his application for sentence correction, a defendant's suspended prison time over convictions whose sentences initially comprised fines that had been suspended in full.

Scope of Review

This Court reviews questions of law associated with a motion for sentence correction *de novo*.[10] Likewise, this Court reviews claims alleging the infringement of a constitutionally protected right *de novo*.[11]

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[10] *Thomas v. State*, 2019 WL 5152786, at *1 (Del. Oct. 14, 2019). Martin's trial counsel did not file a formal motion for sentence correction under Superior Court Criminal Rule 35(a). A53–54. Nonetheless, trial counsel sought identical relief, informally, in her August 29, 2022 email to the Superior Court. *See* A53–54.
[11] *Williamson v. State*, 707 A.2d 350, 362 (Del. 1998).

Merits of Argument

The Superior Court initially imposed an aggregate sentence of five years in prison, suspended after one year for two years of probation, plus $200-worth of suspended fines. The court mistakenly assigned all five years of prison time to Martin's conviction for stalking, which carried a statutory maximum penalty of three years. Seventeen days after sentencing, Martin's trial counsel emailed the court to bring the illegal sentence to its attention.[12] In her email, trial counsel copied the prosecutor's position and proposed solution:

> [T]he 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.[13]

Trial counsel did not object to the prosecutor's solution or propose an alternative.[14] The court adopted the parties' recommended solution, redistributing the suspended prison time over the three charges, within the statutory range of penalties for each.

Martin now challenges the Superior Court's redistribution on appeal. Martin claims that he completed his original sentences for noncompliance with conditions

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[12] A53–54.
[13] A53.
[14] A54.

of bond—suspended $100 fines—before the correction; thus, the Double Jeopardy Clause barred the court from revising those sentences upward.[15]

Martin's appeal is untimely, and this Court is without jurisdiction to decide his claim. Regardless, Martin had not yet developed a legitimate expectation of finality in his sentences so soon after his convictions, while the time for taking an appeal had not yet lapsed. Thus, the Double Jeopardy Clause did not bar the Superior Court from correcting his sentences as it did.

A. This Court is without jurisdiction to hear Martin's untimely appeal.

In a criminal case, a notice of appeal must be filed within 30 days.[16] For a direct appeal of a criminal conviction, the time runs from the date the sentence is imposed.[17] For postconviction proceedings, the time runs from the date the lower court enters its judgment or order upon its docket.[18]

Time is a jurisdictional requirement.[19] The Clerk of this Court must receive the notice of appeal within the applicable period for it to be effective.[20] This Court

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[15] Opening Br. 8–10.
[16] Supr. Ct. R. 6(a)(iii)–(iv).
[17] R. 6(a)(iii).
[18] R. 6(a)(iv); *see also Warnick v. State*, 2017 WL 1056130, at *1 (Del. Mar. 20, 2017).
[19] *Carr v. State*, 554 A.2d 778, 779 (Del. 1989).
[20] Supr. Ct. R. 10(a).

cannot consider an untimely appeal unless the appellant demonstrates that the untimeliness is attributable to court-related personnel.[21]

Martin filed his notice of appeal on October 18, 2022. Thus, the appeal is timely only if it relates to a judgment or an order issued or docketed within the prior 30 days, *i.e.*, on or after September 18, 2022. Two orders might serve as the appropriate reference point for this appeal, which challenges the distribution and redistribution of Level V time among his sentences: either the original sentence order—but it was imposed too early, on August 12, 2022—or the corrected sentence order granting Martin's email application for sentence correction—but it was also too early, being both issued and docketed on September 8, 2022.

In an attempt to render his appeal timely, Martin also attached the September 21, 2022 corrected sentence order to his notice of appeal. But that order did not respond to his email application for sentence correction or touch on the issue Martin now raises on appeal. A subsequent, impertinent order cannot restart or toll the jurisdictional clock for an appeal from a prior order.[22]

Martin claims that the Superior Court issued the September 21, 2022 corrected sentence order to "clarify that the probationary portion of the sentence

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[21] *Bey v. State*, 402 A.2d 362, 363 (Del. 1979).
[22] *See Belfield v. State*, 2022 WL 468523, at *1 (Del. Feb. 15, 2022) (dismissing as untimely an August 12, 2021 appeal from a July 16, 2021 order because the appellant was challenging the substance of an earlier March 9, 2021 order).

for the convictions of [noncompliance with bond conditions] are to follow that for the Stalking."[23] The September 21 order removed the language "Probation is concurrent to any probation now serving" from each of the three sentences but did not add any language.[24] The order did not say that any of the probationary terms shall run consecutively. It did not say whether the probationary terms for noncompliance with bond conditions shall run concurrently to each other but consecutively to the probationary term for stalking. At most, the correction is unclear as to whether it has any effect on how these sentences relate to each other. Yet, the default rule in the Superior Court is that probationary terms run concurrently when the sentence order is silent on the matter: "It has become a standard practice to include language in sentencing orders which provides that a sentence is consecutive to any other sentence being served. In the absence of such language, probationary terms of community supervision are concurrent with any other sentence."[25] Thus, by the orders' plain language, the probationary sentences ran concurrently to each other both before and after the September 21 correction.[26]

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[23] Opening Br. 6.

[24] Opening Br. Ex. C, at 3. *Compare* Opening Br. Ex. C, *with* Opening Br. Exs. A & B.

[25] *State v. Stevenson*, 2002 WL 1335301, at *2 n.2 (Del. Super. Ct. June 10, 2002) (Report of Findings on Remand), *adopted*, 2002 WL 31399418 (Del. Sept. 17, 2002).

[26] To the extent the court's intent is at issue, it is unclear from the docket what prompted it to delete the language. *See* A2, at D.I. 10–11.

In any case, the September 21 order does not involve or concern the redistribution of Level V time from the stalking sentence to the sentences for noncompliance with bond conditions.

Martin applied to the Superior Court for a correction of the illegal sentence on his stalking conviction. The court issued and docketed an order resolving that problem on September 8, 2022. If Martin wished to appeal how the court resolved the issue, he had 30 days—until October 10, 2022—to file the notice of appeal.[27] He did not. He also does not claim that his delay is attributable to court-related personnel. His October 18, 2022 notice of appeal is therefore untimely, and this Court is without jurisdiction to hear it.

B. The redistribution of suspended prison time to Martin's sentences for noncompliance with bond conditions did not violate principles of double jeopardy because Martin did not yet have a legitimate expectation of finality in those sentences.

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." It protects a defendant against: (i) successive prosecution for the same offense after acquittal; (ii) successive prosecution for the same offense after

[27] Supr. Ct. R. 6(a)(iv). The end of the 30-day period technically landed on Saturday, October 8, 2022. Therefore, Martin had until the following Monday to file his notice of appeal. Supr. Ct. R. 11(a).

conviction; and (iii) multiple punishments for the same offense.[28] The Clause is enforceable against the states through the Fourteenth Amendment.[29]

The controlling principle of the Double Jeopardy Clause is a prohibition against multiple trials.[30] The prohibition is not absolute; for example, the State may retry a defendant after reversal on appeal.[31] An acquittal is different, however.[32] The Constitution "conclusively presumes that a second trial would be unfair" after an acquittal.[33] The risk that the State, with its superior resources, might wear down an innocent defendant until it obtains a conviction would be "unacceptably high."[34] Therefore, the Constitution "afford[s] absolute finality to a jury's verdict of acquittal" and bars retrial even if legal error occurred.[35]

The pronouncement of a sentence "has never carried the finality that attaches to an acquittal."[36] For example, a sentencing judge may recall a defendant to impose a mandatory portion of a sentence initially missed.[37] If a defendant's convictions are reversed on appeal, the trial court may impose a more severe

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[28] *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).
[29] *Benton v. Maryland*, 395 U.S. 784, 794 (1969).
[30] *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980).
[31] *Id.* at 130–32.
[32] *See id.* at 129–30.
[33] *Arizona v. Washington*, 434 U.S. 497, 503 (1978).
[34] *DiFrancesco*, 449 U.S. at 130.
[35] *Burks v. United States*, 437 U.S. 1, 16 (1978) (emphasis omitted).
[36] *DiFrancesco*, 449 U.S. at 133.
[37] *Id.* at 134–35.

sentence if the defendant is convicted a second time.[38] Additionally, if fewer than all of several related sentences are vacated on appeal, the trial court may resentence the defendant up to the combined duration of the original sentences.[39]

The Double Jeopardy Clause prohibits a court from increasing a sentence once the defendant has a legitimate expectation of its finality.[40] There is no bright-line rule defining when this occurs.[41] When an appeal is available to the State, however, a defendant will have no expectation of finality in his sentence before the appeal is concluded or the time to appeal has expired.[42] After all, defendants are charged with knowledge of the law, including appeal provisions.[43]

Title 10, Section 9902 of the Delaware Code defines and delineates the scope of the State's right to appeal in criminal cases. The State may appeal orders dismissing an indictment or suppressing substantial and material evidence.[44] The State also has "an absolute right to appeal any sentence on the grounds that it is

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[38] *Id.* at 135–36 (discussing *Pearce*, 395 U.S. 711)).
[39] *White v. State*, 576 A.2d 1322, 1328 (Del. 1990).
[40] *United States v. Fogel*, 829 F.2d 77, 87 (D.C. Cir. 1987) (construing *DiFrancesco*, 449 U.S. 117); *see also White*, 576 A.2d at 1328 ("Under these circumstances, when the defendant challenged his robbery and weapons convictions on double jeopardy grounds, he had no legitimate expectation of finality in his original sentence.").
[41] *United States v. Silvers*, 90 F.3d 95, 99–100 (4th Cir. 1996).
[42] *DiFrancesco*, 449 U.S. at 136; *see also, e.g.*, *Wilmer v. Johnson*, 30 F.3d 451, 457 (3d Cir. 1994); *United States v. Smith*, 929 F.2d 1453, 1457 (10th Cir. 1991).
[43] *Id.* at 136.
[44] 10 *Del. C.* § 9902(a)–(b).

unauthorized by, or contrary to, any statute or court rule."[45] The State must initiate its appeal within 30 days from the order.[46]

Martin did not have a legitimate expectation of finality in his sentences when the Superior Court redistributed his suspended prison time within the time his sentence was subject to appeal. The Superior Court initially sentenced Martin on August 12, 2022. The State had an absolute right, until September 12, 2022, to appeal the legality of any or all of Martin's three sentences.[47] Martin applied for and received his sentence correction within that 30-day window, when he should have known that his sentence was still subject to judicial review.

Arguably, the State had no right to appeal Martin's initial sentences for noncompliance with bond conditions because they were plainly legal. Regardless, the State had an absolute right to appeal Martin's illegal stalking sentence. Upon review, this Court would have vacated the sentence and remanded the case for resentencing.[48] Then, the Superior Court could have resentenced Martin on all related convictions "up to the combined duration of the original sentences without

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[45] § 9902(f); *State v. Laboy*, 117 A.3d 562, 563, 568 n.37 (Del. 2015) (holding that § 9902(f) granted the State authority to appeal a sentence that failed to impose mandatory minimum prison time under the DUI statutes).
[46] § 9904.
[47] *Id.*; Supr. Ct. R. 11(a).
[48] *See, e.g.*, *Harris v. State*, 2005 WL 2414423, at *1 (Del. Sept. 30, 2005).

violating the constitutional prohibition against double jeopardy."[49] Before that could happen, however, the same result was properly attained through the agreement of the parties, thereby obviating the need for an appeal.

Martin's three sentences were indeed related or "interdependent."[50] They applied to charges from the same indictment involving the same course of conduct toward the same victim.[51] The Superior Court issued the sentences together and offered a single, unified statement justifying them as a whole.[52] It provided no independent rationale for the noncompliance-with-bond-conditions sentences that might set them apart from the stalking sentence. As the First Circuit observed, "when a defendant is found guilty on a multicount indictment, there is a strong likelihood that the [trial] court will craft a disposition in which the sentences on the various counts form part of an overall plan."[53] As evidenced by trial counsel's email to the court and the court's ensuing correction, all parties understood that the Superior Court originally intended to impose a five-year prison sentence, suspended after one year, but that it distributed the time incorrectly.

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[49] *Taylor v. State*, 1991 WL 165552, at *2 (Del. Aug. 12, 1991); *accord White*, 576 A.2d at 1328.
[50] *See White*, 576 A.2d at 1328.
[51] A3–A7.
[52] A50–51.
[53] *United States v. Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir. 1989).

Consequently, even on appeal from the stalking sentence alone, all of Martin's sentences remained subject to review as part of the same sentencing package. Martin thus had no legitimate expectation of finality in his sentences for noncompliance with bond conditions, and the Double Jeopardy Clause did not bar the Superior Court from redistributing the same aggregate prison sentence over the several related convictions.

Contending otherwise, Martin argues for a bright-line rule that defendants have a legitimate expectation of finality once they have completed a sentence, regardless of other facts or circumstances. In support of this position, Martin cites decisions from the Massachusetts Supreme Judicial Court and a Florida intermediate appellate court.[54] Martin's proposed rule is inconsistent with the United States Supreme Court's holding in *DiFrancesco* and the decisions of the Circuit Courts applying it, however.[55] The Circuit Courts "are nearly uniform in their conclusion that a defendant has no legitimate expectation of finality for double-jeopardy purposes even where she served the entirety of a constituent sentence in a sentencing package."[56] Martin's rule would also be inconsistent with the approaches of other state courts, such as New York, which generally requires

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[54] Opening Br. 8 n.26, 10 n.32.
[55] *E.g.*, *Wilmer*, 30 F.3d at 457; *Smith*, 929 F.2d at 1457.
[56] *United States v. Brown*, 26 F.4th 48, 61 (1st Cir. 2022) (citing cases).

both the completion of the sentence and the expiration of the appeal period,[57] and Wisconsin, which weighs factors such passage of time and the defendant's misconduct in obtaining the sentence.[58]

Of course, trial courts cannot have *carte blanche* to increase a defendant's sentence, even during the period for taking an appeal: "[I]t is unacceptable for the defendant's sentence to be seen as a work in progress that a circuit court can add to or subtract from at will. This result would clearly conflict with the underlying rationale of the Double Jeopardy Clause."[59] At the same time, a trial court "should not be tethered in every instance to a sentence that is based on a mistake of law, mistake of fact, or inconsistent with the court's intent."[60] The Constitution "does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."[61]

Martin sought to correct the mistake in the Superior Court's order within the appeal window. And, in his application to the court, he proffered the precise solution he now challenges on appeal. Martin's trial counsel presented the State's proposed solution to the court without qualification, modification, or objection.

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[57] *New York v. Williams*, 925 N.E.2d 878, 891 (N.Y. 2010).
[58] *Wisconsin v. Robinson*, 847 N.W.2d 352, 364 (2014).
[59] *Id.*
[60] *Id.*
[61] *DiFrancesco*, 449 U.S. at 135 (quoting *Bozza v. United States*, 330 U.S. 160, 166–67 (1947)).

The Double Jeopardy Clause is not so inflexible as to prohibit the court from correcting its mistake under these circumstances, within this timeframe.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: February 13, 2023

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Date: February 13, 2023

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