



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 REPLY BRIEF

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**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.**

The State is simply wrong in its contention that Martin’s appeal is untimely. Delaware Supreme Court Rule 6 states that a notice of appeal shall be filed “[w]ithin 30 days *after a sentence* is imposed in a direct appeal of a criminal conviction.” Here, the notice of appeal was filed within 30 days of the sentence imposed on October 17, 2022. In fact, it was filed the very next day. That sentence is unlawful as the illegality in the sentence imposed on September 18, 2022 carried through both the September 21, 2022 and October 17, 2022 sentences.<sup>1</sup> But, most compelling, is that this Court has, on multiple occasions, remanded cases for the trial court to reimpose the original sentence in order to avoid a jurisdictional default. Further, the State often agrees or even suggests that remedy.<sup>2</sup> In our case, the September 21, 2022 and October

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<sup>1</sup>See *Bouyer-Bello v. State*, 251 A.3d 643 (Del. 2021) (noting that the State acknowledged that an error imposed in an original sentence carried through to the VOP sentence that was at issue on appeal).

<sup>2</sup>*Domingo v. State*, 284 A.3d 724 (Del. 2022) (“The State suggests that, in the interests of justice, the matter should be remanded to the Superior Court with directions to vacate and reimpose Domingo’s sentence. We agree that the interests of justice favor a remand to the Superior Court for resentencing.”); *Anderson v. State*, 214 A.3d 933 (Del. 2019) (same); *Amaro v. State*, No. 63, 2013, 2013 WL 1087644, at \*1 (Del. Mar. 13, 2013) (same).

17, 2022 sentences are simply reimpositions of the September 18, 2022 sentence as they were both issued to clarify portions of the sentence.<sup>3</sup>

Unlike the cases cited by the State, this is not one where the defendant appealed, a conviction was vacated and the sentences on the remaining convictions could be redistributed. Martin acknowledged in his Opening Brief that 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>4</sup> However, “double jeopardy principles bar resentencing on any conviction for which the defendant has already fully served his sentence.”<sup>5</sup>

Contrary to the State’s assertion, Martin did have a legitimate expectation in finality because he completed the two NCB sentences, thus the principles of double jeopardy barred resentencing on those convictions. By the time both parties and the court realized the mistake, Martin’s “sentence

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<sup>3</sup> See Ex. C and D attached to Opening Brief.

<sup>4</sup> *White v. State*, 576 A.2d 1322, 1329 (Del. 1990).

<sup>5</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”).

had already been served. Moreover, where a sentence has already been served, even if it is an illegal sentence, the court lacks jurisdiction and would violate the Double Jeopardy Clause by resentencing the defendant to an increased sentence.”<sup>6</sup> Further, “[s]ince *DiFrancesco*,<sup>7</sup> the majority view is that after a defendant has *completed* a sentence, a legitimate expectation in the finality of the sentence arises and double jeopardy principles prevent reformation of the original, albeit illegal, completed sentence.”<sup>8</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>9</sup> On August 12, 2022, the judge illegally

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<sup>6</sup> *Sneed v. State*, 749 So. 2d 545, 546 (Fla. Dist. Ct. App. 2000).

<sup>7</sup> *United States v. DiFrancesco*, 449 U.S. 117 (1980).

<sup>8</sup> *State v. Houston*, 795 N.W.2d 99 (Iowa Ct. App. 2010) (citing *United States v. Silvers*, 90 F.3d 95, 101 (4th Cir.1996) (“[O]nce a defendant fully serves a sentence for a particular crime, the Double Jeopardy Clause’s bar on multiple punishments prevents any attempt to increase thereafter a sentence for that crime.”); *United States v. Daddino*, 5 F.3d 262, 265 (7th Cir.1993) (finding that completion of incarceration portion of sentence precluded any increase of it); *United States v. Arrellano–Rios*, 799 F.2d 520, 524–525 (9th Cir. 1986); *Oksanen v. United States*, 362 F.2d 74, 80 (8th Cir.1966) (applying the rule to a completed term of probation); *People v. Williams*, 925 N.E.2d 878, 888–89 (2010).

<sup>9</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

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>10</sup> Thus, Martin’s sentences on those two convictions were completed on August 12, 2022. Thus, when the judge vacated each NCB sentence and replaced it with Level 5 time, the principles of double jeopardy were violated.<sup>11</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>12</sup> To the extent this Court concludes that defense counsel’s

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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>10</sup> Ex. A attached to Opening Brief.

<sup>11</sup> *Sneed*, 749 So. 2d 545 (“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>12</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 sent 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>13</sup> The exception is narrow and applies to the circumstances such as ours where the sentence is constitutionally invalid.<sup>14</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>13</sup>*Andis*, 333 F.3d at 891-892.

<sup>14</sup> See Op. Br. at 11.



## 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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