

**NOT FOR PUBLICATION WITHOUT THE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-1998-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KELVIN VAUGHAN, a/k/a
KELVIN VAUGHN and CALVIN VAUGHN,

Defendant-Appellant.

Submitted March 7, 2017 – Decided March 23, 2017

Before Judges Yannotti, Fasciale and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Accusation No.
15-08-0629.

Joseph E. Krakora, Public Defender, attorney
for appellant (John Douard, Assistant Deputy
Public Defender, of counsel and on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Jeffrey P. Mongiello,
Deputy Attorney General, of counsel and on the
brief).

PER CURIAM

Defendant pled guilty to third-degree violation of a condition of his special sentence of community supervision for life (CSL), contrary to N.J.S.A. 2C:43-6.4(d). The court sentenced defendant to 364 days of incarceration in the county jail, and imposed a special sentence of parole supervision for life (PSL). Defendant appeals from the judgment of conviction (JOC) dated November 19, 2015. We reverse.

On January 7, 2009, defendant pled guilty to second-degree sexual assault in violation of N.J.S.A. 2C:14-2(b), for crimes he committed in 2002. On May 8, 2009, defendant was sentenced to a five-year prison term, and was required to comply with Megan's Law, N.J.S.A. 2C:7-1 to -23. The court also sentenced defendant to CSL, pursuant to N.J.S.A. 2C:43-6.4 (prior to amendment). Violation of a condition of CSL was then a crime of the fourth degree. L. 1994, c. 130.

Effective July 1, 2014, N.J.S.A. 2C:43-6.4(a) and (d) were amended to upgrade a violation of a condition of CSL to a third-degree crime and to add convictions for a violation of CSL to the list of predicate crimes that mandate the imposition of PSL (the 2014 amendments). L. 2013, c. 214.

On September 4, 2015, a grand jury returned an indictment charging defendant with fourth-degree violation of the conditions of his CSL, contrary to N.J.S.A. 2C:43-6.4, for failing to report

to his parole officer on June 16, 2015 (approximately eleven months after the effective date of the 2014 amendment). On that same date, defendant waived his right to indictment and pled guilty to an amended third-degree violation of the conditions of his CSL. During the plea colloquy, defendant said he understood that his CSL would be converted to PSL. He did not preserve any issues for appeal.

On November 13, 2015, the trial court sentenced defendant in accordance with the plea agreement to a term of 364 days in the county jail and imposed a mandatory special sentence of PSL under N.J.S.A. 2C:43-6.4(a). The judge entered a JOC dated November 19, 2015.

Defendant appeals and raises the following arguments:

POINT I

PURSUANT TO THE RECENT EX POST FACTO DECISIONS IN STATE V. PEREZ AND STATE V. F.W., DEFENDANT'S CONVICTION SHOULD BE REVERSED. DEFENDANT WAS ONLY ELIGIBLE TO BE CONVICTED OF THE FOURTH-DEGREE VERSION OF N.J.S.A. 2C:43-6.4(d) AND SHOULD NOT HAVE HAD HIS COMMUNITY SUPERVISION FOR LIFE CONVERTED TO PAROLE SUPERVISION FOR LIFE.

POINT II

THE 2014 AMENDMENT TO N.J.S.A. 2C:43-6.4a, REQUIRING THE TRANSFER OF DEFENDANTS WHO VIOLATE A CONDITION OF COMMUNITY SUPERVISION FOR LIFE TO PAROLE SUPERVISION FOR LIFE, IS A FACIAL VIOLATION OF THE EX POST FACTO CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

We note initially that the State argues that defendant's appeal should be dismissed because defendant entered into an unconditional plea agreement, did not raise any constitutional arguments in the trial court, and did not preserve any issues for appeal pursuant to Rule 3:9-3(f). We choose not to apply the rule because "[s]trict adherence" to [its] requirements . . . 'would result in an injustice.'" State v. Gonzalez, 254 N.J. Super. 300, 304 (App. Div. 1992) (quoting R. 1:1-2) (considering the defendant's unreserved argument challenging the constitutionality of N.J.S.A. 2C:35-12).

Accordingly, we have carefully considered defendant's arguments and the State's response. We reverse defendant's conviction for the reasons stated in State v. Hester, ___ N.J. Super. ___ (App. Div. 2017).

We reject defendant's facial constitutional challenge to the 2014 amendments to N.J.S.A. 2C:43-6.4(a) and (d). We conclude, however, that as applied to defendant, the amendments to N.J.S.A. 2C:43-6.4(a) and (d), which upgrade a violation of a condition of CSL to a third-degree offense, and mandates imposition of a special sentence of PSL, violate the constitutional prohibition against ex post facto laws.

Reversed.

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



CLERK OF THE APPELLATE DIVISION