

**NOT FOR PUBLICATION WITHOUT THE  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-3423-16T1

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

LEON MACK,

Defendant-Respondent.

---

Submitted September 12, 2017 – Decided October 11, 2017

Before Judges Reisner and Gilson.

On appeal from the Superior Court of New  
Jersey, Law Division, Hudson County,  
Indictment No. 16-02-0234.

Robert D. Laurino, Acting Essex County  
Prosecutor, attorney for appellant (Frank J.  
Ducoat, Special Deputy Attorney  
General/Acting Assistant Prosecutor, of  
counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney  
for respondent (Laura B. Lasota, Assistant  
Deputy Public Defender, of counsel and on the  
brief).

PER CURIAM

N.J.S.A. 2C:39-5(j) provides that the commission of certain  
weapons offenses by a person who has a prior conviction of a crime

enumerated in the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, is a first-degree crime. The question presented on this appeal is whether N.J.S.A. 2C:39-5(j) is a substantive statute identifying a separate crime, or a sentencing enhancement provision.

We hold that N.J.S.A. 2C:39-5(j) is a substantive statute identifying a separate crime subject to indictment and trial by jury. We, therefore, reverse the April 13, 2017 order of the trial court that dismissed defendant's indictment charging him with first-degree knowing possession of a handgun by a person previously convicted of a crime enumerated in NERA. On remand, we direct that the trial court address defendant's separate arguments to dismiss the indictment.

I.

On September 8, 2015, defendant Leon Mack allegedly attempted to enter the Hall of Records in Essex County Courthouse. He had a bag with him, which he put through the metal detector. An officer noted that the bag appeared to have a weapon, and a search of the bag revealed a .25 caliber semi-automatic pistol. Defendant attempted to flee, but was apprehended.

A criminal background check disclosed that in 1991, defendant had been convicted of second-degree aggravated assault. An

examination of the handgun showed that it had allegedly been defaced.

A grand jury issued two indictments charging defendant with four crimes arising out of his conduct on September 8, 2015. Indictment No. 16-02-234 charged defendant with one count of first-degree unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5(j). Indictment No. 16-02-0235 charged defendant with second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); fourth-degree possession of a defaced weapon, N.J.S.A. 2C:39-3(d); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a)(2).

Defendant moved to dismiss Indictment No. 16-02-0234, arguing that the underlying predicate offense, a 1991 conviction of second-degree aggravated assault, did not subject him to a charge under N.J.S.A. 2C:39-5(j) because NERA was not enacted until 1997. The trial court never reached that issue. Instead, the trial court held, sua sponte, that N.J.S.A. 2C:39-5(j) was a sentencing statute and not a substantive statute identifying a separate crime. Consequently, the trial court dismissed the indictment charging defendant with a separate crime under N.J.S.A. 2C:39-5(j).

On leave granted, the State appeals and argues that N.J.S.A. 2C:39-5(j) establishes a separate crime subject to indictment and trial by jury. Defendant agrees with the State that N.J.S.A.

2C:39-5(j) is a separate crime. Defendant, however, argues that we should affirm the dismissal of the indictment on separate grounds. Specifically, defendant contends that because the underlying predicate act — second-degree aggravated assault — resulted from a conviction in 1991, he is not subject to N.J.S.A. 2C:39-5(j). Defendant asserts that subsection j refers to NERA, and NERA was enacted in 1997. Moreover, defendant points out that NERA first listed specific crimes, such as second-degree aggravated assault, in a 2001 amendment.

## II.

Whether N.J.S.A. 2C:39-5(j) is a substantive provision identifying a crime or a sentencing enhancement provision is a question of law, which we review de novo. See, e.g., State v. Maurer, 438 N.J. Super. 402, 411 (App. Div. 2014). Both the statute's plain language and its legislative history support the interpretation that N.J.S.A. 2C:39-5(j) is a substantive provision identifying a separate crime. Viewing subsection j in the context of another provision in the same statutory section is also instructive. Finally, such an interpretation is consistent with and supported by the established interpretation of the analogous criminal statute of certain persons not to possess weapons, N.J.S.A. 2C:39-7.

A. The Plain Language and Legislative History

Statutory interpretation starts with the plain language of the statute. State v. Malik, 365 N.J. Super. 267, 274 (App. Div. 2003), certif. denied, 180 N.J. 354 (2004). N.J.S.A. 2C:39-5(j) provides:

A violation of subsections a., b., c. or f. of this section by a person who has a prior conviction of any of the crimes enumerated in subsection d. of §2 of P.L. 1997, c. 117 ([N.J.S.A.] 2C:43-7.2) is a first degree crime.

The language "first degree crime" plainly means that subsection j is identifying a separate substantive crime.

That plain reading is supported by the statute's legislative history. Subsection j was added to N.J.S.A. 2C:39-5 in 2013, as part of L. 2013, c. 113, § 1. Cannel, New Jersey Criminal Code Annotated, comment 1 on N.J.S.A. 2C:39-5 (2017). The statement supporting that amendment provided, in relevant part:

This bill upgrades the crime of unlawful possession of a firearm to a first degree crime in certain circumstances and amends various penalty provisions under the Graves Act.

The provisions of the bill make it a crime of the first degree for a person to unlawfully possess a machine gun, handgun, rifle or shotgun, or an assault firearm following a conviction for a crime enumerated in subsection d. of §2 of P.L. 1997, c. 117 ([N.J.S.A.] 2C:43-7.[2]) (the No Early Release Act.) Under current law, violations of these

provisions are either a second degree offense, in the case of machine guns, handguns and assault firearms, or a third degree offense, in the case of rifles and shotguns.

[Sponsor Statement on S2804, 2013 Leg., 215th Sess. 1 (N.J. 2013).]

Comparing subsection j with subsection i of the same statutory section also supports our interpretation. Compare N.J.S.A. 2C:39-5(i), with N.J.S.A. 2C:39-5(j). Subsection i expressly identifies the "sentencing court" as the fact finder. In that regard, the subsection states in relevant part:

The sentencing court shall make a finding on the record as to whether the aggravating circumstances set forth in paragraph (5) of subsection a. of N.J.S.A. 2C:44-1 applies, and the court shall presume that there is a substantial likelihood that the defendant is involved in organized criminal activity if there is a substantial likelihood that the defendant is a member of an organization or a group that engages in criminal activity. The prosecution at the sentencing hearing shall have the initial burden of producing evidence or information concerning defendant's membership in such an organization or group.

[N.J.S.A. 2C:39-5(i).<sup>1</sup>]

---

<sup>1</sup> Subsection i was held unconstitutional in State v. Grate, 220 N.J. 317 (2015), because it required a sentencing judge to impose a period of parole ineligibility based on a finding by the judge, rather than by a jury, that the defendant was involved in organized criminal activity. Id. at 334. Thus, the Court held that subsection i violated the Sixth Amendment of the Constitution. Id.

In contrast, subsection j never mentions a sentencing court. Instead, the statute plainly states that it is creating a "first degree crime[.]" N.J.S.A. 2C:39-5(j).

Instead of considering the plain wording of the statute or its history, the trial court appears to have assumed — mistakenly — that because a defendant's criminal history may properly be considered as a sentencing factor, see N.J.S.A. 2C:44-1(a)(6), subsection j was probably a sentencing statute because it referenced a defendant's prior conviction. Thus, in dismissing defendant's indictment, the trial court cited Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), for the proposition that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. The trial court read the holding in Apprendi as authorizing a court to use prior convictions in sentence enhancing determinations.

The Apprendi Court's holding followed its decision in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), which held that a defendant's prior conviction was not an element of a substantive offense, but rather a sentencing enhancement provision. In so holding, the Almendarez-Torres Court considered the language used in the statute, the

title of the statute ("Criminal penalties for reentry of certain deported aliens"), the congressional intent to enhance penalties rather than create a new offense, and the absence of other federal statutes that include a defendant's prior conviction as an element of the offense. Id. at 230-34.

N.J.S.A. 2C:39-5(j) is distinguishable from the statute at issue in Almendarez-Torres for two reasons. First, the plain language of N.J.S.A. 2C:39-5(j) demonstrates that the addition of subsection j created a separate substantive crime. Second, the legislative history of the 2013 amendment, including the sponsor statement, shows the Legislature's intent to create a new first-degree crime, not a sentencing enhancement provision.

#### B. The Analogous Certain Persons Offense

Finally, contrary to the trial court's analysis, interpreting N.J.S.A. 2C:39-5(j) as a substantive criminal statute is consistent with the established interpretation of the analogous crime of certain persons not to possess weapons, N.J.S.A. 2C:39-7. To establish a defendant's guilt under that statute, the State must prove beyond a reasonable doubt that defendant possessed a firearm and he had been previously convicted of an enumerated crime. State v. Ragland, 105 N.J. 189, 194 (1986). See Model Jury Charge (Criminal), "Certain Persons Not to Have Weapons" (2005). Similar to the certain persons offense, N.J.S.A. 2C:39-



5(j) requires proof that defendant possessed a particular type of firearm and defendant is "a person who has a prior conviction of any of the crimes enumerated" in NERA.

In summary, we hold that N.J.S.A. 2C:39-5(j) identifies a substantive crime. Accordingly, we reverse the trial court's April 13, 2017 order in this matter.

III.

Defendant argues that we should go on to address the arguments that he made in support of his motion to dismiss the indictment charging him with violating N.J.S.A. 2C:39-5(j). The State also urges us to exercise our discretionary original jurisdiction under Rule 2:10-5. In contrast to defendant, however, the State argues that we should deny defendant's motion to dismiss the indictment for substantive reasons. We decline this invitation. Instead, we remand this matter to the trial court directing that the court address and rule on the arguments presented by defendant in his motion to dismiss the indictment charging him with violating N.J.S.A. 2C:39-5(j).

Reversed and remanded. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION