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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-4020-16T3

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

TERESA A. CLARK,

Defendant-Respondent.

Submitted December 5, 2017 – Decided December 27, 2017

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
10-08-1847.

Damon G. Tyner, Atlantic County Prosecutor,
attorney for appellant (John J. Santoliquido,
Assistant Prosecutor, of counsel and on the
brief).

Respondent has not filed a brief.

PER CURIAM

The State of New Jersey appeals from a May 1, 2017 order granting post-conviction relief (PCR) to defendant Teresa A. Clark. We reverse and remand for the court to issue an order

directing the Motor Vehicle Commission to reinstate the driving while intoxicated (DWI) violation on defendant's certified driver's abstract.

On October 14, 2011, defendant pled guilty to assault by auto, in violation of N.J.S.A. 2C:12-1(c)(2), as well as driving while intoxicated, in violation of N.J.S.A. 39:4-50.¹ Defendant was sentenced to two years probation, a two-year revocation of her driving privileges under the assault by auto charge, a two-year revocation of her driving privileges for the DWI violation², two years of ignition interlock, thirty days community service, and a \$1,000 fine.

On April 3, 2017, defendant applied for PCR. Defendant argued that the DWI charge should have been merged with the assault by auto charge at the time of sentencing as a lesser included offense and requested the DWI violation be deleted from her driver's abstract.

A PCR hearing was held on May 1, 2017. The issue before the PCR judge was whether defendant's DWI charge should have merged with the assault by auto charge. The PCR judge granted the

¹ This was defendant's second charge for DWI.

² The two-year revocation of defendant's license for the DWI violation was to run concurrent with her license revocation under the assault by auto charge.

defendant's application to merge the DWI conviction with the conviction for assault by auto. In addition, the judge ordered the Motor Vehicle Commission to remove the DWI violation from the defendant's driver's abstract.

The State subsequently moved to vacate the PCR judge's order and dismiss the PCR petition, arguing that merger of the DWI conviction did not result in dismissal of the violation. The State also argued that the PCR petition was untimely.

The PCR judge denied the State's motion, reasoning that this matter was nearly identical to the matter before the court in State v. Baumann, 340 N.J. Super. 553 (App. Div. 2001).

On appeal, the State raises the following arguments:

POINT I - THE LOWER COURT ERRED IN DISMISSING DEFENDANT'S VIOLATION FOR DRIVING WHILE INTOXICATED, AS MERGER OF THE VIOLATION DOES NOT CAUSE THE VIOLATION TO BE DISMISSED.

POINT II - THE LOWER COURT ERRED IN NOT DISMISSING DEFENDANT'S PCR PETITION, AS DEFENDANT COMPLETED HER SENTENCE.

Our "standard of review is necessarily deferential to a PCR court's factual findings . . . [and] we will uphold the PCR court's findings that are supported by sufficient credible evidence in the record." State v. Nash, 212 N.J. 518, 540 (2013) (citing State v. Harris, 181 N.J. 391, 415 (2004)). However, we "need not defer to a PCR court's interpretation of the law; a legal conclusion is

reviewed de novo." Id. at 540-41 (citing Harris, 181 N.J. at 415-16).

We first decide whether the PCR judge properly interpreted our decision in State v. Baumann. In Baumann, the defendant had a blood alcohol level of .149 when he crossed the center line and struck another car driving in the opposite direction. Baumann, 340 N.J. Super. at 555. Baumann was charged with DWI and assault by auto. Ibid. On appeal, the State acknowledged that merger of the two charges would be required if the State's sole evidence of recklessness was the defendant's intoxication. Id. at 556.

The question in Baumann was whether the State proffered any evidence of recklessness apart from the defendant's intoxication. Ibid. The State argued that the entirety of the defendant's conduct demonstrated recklessness, including his decision to drive after waking up early to play golf, taking a trip of more than one hour, falling asleep while driving, driving over the center line, and failing to take steps to avoid the accident. Ibid. We rejected these arguments finding that "[w]hat constituted recklessness in [that] case was defendant getting into his car and attempting to drive home while he was drunk, and the occurrence of [the] . . . accident [could not] be fairly or realistically attributable to anything other than his intoxication." Ibid.

Therefore, we concluded that merger of the DWI and assault by auto was proper. Ibid.

However, we also determined in Baumann that the mandatory penalties for the DWI violation "survive[d] the merger" Id. at 557. We concluded "that the criminal jurisprudence of this State permits the survival of mandatory penalties attendant upon a lesser charge when merged with a more serious offense that does not carry those penalties." Ibid. See also State v. Frank, 445 N.J. Super. 98, 109 (App. Div. 2016) (affirming that "[m]andatory penalties attached to a merged violation survive merger, even if the elements of the merged violation are completely encompassed in the surviving violation.") Our reasoning in Baumann was adopted by the New Jersey Supreme Court in State v. Wade, 169 N.J. 302, 303 (2001).

Baumann supports the trial judge's conclusion that merger was required in this case for sentencing purposes. However, Baumann does not support the judge's conclusion that the merger, in effect, extinguished defendant's DWI conviction. It did not. As we previously stated in State v. Pennington, 273 N.J. Super. 289 (App. Div. 1994), "[c]onvictions merged for the purpose of sentencing are not extinguished. The doctrine of merger . . . only serves to prevent 'an accused who has committed . . . one

offense . . . from being punished as if for two.'" Id. at 295 (quoting State v. Cole, 120 N.J. 321, 325-26 (1990)).

We next consider whether defendant's PCR petition was untimely. Rule 3:22-12(a) provides that petitions for post-conviction relief must be filed within five years of the entry of the judgment of conviction that is being challenged. However, "[t]he failure to merge convictions results in an illegal sentence for which there is no procedural time limit for correction." State v. Romero, 191 N.J. 59, 80 (2007). Because defendant was seeking relief from an illegal sentence, her petition was not governed by the five year time period under Rule 3:22-12(a), even though we ultimately conclude that she is not entitled to the relief she is seeking.

Based on the foregoing, we reverse and vacate the PCR judge's May 1, 2017 order and remand the matter to the court to issue an order directing the Motor Vehicle Commission to reinstate the DWI violation on defendant's certified driver's abstract.

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