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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-4970-15T2  
A-5531-15T2

STATE OF NEW JERSEY,

Plaintiff-Appellant/  
Cross-Respondent,

v.

B.L. THOMAS-HUNTER a/k/a  
THOMAS J. BERRY, LORD BERRY,  
THOMAS HUNTER BL, B.L. THOMAS  
HUNTER, BARRY THOMAS HUNTER, BL  
HUNTER, BL THOMAS HUNTER, B.L. THOMAS,  
BARRY THOMAS, BARRY L. THOMAS, BARRY  
LEE THOMAS, BARRY THOMAS-HUNTER,  
BERRY THOMAS-HUNTER, BI THOMAS-  
HUNTER, BL THOMAS-HUNTER,

Defendant-Respondent/  
Cross-Appellant.

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

B.L. THOMAS-HUNTER a/k/a  
THOMAS J. BERRY, LORD BERRY,  
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BARRY THOMAS, BARRY L. THOMAS, BARRY

LEE THOMAS, BARRY THOMAS-HUNTER,  
BERRY THOMAS-HUNTER, BI THOMAS-  
HUNTER, BL THOMAS-HUNTER,

Defendant-Appellant.

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Submitted November 1, 2017 – Decided December 22, 2017

Before Judges Manahan and Suter.

On appeal from Superior Court of New Jersey,  
Law Division, Gloucester County, Indictment  
No. 14-12-1045.

Sean F. Dalton, Gloucester County Prosecutor,  
attorney for appellant/cross-respondent State  
of New Jersey in A-4970-15 and respondent  
State of New Jersey in A-5531-15 (Douglas B.  
Pagenkopf, Assistant Prosecutor, on the  
brief).

Helmer, Conley & Kasselmann, PA, attorneys for  
respondent/cross-appellant B.L. Thomas-Hunter  
in A-4970-15 and appellant B.L. Thomas-Hunter  
in A-5531-15 (Patricia B. Quelch, of counsel  
and on the brief).

PER CURIAM

In these consolidated appeals, the State appeals from the probationary sentence imposed by the Law Division on second-degree Graves Act charges. Defendant B.L. Thomas cross-appeals from the denial of his motion to dismiss the indictment. We reverse and remand for re-sentence. We affirm the denial of the motion to dismiss the indictment.

On June 25, 2014, Monroe Township police officers responded to a suspicious person complaint regarding a private residence

located on Trinidad Avenue. Upon arrival, police observed defendant on the property with two other men. Defendant stated that the property belonged to his deceased sister and that he was the executor of the estate. Defendant produced documentation to confirm his statement. Defendant further indicated that he did not possess a key to the residence and used a knife to split a window screen to gain entry into the residence. Defendant identified himself as a Special Agent for the United States Office of American Security and Intelligence Service and produced identification. Due to a suspicion that defendant provided false identification, police questioned defendant further regarding his employment. Defendant was unable to provide answers to the police inquiries and altered his statement multiple times regarding his employer and employment status.

In addition to the knife seized by police, defendant voluntarily surrendered a firearm, holstered on his person, found to contain four hollow-point bullets. Defendant produced a Utah permit to carry. He did not have a permit to carry in New Jersey or in his home state of California.

The police communicated by phone with a representative from Bank of America, who indicated that the house was foreclosed upon. Defendant was then arrested and searched, which yielded a pepper spray blaster attached to his belt.

In December 2014, a Gloucester County grand jury charged defendant with: third-degree burglary, N.J.S.A. 2C:18-2(a)(1) (count one); second-degree unlawful possession of a weapon-handgun, N.J.S.A. 2C:39-5(b) (count two); fourth-degree unlawful possession of a deadly weapon, N.J.S.A. 2C:39-5(d), (counts three and seven); fourth-degree unlawful possession of certain weapons or device (dum-dum bullets), N.J.S.A. 2C:39-3(f) (count four); fourth-degree impersonating a law enforcement officer, N.J.S.A. 2C:28-8(b) (count five); and fourth-degree possession of a document falsely purported to be government issued identification, N.J.S.A. 2C:21-2.1(d) (count six).<sup>1</sup>

In October 2015, defendant filed a motion to dismiss the indictment arguing that there was improper instruction given to the grand jurors on the applicable law. It was further argued that several charges be dismissed due to failure to provide the grand jurors with exculpatory evidence that defendant had a right to be on the property. After hearing argument, the judge held the State presented a prima facie case to the grand jury and denied defendant's motion.

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<sup>1</sup> The State served two subpoenas duces tecum to Bank of America. In response to the second subpoena, after defendant's indictment, Bank of America responded that the property was not foreclosed upon. Rather, the property was owned by the Estate of Barbara Berry and was in the process of foreclosure.

Pursuant to a negotiated plea agreement, defendant pled guilty to second-degree unlawful possession of a weapon in exchange for the State recommending a sentence of three years in New Jersey State Prison, with one year of parole ineligibility. The State, in order to allow for the departure from the mandatory minimum sentence under the Graves Act, filed a motion for a Graves Act waiver pursuant to N.J.S.A. 2C:43-6.2, which was granted by the assignment judge's designee, the criminal presiding judge. The matter was set down for sentence before the presiding judge.

On the sentence date, after hearing from defendant, his counsel, and the State, the judge made findings regarding the applicable aggravating and mitigating factors N.J.S.A. 2C:44-1(a) and N.J.S.A. 2C:44-1(b). The judge found one aggravating factor (9), which he did not afford substantial weight. On the other hand, the judge found mitigating factors (2), (4), (7), (8), (9) and (10), which he afforded substantial weight.

After weighing of the factors and after considering the defendant's prior military service, his service-related illness, his history of community involvement, and the character of the defendant, the judge held that it would be a serious injustice for defendant to receive a prison term. As such, the judge sentenced defendant to a two-year probationary term. All remaining charges were dismissed, appropriate fines were imposed, and defendant was

credited with fifty-eight days' time served.

On appeal, the State argues that the probationary sentence was erroneous as the judge was without authority to reduce the negotiated plea to probation under the Graves Act waiver. Given our Supreme Court's decision in State v. Nance, 228 N.J. 378, 397 (2017), which was decided after the filing of the appeal, this argument lacks merit.

The State also argues that the sentence was illegal pursuant to N.J.S.A. 2C:43-6.2 and N.J.S.A. 2C:44-1(d) because the facts before the judge, as well as the findings, supported imposition of a prison sentence of not less than three years, which would require, under the waiver provision, a one-year parole disqualifier as a component of the sentence. For reasons set forth below, we conclude this argument has merit and compels reversal.

Following the State's appeal, defendant cross-appealed the order denying dismissal of the indictment contending that the prosecutorial misconduct warranted its dismissal. We disagree.

On appeal, defendant raises the following contention:

POINT I

PROSECUTORIAL MISCONDUCT AFFECTED THE FAIR AND IMPARTIAL DECISION-MAKING PROCESS OF THE GRAND JURY.

A. FAILURE TO INVESTIGATE.

B. INSTRUCTIONS TO THE GRAND JURY.

C. FAILURE TO PRESENT PRIMA FACIE  
EVIDENCE AS TO EACH ELEMENT OF THE  
CRIMES CHARGED.

Further, defendant raises the following points in response  
to the State's brief:

POINT I

THE SENTENCING COURT DID NOT ABUSE ITS  
DISCRETION BY IMPOSING A CUSTODIAL  
PROBATIONARY SENTENCE UPON THIS DEFENDANT.

POINT II

DEFENDANT'S CHALLENGES TO THE INDICTMENT WERE  
RAISED BEFORE THE LOWER COURT.

I.

We commence our discussion by addressing whether the sentence  
imposed was in derogation of the exacting standards for deviation  
from the presumption of incarceration for a second-degree crime.  
N.J.S.A. 2C:44-1(d).<sup>2</sup> In other words, we are called upon to  
determine whether this is the exceptional case where imprisonment  
will not serve any deterrence purpose and imprisonment would be a  
serious injustice.

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<sup>2</sup> The downgrading of a second-degree crime to a third-degree crime,  
as here, does not affect the applicability of the presumption of  
incarceration. See, State v. Salentre, 275 N.J. Super. 410, 415  
(App. Div. 1994).

In Nance, the Court addressed the serious injustice exception:

N.J.S.A. 2C:44-1(d) provides:

The court shall deal with a person who has been convicted of a crime of the first or second degree . . . by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.

"The 'serious injustice' exception to the presumption of imprisonment applies only in 'truly extraordinary and unanticipated circumstances,'" State v. Jabbour, 118 N.J. 1, 7 (1990) (quoting State v. Roth, 95 N.J. 334, 358 (1984), "where the 'human cost' of punishing a particular defendant to deter others from committing his offense would be 'too great,'" State v. Evers, 175 N.J. 355, 389 (2003) (quoting State v. Rivera, 124 N.J. 122, 125 (1991)). N.J.S.A. 2C:44-1(d) thus imposes a high standard that must be overcome before a first or second-degree offender may be sentenced to a non-custodial term.

[Nance, 228 N.J. at 395.]

For a defendant to overcome the presumption of incarceration and forestall the deterrent effect of incarceration, the defendant must be "idiosyncratic." The exception only applies in the exceptional case. See Jabbour, 118 N.J. at 7-8.

In Evers, the Court provided guidance to trial courts for



determining whether the presumption has been overcome.

[T]rial courts should look to the statutory sentencing mitigating factors and determine whether those factors are present to such an extraordinary degree and so greatly exceed the aggravating factors that a particular defendant is distinguished from the "heartland" of cases for the particular offense. (citation omitted). It is the quality of the extraordinary mitigating factors taken together that must be weighted in deciding whether the "serious injustice" standard has been met. The trial court also must look at the gravity of the offense with respect to the peculiar facts of a case to determine how paramount deterrence will be in the equation. Generally, for first- and second-degree crimes there will be an overwhelming presumption that deterrence will be of value.

[Id. at 395-96.]

Turning to the sentence herein, the judge found only aggravating factor (9) "the need for deterrence" but provided it little weight. The judge declined to find mitigating factor (1) "the defendant's conduct neither caused nor threatened serious harm." The judge stated, "[I] find that in any possession, unlawful possession of a weapon case, there's always a threat of serious harm that could result." We agree.

Defendant was carrying a handgun on his person while at his sister's former residence under circumstances that resulted in the police responding to the scene. One can easily envision how the events of that encounter between the defendant and the police may

have been different, resulting in "serious harm." Further, defendant's conduct in possessing the weapon without the required permit, without more, is conduct that the Graves Act seeks to deter. Clearly, the Legislature considered the harm caused by defendant's conduct when it graded the conduct as a second-degree crime.

We disagree with the judge's finding that defendant possessed the weapon "lawfully" but "in the wrong jurisdiction" as that finding is in contravention of the facts and the controlling law. As such, the application of that finding to a determination of the applicability of mitigating factor (2) "defendant did not contemplate that his conduct would cause or threaten serious harm," is without support.

We take no issue with the judge's findings as to the applicability of the remaining mitigating factors. Those mitigating factors are supported by the record. As well, we take no issue with the judge's findings relating to defendant's positive character. However, we do not conclude, even after acceptance of those findings, that defendant's character is of the type and the nature that qualifies as an exception to the presumption of incarceration.

Defendant's status as a first-time offender, a military veteran and a longstanding community activist, while commendable,

does not qualify him as "idiosyncratic." Compare, Jabbour, 118 N.J. at 8. Nor would his service-related illness alone overcome the presumption; at least in the absence of a medical prognosis or proof that his medical needs could not be adequately met while incarcerated. State v. Lebra, 357 N.J. Super. 500, 511-12 (App. Div. 2002).

Therefore, we hold the judge's determination that the defendant's incarceration would constitute a serious injustice, based on the sentence record, was erroneous. In reaching our decision, we are mindful of the judge's familiarity with defendant's life circumstances. We are also mindful that the judge gave thoughtful consideration to his sentence decision. However, as in Evers, "[W]e cannot agree that the sum of [defendant's] circumstances is so rare and extraordinary that the 'human cost' of defendant's imprisonment exceeds society's imperative need to deter others . . . ." Id. at 401. We are therefore constrained to remand for re-sentencing.

## II.

We next turn to defendant's appeal of the order denying the motion to dismiss the indictment. The standard for appellate review of a motion to dismiss an indictment is abuse of discretion. State v. Hoqan, 144 N.J. 216, 229 (1996) (citing State v. Weleck, 10 N.J. 355, 364 (1952)). "A trial court's exercise of this

discretionary power will not be disturbed on appeal unless it has been clearly abused." State v. Warmbrun, 277 N.J. Super. 51, 60 (App. Div. 1994) (quoting Weleck, 10 N.J. at 364), certif. denied, 140 N.J. 277 (1995).

Defendant argues that the failure to investigate, the improper instructions to the grand jury, and the failure to present prima facie evidence constituted prosecutorial misconduct. We disagree.

Although a prosecutor bears a responsibility to investigate, it is not the role of the prosecutor to make the defendant's case for him. Hogan, 144 N.J. at 238. While the information provided to the police by the bank regarding the foreclosure status of defendant's sister's former residence was erroneous, the error was not due to the conduct of the State. The State promptly notified defendant's counsel of the status of the foreclosure upon learning the error. Further, there can be no claim of prejudice by defendant as the State dismissed the charge relating to the misinformation pursuant to the plea agreement.

Given our standard of review and the record before us, we conclude that defendant's remaining arguments, not specifically addressed herein, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Reversed in part. Affirmed in part. Remanded for re-

sentence. We do not retain jurisdiction.

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

A handwritten signature in black ink, appearing to be 'JWA', is written over the text 'file in my office.' and extends slightly above it.

CLERK OF THE APPELLATE DIVISION