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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-1652-17T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EDWIN NIEVES,

Defendant-Appellant.

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Submitted April 10, 2018 – Decided April 26, 2018

Before Judges Reisner and Gilson.

On appeal from Superior Court of New Jersey,  
Law Division, Ocean County, Indictment No. 17-  
07-1032.

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

Joseph D. Coronato, Ocean County Prosecutor,  
attorney for respondent (Samuel Marzarella,  
Chief Appellate Attorney, of counsel; William  
Kyle Meighan, Senior Assistant Prosecutor, on  
the brief).

PER CURIAM

By leave granted, defendant Edwin Nieves appeals from a  
November 9, 2017 order denying defendant's motion for additional

discovery. Defendant sought discovery of the prosecutor's reasons for supporting a Graves Act waiver<sup>1</sup> but opposing a probationary term. We affirm the order on appeal.

To put the issue in context, the Graves Act provides that a defendant convicted of certain weapons offenses must be sentenced to at least five years in prison with a minimum of forty-two months of parole ineligibility. N.J.S.A. 2C:43-6(c). However, in certain circumstances, the statute allows for a waiver of the forty-two month parole ineligibility term, on motion by the prosecutor. N.J.S.A. 2C:43-6.2 provides, in pertinent part:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under . . . subsection c. of N.J.S. 2C:43-6 for a defendant who has not previously been convicted of an offense under that subsection, . . . does not serve the interests of justice, the assignment judge shall place the defendant on probation . . . or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole.

[N.J.S.A. 2C:43-6.2.]

Pursuant to a plea agreement, defendant pled guilty to one count of second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b). As part of the plea agreement, the prosecutor agreed

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<sup>1</sup> The term "Graves Act waiver" refers to a waiver of the mandatory period of parole ineligibility under the Graves Act. See N.J.S.A. 2C:43-6.2.

to file a Graves Act waiver motion, pursuant to N.J.S.A. 2C:43-6.2, and agreed to a sentence of five years in prison with one year of parole ineligibility. Despite defense counsel's written statement to the prosecutor, supporting a probationary term, the prosecutor rejected that option. The prosecutor's office included a copy of defense counsel's statement as an attachment to its waiver motion, but did not file anything in writing explaining its reasons for opposing a probationary sentence.

Mistakenly believing that the prosecutor had authority to decide both the waiver issue and the sentence, defendant filed a motion for an Alvarez hearing,<sup>2</sup> aimed at challenging the prosecutor's decision. Defendant also filed a motion to obtain discovery of the prosecutor's reasons for rejecting a probationary term. See State v. Benjamin, 228 N.J. 358 (2017) (requiring the prosecutor to provide a written statement of reasons for denying a Graves Act waiver). The trial court denied the discovery motion, reasoning that the prosecutor had granted the Graves Act waiver and Benjamin did not require the prosecutor to provide reasons for opposing a probationary sentence. However, in dicta, the judge

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<sup>2</sup> State v. Alvarez, 246 N.J. Super. 137, 139 (App. Div. 1991), gives a defendant the right to request a hearing to challenge a prosecutor's denial of a Graves Act waiver.

observed that the prosecutor's decision to oppose probation was not arbitrary.

After we granted leave to appeal, both sides filed merits briefs acknowledging that, pursuant to State v. Nance, 228 N.J. 378 (2017), the prosecutor has authority to decide whether to agree to a Graves Act waiver, but has no authority to determine the sentence that will be imposed pursuant to the waiver. Rather, the decision to impose a prison term or probation rests entirely with the Assignment Judge (AJ) or the Criminal Presiding Judge acting as the AJ's designee. Id. at 397. As a result, defendant implicitly concedes that he no longer seeks an Alvarez hearing and therefore does not need pre-hearing discovery.

However, defendant seeks to raise the following issues, which were not the subject of our order granting leave to appeal:

POINT I: A REMAND SHOULD BE ORDERED BECAUSE THE COURT FAILED TO MAKE ITS OWN DECISION AS TO THE SUBSTITUTE SENTENCE WHEN THE GRAVES ACT SENTENCE WAS WAIVED AND MISTAKENLY ASSUMED THAT THE DECISION WAS THE PROSECUTOR'S. U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, PARAS. 1.

POINT II: ON REMAND, THE PROSECUTOR SHOULD PROVIDE REASONS FOR THE DECISION ON THE GRAVES ACT WAIVER BECAUSE THE EFFECTIVE FUNCTIONING OF THE SYSTEM REQUIRES REASONS IN ALL CASES. U.S. CONST. AMEND. XIV; N.J. CONST. ART. I, PARAS. 1.

Defendant's first point assumes that the trial court already imposed sentence. That is incorrect. The trial court only addressed defendant's motion for discovery. The sentencing was stayed pending the outcome of this appeal. As a result, the sentencing issue is not before us. However, to the extent that the trial court's decision could be read as implying deference to the prosecutor's recommendation of prison instead of probation, that view was mistaken.

As Nance makes clear, once the waiver is granted, the decision whether to impose probation or a prison term with one year of parole ineligibility is entirely up to the AJ or the AJ's designee. Nance, 228 N.J. at 385-86. Therefore, on remand, the trial court must conduct a sentencing hearing in which the court gives equal consideration to the sentencing arguments presented by each side. We note that, as part of its sentencing memorandum, the prosecutor will have to state reasons opposing defendant's request for probation, or the request will stand unopposed.

Because defendant is not challenging the prosecutor's decision to apply for a Graves Act waiver, and is no longer seeking discovery pursuant to Benjamin, which was the issue on which we granted leave to appeal, we decline to consider the new issue defendant raises in his second point.

We affirm the November 9, 2017 order denying the discovery motion, vacate the November 9, 2017 order staying the sentencing, and remand for further proceedings consistent with this opinion.

Affirmed 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