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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-1694-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HERRON ALSTON,

Defendant-Appellant.

Submitted January 25, 2023 - Decided March 1, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Essex County, Indictment No. 92-08-2908.

Herron Alston, appellant pro se.

Theodore N. Stephens II, Acting Essex County
Prosecutor, attorney for respondent (Lucille M.
Rosano, Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the denial of his motion to withdraw a 1996 guilty plea to a violation of probation (VOP). Our review of the record reflects defendant did not plead guilty to the VOP but was instead found guilty of the violation. We affirm.

In 1993, defendant pleaded guilty to third-degree receipt of stolen property (an automobile). The court sentenced him to 364 days in jail and three years of probation.

On June 17, 1995, a notice of VOP was issued to defendant for "fail[ing] to report since July of 1993, three months or less after being placed on probation . . . fail[ing] to perform any community service, [and] fail[ing] to make any payments," and he was arrested on new charges.

In July 1995, defendant was charged in an indictment with second-degree conspiracy to commit murder, N.J.S.A. 2C:5-2 and N.J.S.A. 2C:11-3; murder, N.J.S.A. 2C:11-3(a)(1) and (2); third-degree unlawful possession of a weapon (handgun), N.J.S.A. 2C:39-5(b); and second-degree possession of a weapon (handgun) for an unlawful purpose, N.J.S.A. 2C:39-4(a).

After a 1996 jury trial, defendant was acquitted of second-degree conspiracy to commit murder but convicted of aggravated manslaughter, as a lesser-included offense of murder, and the weapons-related offenses.

During the sentencing hearing in June 1996, the court addressed defendant's VOP stemming from the 1993 guilty plea and sentence. The court stated, "I take it, [defense counsel], there is no question that Mr. Alston is clearly in violation of the conditions of the sentence." Defense counsel replied, "Yes, your Honor" and the court responded, "I agree." The court listed the grounds underlying the VOP, as indicated on the notice. The court further noted that defendant "has been arrested and convicted now in connection with this present offense while he was on active probation." The court addressed defendant, stating:

By your entire conduct throughout the period of this probationary sentence and given the fact that you have now been convicted of aggravated manslaughter, a crime committed while on probation, in connection with that sentence I find beyond a doubt you have wil[l]fully violated the conditions of your probation, disregarded the purpose of probationary supervision and the goals of that particular sentence.

Accordingly, the court vacated the sentence previously imposed in 1993 and sentenced defendant to five years' imprisonment with eighteen months of parole ineligibility.

The court then sentenced defendant on his 1996 convictions. After the merger of counts, the court sentenced defendant to an aggregate life term with twenty-five years of parole ineligibility. The five-year term imposed for the

VOP was to run consecutive to the life term. Defendant completed the VOP sentence in September 1999. Defendant did not appeal his VOP or the resulting sentence.

Defendant did appeal his 1996 convictions. We reversed, finding the erroneous admission of hearsay evidence during trial violated defendant's rights under the Confrontation Clause. State v. Alston (Alston I), 312 N.J. Super. 102, 116 (App. Div. 1998).

In the second trial, defendant was again convicted of aggravated manslaughter, and the weapons-related offenses. In 2000, the court sentenced defendant to the same aggregate sentence—a life term with twenty-five years of parole ineligibility. We affirmed his convictions and sentence. State v. Alston (Alston II), No. A-3453-00 (App. Div. Feb. 8, 2002), certif. denied, 174 N.J. 41 (2002).

In 2005, defendant filed his first petition for post-conviction relief (PCR), claiming ineffective assistance of counsel because his trial attorney did not sufficiently consult with him. After an evidentiary hearing, the trial court denied the petition. We affirmed. State v. Alston (Alston III), No. A-5384-08 (App. Div. Mar. 2, 2011) (slip op. at 21) (finding defense counsel "was thoroughly familiar with the evidence presented at the first trial, was successful on the

appeal, and made informed strategic choices about the alibi and rebuttal witnesses during the retrial").

In November 2017, defendant filed a second PCR petition. State v. Alston (Alston IV), No. A-2130-18 (App. Div. Jan. 29, 2020) (slip op. at 3), certif. denied, 245 N.J. 66 (2021). Defendant requested 447 days of jail credits and argued that his parole disqualifier violated his constitutional right to a jury trial. Id., slip op. at 2-4. The trial court determined the motion was untimely, defendant was not entitled to relief on the jail credit issue, and there was no basis to grant PCR. Id., slip op. at 4-5.

We affirmed. In considering the jail credit issue, the panel found that after defendant was remanded for a new trial, the pending charges provided a basis for the VOP charge. Id., slip op. at 6-7. We relied on Rule 3:31-8(a) to find defendant was properly credited with gap time for the 447 days, and that jail credit was not warranted under these circumstances. Ibid. Therefore, "[e]ven if counsel had argued the jail credit . . . issue, the arguments lacked merit and would not have changed the outcome of the sentence." Id., slip op. at 7.

In August 2020, defendant moved to withdraw his guilty plea to the VOP, asserting that the court's finding—that defendant violated probation—needed to be supported by an admission from defendant.

On January 19, 2022, the court denied the motion in an oral decision. The court noted the colloquy regarding the VOP in 1996 "was not a plea, it was a finding by the Court." The judge stated, "I do not find . . . manifest injustice" and denied the motion under Rule 3:21-1.

On appeal, defendant raises the following issues:

I. [DEFENDANT]'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHERE THE COURT, SOLELY ON THE BASIS OF HIS ATTORNEY CONSENTING/STIPULATING THAT THE PROBATION IN THE 2908 CASE HAD BEEN VIOLATED, ADJUDICATED HIM GUILTY ON THE VOP CHARGE AND IMPOSED A FIVE YEAR SENTENCE.

II. WHERE THE APPELLATE DIVISION DECISION VACATED THE JUDGMENT OF CONVICTION IN THE 2488 CASE IN MAY, 1998, THE LEGAL BASIS FOR THE VOP IN THE 2908 CASE WAS DE JURE ALSO VACATED AND THE TIME SERVED ON THE VOP SHOULD HAVE BEEN CREDITED AGAINST THE 2488 CASE'S SENTENCE AS [RULE] 3:21-8 CREDIT.

III. THE COURT BELOW COMMITTED PLAIN ERROR IN DENYING DEFENDANT'S MOTION TO WITHDRAW THE PLEA OF GUILTY BECAUSE A "MANIFEST INJUSTICE" WAS DEMONSTRATED.

We discern no error in the court's denial of defendant's motion to withdraw his guilty plea to the VOP. There was no guilty plea. Instead, the court

employed the procedure under N.J.S.A. 2C:45-3 and found defendant guilty of the violation. Under that statute, if the court is "satisfied that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of" his probation or if the defendant "has been convicted of another offense," the court "may revoke the suspension or probation and sentence or resentence the defendant." N.J.S.A. 2C:45-3(a)(4).

N.J.S.A. 2C:45-4 provides a probationer certain procedural protections:

The court shall not revoke a suspension of sentence or probation or delete, add or modify conditions of probation except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense, and to be represented by counsel.

[Ibid.]

"The State bears the burden of proving the charges" supporting the violation of probation "by a preponderance of the evidence." State v. Mosley, 232 N.J. 169, 182 (2018) (citing State v. Reyes, 207 N.J. Super. 126, 137 (App. Div. 1986)).

Defendant does not dispute he received notice of the VOP. During the brief hearing, defendant did not speak or offer any evidence in his defense. The court accepted as true the State's allegations in the notice of VOP that defendant had failed to report since July 1993—three months after being placed on

probation, failed to perform any community service, and failed to make any required payments. This, coupled with the aggravated manslaughter conviction, "a crime committed while on probation," permitted the court to "find beyond a doubt" that defendant had willfully violated the conditions of his probation. Although defendant's first conviction for aggravated manslaughter was later reversed, his failure to comply with the additional conditions of probation permitted a finding of guilt on the VOP. Defendant does not challenge any facts relating to the other grounds for issuing the notice of VOP and for which the court found the violation.

Even if the VOP was vacated, defendant was later convicted in the re-trial. He would have been resentenced on the VOP and likely received the same consecutive sentence. As it was, he had completed the VOP sentence prior to the completion of the second trial.

As to Point II, in Alston IV, we considered defendant's argument that his VOP was "nullified" after the reversal of the original convictions and he was entitled to jail credit. We stated:

[d]efendant appealed his convictions for aggravated manslaughter and the weapons charges. When the conviction was reversed, all of the charges were remanded for a re-trial. Therefore, defendant still violated his probation as there were pending

charges. . . . Defendant's contention that his VOP was nullified is without merit.

[Alston IV, slip op. at 6.]

There was no error in the trial court's denial of defendant's motion to withdraw his guilty plea as there was no guilty plea to withdraw. Moreover, the finding that defendant violated his probation was supported by the evidence before the court.

Any remaining arguments not addressed by this court lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION