

To: New Jersey Law Revision Commission
From: Kiersten Fowler
Re: Whether gap-time credits pursuant to N.J.S. 2C:44-5 apply to offenses outside of the Criminal Code
Date: September 11, 2017

M E M O R A N D U M

Executive Summary

In *State v. Walters*,¹ the Appellate Division addressed the issue of “whether a defendant is entitled to receive gap-time credits for a sentence of imprisonment imposed following a Title 39 motor vehicle violation.”² Generally, if a defendant is given two separate sentences on two different dates, the time spent in custody for the first sentence is added as a “gap-time credit” toward the second sentence pursuant to N.J.S. 2C:44-5.³ However, the statutory language does not explicitly address if this provision applies only to “offense[s]” under the Criminal Code, or if it extends to other offenses such as offenses under the Juvenile Code or under Title 39. Ultimately, the Court determined that gap-time credits apply to offenses outside of New Jersey’s Criminal Code.⁴ *State v. Walters* was appealed to the N.J. Supreme Court, but the petition for certification was denied.⁵

It should be noted that the statute in question, N.J.S. 2C:44-5, is the subject of proposed legislation that might be contrary to the holding in *State v. Walters*. Bill S1482, sponsored by Jennifer Beck and Joseph M. Kyrillos, Jr., “[c]larifies that defendants are to be credited for pre-sentence jail time directly attributable to specific offense for which sentence is imposed.”⁶ This bill would effectively reverse *State v. Hernandez*, which was vital to the holding in *State v. Walters*. The bill was introduced in the Senate on February 16, 2016 and was referred to the Senate Law and Public Safety Committee but no further action was taken during the Legislative session.

Statute

N.J.S. 2C:44-5

....

b. Sentences of imprisonment imposed at different times. When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for an offense committed prior to the former sentence, other than an offense committed while in custody:

....

¹ 445 N.J.Super. 596, 598 (App. Div. 2016).

² *Id.* at 598.

³ *Id.* at 600 (citing to *State v. Hernandez*, 208 N.J. 24, 48-49 (2011)).

⁴ *Id.* at 603.

⁵ *State v. Walters*, 228 N.J. 495, 581-82 (2017).

⁶ 2016 New Jersey Senate Bill No. 1482, New Jersey Two Hundred Seventeenth Legislature - First Annual Session.

(2) Whether the court determines that the terms shall run concurrently or consecutively, the defendant shall be credited with time served in imprisonment on the prior sentence in determining the permissible aggregate length of the term or terms remaining to be served.⁷

Background

On November 16, 2013, defendant was arrested and charged pursuant to N.J.S. 39:4-50 for driving while intoxicated.⁸ Later that same month, on the 24th, the defendant was a passenger in a vehicle when he caused that vehicle to crash into a concrete center barrier by getting into a physical altercation with the driver.⁹ Two children were in the backseat during the crash.¹⁰ On the day of the crash the defendant was arrested and incarcerated, where he remained during subsequent proceedings.¹¹

On January 21, 2014, the defendant was charged for the latter incident under Cape May County Indictment No. 14-01-0074.¹² On February 18, 2014, before Indictment No. 14-01-0074 was resolved, the defendant pled guilty to the DWI incident from early November.¹³ That same day he was sentenced and began serving 180 days in the county jail, “where he was already incarcerated since his November 24 arrest.”¹⁴ Thereafter, on April 3, 2014, Indictment No. 14-01-0074 was resolved with the defendant pleading guilty to the amended charges of third-degree aggravated assault and violation of probation for the shoplifting conviction, pursuant to a plea agreement.¹⁵ The defendant was sentenced to three years in prison followed by a 365-day sentence for his violation of probation.¹⁶

Originally, due to defendant’s custodial DWI sentence that he had already served, he received “jail credit of eighty-six days and gap-time credit of ninety-four days.”¹⁷ Regarding the probation sentence, he did not receive any gap-time credit, but he did receive jail credit of ninety-two days.¹⁸ Even though the State voiced no objection at the time of sentencing, in May the State moved for reconsideration of the JOC, contending that “gap-time credit should not be awarded based on the sentence imposed for a Title 39 motor vehicle violation.”¹⁹ After reconsideration, the Law Division held that the defendant’s gap-time credit should be revoked.²⁰ Relying on *State v. French*,²¹ the trial judge posited that the “defendant was not entitled to gap-time credit because the prior custodial sentence for DWI was imposed for a motor vehicle

⁷ N.J.S. 2C:44-5.

⁸ *Walters*, 445 N.J.Super. at 598.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 599.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ 313 N.J.Super. 457, 466 (Law Div. 1997).

violation in municipal court, and defendant served his sentence in the county jail, rather than state prison.”²² Additionally, she found that “gap-time credit is earned only for a term of imprisonment imposed as part of a sentence for conviction of an ‘offense’ under the Criminal Code.”²³

The defendant appealed to the Appellate Division, arguing that he satisfied the requirements set forth in N.J.S. 2C:44-5(b)(2) and thus should be awarded gap-time credits for the time served on the DWI conviction.²⁴ Ultimately, the Appellate Division decided in favor of the defendant, opining that:

[T]he trial court erred in finding that a person can only receive gap-time credit for a custodial sentence imposed for a violation of the New Jersey Code of Criminal Justice (Criminal Code), N.J.S.A. 2C:1-1 to -104-9. . . . Here, nothing in the language or statutory scheme of N.J.S.A. 2C:44-5(b) supports the conclusion that a defendant must be convicted for a Criminal Code offense to receive gap-time credits.²⁵

Two cases appear to have been vital to the Court’s conclusion: *State v. Hernandez*²⁶ and *State v. Franklin*.²⁷

According to *State v. Hernandez*, the purpose of gap-time credit is to award a defendant “who is given two separate sentences on two different dates credit toward the second sentence for the time spent in custody since he or she began serving the first sentence.”²⁸ Additionally, *State v. Hernandez* implemented a bright-line rule, that “a sentencing court is obligated to award gap time credits”²⁹ when “(1) the defendant has been sentenced previously to a term of imprisonment; (2) the defendant is sentenced subsequently to another term; and (3) both offenses occurred prior to the imposition of the first sentence.”³⁰ Since the defendant in *Walters* met all of these requirements, the Appellate Division found no reason not to extend the gap-time provisions to offenses outside of the New Jersey Criminal Code.³¹

Going further, the Court compared the holding in *Franklin* to the defendant in *Walters*, effectively extending the definition of “offense[s]” in N.J.S. 2C:44-5(b)(2). In *State v. Franklin*,³² the New Jersey Supreme Court stated that “[a] juvenile incarcerated pursuant to the Juvenile Code, N.J.S.A. 2A:4A-20 to -48, is entitled to gap-time credits pursuant to N.J.S.A.

²² *Walters*, 445 N.J.Super. at 599 (citing *French*, 313 N.J.Super. at 466).

²³ *Id.* at 601.

²⁴ *Id.* at 600.

²⁵ *Id.* at 600-601.

²⁶ 208 N.J. 24 (2011).

²⁷ 175 N.J. 456 (2003).

²⁸ *Hernandez*, 208 N.J. at 48-49.

²⁹ *Walters*, 445 N.J.Super. at 601 (citing *Hernandez*, 208 N.J. at 48-49).

³⁰ *Id.* at 600-01 (quoting *State v. Franklin*, 175 N.J. 456, 462 (2003) (alteration in the original); quoted by *Hernandez*, 208 N.J. at 48-49).

³¹ *Id.* at 601.

³² *Franklin*, 175 N.J. at 462.

2C:44-5(b). . . . [because] a juvenile’s ‘incarceration’ under the Juvenile code is no different than an adult’s ‘imprisonment’ under the criminal code.”³³

In *Franklin*, the court posited that even though the Juvenile Code does not make any reference to N.J.S. 2C:44-5(b), a plain reading of N.J.S. 2C:44-5(b) requires only that a defendant be imprisoned, and thus should be extended to offenses outside of the Criminal Code, such as Juvenile offenses.³⁴

Using similar logic, the Court in *Walters* determined that despite the fact that Title 39 is silent regarding gap-time credits, N.J.S. 2C:44-5 only requires “that a defendant be ‘previously . . . sentenced to imprisonment’” and therefore should apply to motor vehicle violations under the same way that it applies to offenses under the Juvenile code.³⁵

The Appellate Division rejected the State’s contentions and disagreed with the trial judge’s findings, instead determining that they arguments misapplied *State v. French*.³⁶ In *French*, the court held that incarceration in state prison satisfies the definition of “imprisonment” in N.J.S. 2C:44-5, regardless of the court that imposes the sentence.³⁷ The Appellate Division stated that this does not address the situation “where defendant was serving a custodial term in a county jail imposed by a municipal court for a Title 39 violation”³⁸ and therefore was not dispositive in the case at hand.

Conclusion

Staff seeks authorization from the Commission to conduct additional research in order to determine whether a modest change to the statutory language of N.J.S. 2C:44-5 would be beneficial in addressing the issues raised by *State v. Walters*³⁹ - did the Legislature intend for N.J.S. 2C:44-5 to apply only to offenses contained within the Criminal Code, or did it contemplate a broader interpretation?

³³ *Walters*, 445 N.J.Super at 601 (citing to *Franklin*, 175 N.J. at 462).

³⁴ *Id.*

³⁵ *Id.* at 602.

³⁶ *Id.* (citing *State v. French*, 313 N.J.Super. 457, 466 (Law. Div. 1997).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*