



NEW JERSEY LAW REVISION COMMISSION

Tentative Report Relating to Confinement in New Jersey's Code of Criminal Justice (N.J.S. 2C:44-3)

January 23, 2020

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **April 13, 2020**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Executive Summary

In *State v. Clarity*,¹ the Appellate Division considered whether a probationary term for a defendant's last prior crime was the equivalent of "confinement" for purposes of sentencing him to an extended term as a persistent offender.

The Court noted, that N.J.S. 2C:44-3(a) does not define the term "confinement." The absence of a definition "...[generates] potential uncertainty about its scope when the State seeks a persistent-offender extended term."²

Relevant Statute

The relevant portion of N.J.S. 2C:44-3(a) states the following:

The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

Background

N.J.S. 2C:44-3(a) permits a court to impose an extended prison term upon a defendant when he has been convicted of at least two, separate prior crimes. As a condition precedent, the trial court judge must find that "the latest" of those crimes was committed or the defendant's "last release from confinement" occurred—"whichever is later"—within ten years of the charged crime.³ The statute does not define the term "confinement." The term is not referenced elsewhere in the statute and there is no legislative history addressing the definition of "confinement."

In 2004, Michael Clarity pled guilty to a crime in Florida which was committed on July 26, 2003.⁴ For the crime committed in Florida, Clarity was sentenced to a probationary term.⁵ Michael Clarity thereafter pled guilty to 3rd degree child endangerment in August 2016.⁶ The crime took place on August 17-18, 2013.^{7,8}

¹ *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018).

² *Id.* at 609.

³ N.J.S. 2C:44-3(a).

⁴ *Id.* at 606.

⁵ *Id.*

⁶ *State v. Clarity* at 606.

⁷ *Id.* at 607.

⁸ See Figure 1.

During sentencing for Clarity’s 2013 crime in New Jersey, the trial court interpreted that his release from confinement fell within the ten year limit to be considered a persistent offender under N.J.S. 2C:44-3(a).⁹ As a result, Clarity was sentenced to an eight-year extended prison term with four years of parole ineligibility.¹⁰

Clarity appealed his conviction and argued that he was not “eligible to be sentenced to an extended term as a persistent offender because he neither committed a crime nor was released from confinement imposed for conviction of a crime in the ten years preceding the instant offense.”¹¹

Analysis

The Appellate Division examined the persistent offender statute and reviewed secondary sources to determine the Legislature’s intention. The Appellate Division also reviewed two different states’ persistent offender statutes, to compare the manner in which other states define “confinement”.

The purpose of N.J.S. 2C:44-3(a) is to “create the judicial discretion to impose an extended term on an individual incapable of living a law-abiding life for a significant period of time.”¹² In *Clarity*, the Appellate Division said that the Legislature intended to fix the period of the statute at ten years, “conveying that an individual who is capable of residing in our communities for more than ten years without committing a crime should not be treated as a persistent offender.”¹³ It is important, therefore, to have a clear understanding of the date on which an individual was released from confinement.

The Appellate Division found that the trial court made two errors. As a preliminary matter the Court found that the trial court erroneously utilized the date of the defendant’s initial conviction in performing the extended term eligibility calculation.¹⁴ The trial court also interpreted Clarity’s probation in Florida as “confinement.” That term is not defined in N.J.S. 2C:44-3 *et seq.*

The Appellate Division noted that the absence of a statutory definition for the term “confinement” created ambiguity.¹⁵ The Appellate Division consulted both *Black’s Law Dictionary* and *Ballentine’s Law Dictionary* for a definition of the word “confinement.”¹⁶ *Black’s Law Dictionary* defines confinement as a state in which an individual is “deprive[d] ... of ... liberty.”¹⁷ Additionally, *Ballentine’s Law Dictionary* defines confinement as being “**place[d] in**

⁹ *Id.* at 607.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 610.

¹³ *Id.*

¹⁴ *Id.* at 608.

¹⁵ *Id.*

¹⁶ See *Black’s Law Dictionary* at 362 (10th ed. 2014); see also *Ballentine’s Law Dictionary* 244 (3d ed. 1969).

¹⁷ *Id.*

prison or jail.”¹⁸ In addition to secondary sources, the Court examined the usage of the definition of confinement in three other states.^{19, 20}

The Court observed that the Wisconsin statutes utilize the term “actual confinement.” This term is not defined in the Wisconsin statutes.²¹ According to the common law in Wisconsin, the term “actual confinement” is defined as “connot[ing] a time when an individual is off the streets and is no longer able to wreak further criminal havoc against the community.”²² Missouri defines a person as “in confinement” if they are **“held in a place of confinement pursuant to arrest or order of a court,”** excluding **probation or parole, temporary or otherwise.”**²³ Washington statutes include explicit definitions of the terms “partial confinement”²⁴ and “total confinement.”²⁵

After reviewing the legal dictionary definitions and the definitions used in other states, the Appellate Division held that the trial court incorrectly concluded that the defendant’s “probation[ary sentence was] the same as being ‘confined.’”²⁶ The Court “recognized that the Legislature did not define the word ‘confinement’, thus generating potential uncertainty about its scope when the State seeks a persistent-offender extended term.”²⁷ The Appellate Division determined that “confinement” meant that a person must be “imprisoned” or “restrained.”²⁸ In the absence of any legislative history, however, it is unclear whether the Legislature intended the term confinement to include probation, parole, or home confinement.

¹⁸ *Id.*

¹⁹ Thirty-seven states do not limit the previous convictions of the offenders based on the time period of confinement. Those states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

²⁰ Eleven states explicitly delineate the date the time frame begins and say whether the period includes probation, parole, or other forms of supervised release. Those states are: California, Connecticut, Florida, Hawaii, Indiana, Kentucky, Louisiana, Montana, New Mexico, Oklahoma, and Oregon. Only one state, Wisconsin, used the term “confinement” in its persistent-offender statute.

²¹ See Wis. Stat. § 939.62(2).

²² *State v. Clarity* citing *State v. Price*, 231 Wis.2d 229, 604 N.W.2d 898, 901 (Wis. Ct. App. 1999).

²³ See Mo. Rev. Stat. § 556.061(13).

²⁴ See Wash. Rev. Code Ann. § 9.94A.030 (36) *defining*, “Partial confinement” as confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention, electronic monitoring, or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program or the graduated reentry program, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, electronic monitoring, and a combination of work crew, electronic monitoring, and home detention.

²⁵ See Wash. Rev. Code Ann. § 9.94A.030 (53) “Total confinement” means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

²⁶ *State v. Clarity* at 609.

²⁷ *Id.*

²⁸ *Id.*

Recent Activity

There have now been two appellate decisions in this case. In the first, the Appellate Division reversed and remanded to the trial court to examine whether the Defendant was in fact confined in Florida. The trial court ruled that the defendant was confined.

The defendant again appealed the trial court's decision. The Appellate Division held that since the defendant conceded in the trial court to the confinement, the trial court did not err when deciding that the defendant was a persistent offender and that an extended term applied to him.

Conclusion

In its current form, N.J.S. 2C:44-3(a) does not define the meaning of "confinement". In order to help clarify the definition for both practitioner and the general public, this statute may benefit from the addition of the clarifying language.

The addition on the following page proposes a definition for "confinement" to reflect the principles set out in *State v. Clarity*.

Appendix

The proposed modifications to N.J.S. 2C:44-3(a) are shown with ~~striethrough~~ and underlining:

N.J.S. 2C:44-3. Criteria for sentence of extended term of imprisonment.

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. [...]

a. The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender.

(1) A persistent offender is an ~~person~~ individual who at the time of the commission of the crime:

i. is 21 years of age or over;

ii. ~~who has been~~ was previously convicted on at least two separate occasions of two crimes, committed at different times, when ~~he~~ the individual was at least 18 years of age; and

iii. ~~if~~ the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

(2) For purposes of this subsection, the term “confinement” means that the individual is held inside the physical boundaries of a penal facility or institution, pursuant to arrest or order of a court, excluding probation or parole, temporary or otherwise. [...]

* * *

Comments

The introductory paragraph of N.J.S. 2C:44-3 is included to allow the reader an easy transition from the introduction to section (a) of the statute. The paragraph lays out how subsection (a) shall be applied as a persistent offender statute pertaining to the term “confinement.”

Section a. has been divided into two subsections to allow a clearer and more concise reading of the statute. The statute’s purpose remains the same for section (a).

Subsection (1) has been revised to include a gender-neutral term.

Subsection (2) has been added to N.J.S. 2C:44-3. The newly drafted subsection (2), defines the term “confinement” as it pertains to section (a). In addition, subsection (2) defines the term “confinement” as discussed in *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018).

The language from subsection (2) was derived from *State v. Clarity* in which the Court utilized the definition of Wisconsin when interpreting N.J.S. 2C:44-3(a). In that case, the Court commented that Missouri and Washington's definition of "confinement" is consistent with that of New Jersey. Therefore, the language in subsection (2) is consistent with the Court's opinion. The Court also specifically excluded probation or parole as being considered confinement. Lastly, the Court explained that in order to be confined, the individual must be removed from society, pursuant to an arrest or order of a court.