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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-3018-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREW RHETT,

Defendant-Appellant.

Submitted October 11, 2022 – Decided November 23, 2022

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey, Law
Division, Cumberland County, Indictment No.
88-03-0334.

Andrew Rhett, appellant pro se.

Jennifer Webb-McCrae, Cumberland County
Prosecutor, attorney for respondent (Andre R. Araujo,
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Andrew Rhett appeals from the June 1, 2021 order entered by Judge Cristen D'Arrigo denying his motion to correct an illegal sentence pursuant to Rule 3:21-10(b)(5).¹ Defendant contends his 1988 jury-trial convictions for first-degree robbery and second-degree aggravated assault should have been merged at sentencing and that imposition of consecutive sentences constitutes a double jeopardy violation. Judge D'Arrigo concluded defendant had previously litigated—and lost—his consecutive sentencing argument in both direct and collateral appeals. The judge further determined that defendant's double jeopardy contention is merely a reiteration of his consecutive sentencing argument. We affirm substantially for the reasons explained in Judge D'Arrigo's oral opinion. We add the following comments.

I.

Defendant's convictions arose from a violent episode that occurred on February 15, 1988. Defendant approached the victims, Penny Ruddish and Wayne Durham, while they were sitting in a car. Defendant asked for a ride. Ruddish, the driver, agreed and allowed defendant to enter the vehicle. After driving for five to ten minutes, defendant asked Ruddish to pull over so that he

¹ "A motion may be filed and an order may be entered at any time . . . correcting a sentence not authorized by law including the Code of Criminal Justice." R. 3:21-10(b)(5).

could get out. Ruddish complied. Durham, who was in the front passenger seat, pulled his seat-back forward to aid defendant's exit from the rear seat. As Durham engaged the seat-back lever, defendant pushed the seat forward, pinning Durham to the windshield. Defendant then struck Durham on the left temple with a sharp object.

Ruddish noticed that defendant was attempting to take her purse, which was resting on the console between the two front seats. When she tried to stop defendant from taking the purse, defendant threatened to "cut her up badly or kill her." Ruddish resisted. During the ensuing struggle, defendant slashed Ruddish's face with a knife or piece of glass. She sustained significant facial injuries requiring more than fifty stitches and resulting in permanent scarring and partial paralysis.

In June 1988, defendant was tried before a jury and convicted of robbery and aggravated assault. At sentencing, the trial court imposed an extended term on the first-degree robbery conviction. The judge ordered the sentences imposed on the robbery and aggravated assault convictions to be served consecutively. On direct appeal, we remanded for resentencing with specific instructions for the trial judge to reconsider or more fully articulate the reasons for imposing consecutive sentences. State v. Rhett, No. A-6047-88 (App. Div. May 9, 1991).

On remand, the court again imposed consecutive sentences—this time thoroughly explaining the reasons for that decision. We affirmed the sentence, and the Supreme Court denied defendant's petition for certification. State v. Rhett, 126 N.J. 389 (1991).

Defendant next filed a petition for post-conviction relief (PCR), which the trial court denied in 1992. We affirmed the denial of PCR in 1994, and the Supreme Court denied certification. State v. Rhett, No. A-2726-92 (App. Div. August 23, 1994), certif. denied, 140 N.J. 275 (1995). In 2004, defendant filed a motion to modify or reconsider his sentence. The trial court denied that motion. We affirmed the trial court decision in 2007, and the Supreme Court denied certification. State v. Rhett, No. A-2103-04 (App. Div. June 28, 2007), certif. denied, 192 N.J. 481 (2007).

In 2014, defendant again challenged his consecutive sentences. Defendant also moved for relief due to the COVID-19 pandemic. Judge D'Arrigo denied both of those motions.

In 2021, defendant filed the motion now before us to correct an illegal sentence pursuant to Rule 3:21-10(b)(5). He raises the following contention for our consideration:

POINT I

THE FAILURE OF THE COURT TO MERGE DEFENDANT'S CONVICTION FOR AGGRAVATED ASSAULT WITH THE ROBBERY CONVICTION VIOLATES THE FEDERAL AND STATE CONSTITUTIONAL BARS AGAINST DOUBLE JEOPARDY, DUE PROCESS OF LAW, AND NEW JERSEY'S MERGER.

II.

"[A] truly 'illegal' sentence can be corrected 'at any time.'" State v. Acevedo, 205 N.J. 40, 47 n.4 (2011) (quoting R. 3:21-10(b)(5)). "[A]n illegal sentence is one . . . 'not imposed in accordance with law.'" Id. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). As our Supreme Court explained in Acevedo, to make out a cognizable claim under Rule 3:21-10(b)(5), a defendant must challenge the legality of the sentence rather than its excessiveness. Id. at 47. Here, defendant claims the consecutive sentences violate the double jeopardy clause. Because he is challenging the legality of the consecutive sentences, his contentions are cognizable under Rule 3:21-10(b)(5).

The constitutional protection against double jeopardy is guaranteed under both the Fifth Amendment to the United States Constitution and Article 1, Paragraph 11 of the New Jersey Constitution. See State v. Dillihay, 127 N.J. 42, 47 (1992) ("We have consistently interpreted New Jersey's constitutional

double jeopardy protection as co-extensive with the guarantee of the federal constitution." (internal citation omitted)). Both constitutions preclude imposing "multiple punishments for the same offense." State v. Miles, 229 N.J. 83, 92 (2017) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

Importantly, "[a] prior adjudication upon the merits of any ground for relief is conclusive whether made in proceedings resulting in the conviction or in any post-conviction proceeding . . . or in any appeal taken from such proceedings." R. 3:22-5. In this instance, on multiple occasions, we have addressed and rejected defendant's contentions regarding the decision to impose consecutive sentences. We previously agreed with the trial judge that the conduct constituting the aggravated assault was an intentional criminal act not necessary to commit the robbery since defendant's threat to cut or kill Ruddish was sufficient to establish a basis for the robbery conviction. The slashing that occurred thereafter constituted a separate offense warranting separate punishment. See State v. Jones, 213 N.J. Super. 562, 570 (App. Div. 1986) (noting the defendant continued to inflict bodily injury after the robbery was committed; "[t]hus, the use of the razor to inflict harm was a separate transaction from the threats made with the razor to facilitate the robbery").

We agree with Judge D'Arrigo that defendant's double jeopardy argument is essentially a restatement of his previously-rejected consecutive sentencing argument. As noted, we have already concluded the robbery and ensuing aggravated assault were separate crimes that do not merge for sentencing purposes. That determination thus establishes defendant did not receive "multiple punishments for the same offense" in violation of the double jeopardy clause. See Miles, 229 N.J. at 92.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION