

To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Merger of Criminal Convictions Pursuant to N.J.S. 2C:1-8 for Leaving the Scene (N.J.S. 2C:11-5.1) and Endangering an Injured Victim (N.J.S. 2C:12-1.2)
Date: March 6, 2023

Project Summary

In New Jersey, convictions for different criminal offenses must be merged in the circumstances set forth in N.J.S. 2C:1-8, including that “[t]he offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.”¹ The statutes defining the crimes of leaving the scene of a motor vehicle accident, and endangering an injured victim, explicitly prohibit merger with certain other offenses.²

In *State v. Herrera*,³ the defendant was convicted of leaving the scene of a motor vehicle accident and endangering an injured victim and sentenced to concurrent prison terms by the trial court.⁴ The Appellate Division applied a “flexible’ multi-faceted test embraced” by the New Jersey Supreme Court and held that “the convictions . . . constitute a single criminal offense and thus should have been merged.”⁵

Statutes Considered

N.J.S. 2C:1-8 provides, in relevant part, that:

a. Prosecution for multiple offenses; limitation on convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(1) One offense is included in the other, as defined in subsection d. of this section;

(2) One offense consists only of a conspiracy or other form of preparation to commit the other;

¹ N.J. STAT. ANN. § 2C:1-8(a) (West 2022) (“(1) [o]ne offense is included in the other, as defined in subsection d. of this section; (2) [o]ne offense consists only of a conspiracy or other form of preparation to commit the other; (3) [i]nconsistent findings of fact are required to establish the commission of the offenses; or (4) [t]he offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.”).

² N.J. STAT. ANN. § 2C:11-5.1 (West 2022); N.J. Stat. Ann. § 2C:12-1.2(d) (West 2022).

³ *State v. Herrera*, 469 N.J. Super. 559, 562 (App. Div. 2022) (“[t]he threshold question on appeal, therefore, is whether defendant’s two convictions merge . . .”).

⁴ *Id.* at 561-62 (State appealed the imposition of concurrent sentences, arguing that “the statutes defining both crimes require[d] that the prison terms be served consecutively,” and the defendant appealed his sentence on the basis that “the trial judge should have merged the two convictions”).

⁵ *Id.*

(3) Inconsistent findings of fact are required to establish the commission of the offenses; or

(4) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct. . . .

A determination barring multiple convictions shall be made by the court after verdict or finding of guilt.⁶

* * *

N.J.S. 2C:11-5.1 provides, in relevant part, that:

A motor vehicle operator who knows he is involved in an accident and knowingly leaves the scene of that accident under circumstances that violate the provisions of R.S.39:4-129 shall be guilty of a crime of the second degree if the accident results in the death of another person.

* * *

Notwithstanding the provisions of N.J.S.2C:1-8 or any other provisions of law, a conviction arising under this section shall not merge with a conviction for aggravated manslaughter under the provisions of N.J.S.2C:11-4, reckless vehicular homicide under the provisions of N.J.S.2C:11-5 or strict liability vehicular homicide under the provisions of section 1 of P.L.2017, c. 165 (C.2C:11-5.3) and a separate sentence shall be imposed upon each such conviction.⁷

* * *

N.J.S. 2C:12-1.2 provides, in relevant part, that:

a. A person is guilty of endangering an injured victim if he causes bodily injury to any person or solicits, aids, encourages, or attempts or agrees to aid another, who causes bodily injury to any person, and leaves the scene of the injury knowing or reasonably believing that the injured person is physically helpless, mentally incapacitated or otherwise unable to care for himself.

* * *

d. A person who violates the provisions of this section shall be guilty of a crime of the third degree. Notwithstanding the provisions of N.J.S.2C:1-8 or any other provision of law, a conviction arising under this subsection shall not merge with a conviction of the crime that rendered the person physically helpless or

⁶ N.J. STAT. ANN. § 2C:1-8.

⁷ N.J. STAT. ANN. § 2C:11-5.1.

mentally incapacitated, nor shall such other conviction merge with a conviction under this section.⁸ Notwithstanding the provisions of N.J.S.2C:44-5 or any other provision of law, the sentence imposed pursuant to this section shall be ordered to be served consecutively to that imposed for any conviction of the crime that rendered the person physically helpless or mentally incapacitated.⁹

* * *

Background

In *State v. Herrera*, the defendant was convicted of leaving the scene of a fatal motor vehicle accident and endangering an injured victim.¹⁰ After the defendant struck a pedestrian with his truck, he “tapped on his brakes, and drove away.”¹¹ The incident was caught on surveillance video, which showed that the defendant was traveling between forty and fifty-five miles per hour, and that the victim was not in the crosswalk at the time of the collision.¹²

The defendant was arrested after a witness followed him, told him he had struck someone, and brought him back to the scene of the accident.¹³ At the time of his arrest, the defendant admitted that he hit the victim, but indicated that he was going between twenty-five and thirty-five miles per hour and did not see the victim because the victim crossed from between two parked cars.¹⁴

The defendant was indicted for second-degree leaving the scene of an accident and third-degree endangering an injured victim.¹⁵ The defendant was convicted by a jury on both counts.¹⁶ At sentencing, the trial court specifically found that the convictions should not be merged, and the defendant did not object or argue otherwise.¹⁷ Although N.J.S. 2C:11-5.1 and N.J.S. 2C:12-1.2 both require consecutive sentences,¹⁸ the judge sentenced the defendant to concurrent state prison terms.¹⁹

⁸ Although the *Herrera* Court did not address this language, it is not entirely clear what the phrase “such other conviction” refers to, and therefore, what additional mergers the statute is intended to prohibit.

⁹ N.J. STAT. ANN. § 2C:12-1.2.

¹⁰ *Herrera*, 469 N.J. Super. at 561.

¹¹ *Id.* at 563.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 564.

¹⁷ *Id.* (“ . . . the sentencing judge provided only a limited statement of reasons explaining her decision not to merge the convictions”).

¹⁸ N.J. STAT. ANN. § 2C:11-5.2 (“ . . . when the court imposes multiple sentences of imprisonment for more than one offense, those sentences shall run consecutively”); N.J. STAT. ANN. § 2C:12-1.2d. (“ . . . the sentence imposed pursuant to this section shall be ordered to be served consecutively to that imposed for any conviction of the crime that rendered the person physically helpless or mentally incapacitated”).

¹⁹ *Herrera*, 469 N.J. Super at 564.

Both the State and the defendant appealed the sentence.²⁰ The State argued that the two criminal statutes required imposition of consecutive, not concurrent sentences and the defendant asserted that the convictions should have been merged for the purposes of sentencing.²¹

Analysis

On appeal, the *Herrera* Court addressed how the statutes defining the crimes of which the defendant was convicted should be interpreted, and analyzed “the statutory framework for deciding whether those convictions merge.”²² Using the “multi-part flexible test” developed by the New Jersey Supreme Court, the Appellate Division found that the plain language of the statutes did not prohibit merger, and also that the appropriate interpretation of the statutory language, as well as the legislative intent underlying the statutes, required merging the convictions.²³

The *Herrera* Court explained that the case law addressing the doctrine of merger has evolved,²⁴ but, “[a]t its core, [it] is based on the precept that ‘an accused [who] committed only one offense . . . cannot be punished as if for two.’”²⁵ To determine whether merger is required, the Supreme Court called for a “‘flexible’ approach . . . focus[ing] on the ‘elements of the crimes and the Legislature’s intent in creating them,’ and on ‘the specific facts of each case.’”²⁶

With respect to the crimes at issue in *Herrera*, the statutory language demonstrated that “the material elements of the[] two offenses do not align.”²⁷ To determine whether the offenses may merge despite the absence of alignment, the Appellate Division “consider[ed] the Legislature’s intention with respect to merger.”²⁸

The Court pointed out that N.J.S. 2C:11-5.1 prohibits merger with other specified offenses²⁹ and concluded “that the Legislature knew how to specify the types of convictions that are not subject to merger with [N.J.S. 2C:11-5.1],” and did not include a statutory reference to

²⁰ *Id.* at 561-62.

²¹ *Id.*

²² *Id.* at 565.

²³ *Id.* at 569-71.

²⁴ *Id.* at 565. The New Jersey Supreme Court held in *State v. Bowens* that N.J.S. 2C:1-8 did not require merger “when each offense ‘may be established by proof of a different fact which the other does not require.’” *Id.* at 566, quoting *State v. Bowens*, 108 N.J. 622, 639 (1987). A decade later, the Supreme Court held in *State v. Diaz*, that “[a] preferred and more flexible standard [for determining whether to merge offenses] was articulated in the pre-code case of *State v. Davis* [68 N.J. 69 (1975)].” *State v. Diaz*, 144 N.J. 628, 637 (1996). Subsequently, in *State v. Tate*, the Supreme Court directed that “the better course is to follow *Diaz* in decided this and future merger disputes.” *Herrera*, 469 N.J. Super. at 566, quoting *State v. Tate*, 216 N.J. 300, 307 (2013).

²⁵ *Id.* at 565 (quoting *State v. Davis*, 68 N.J. 69, 77 (1975)) (alteration in original).

²⁶ *Herrera*, 469 N.J. Super. at 567, quoting *Tate*, 216 N.J. at 312.

²⁷ *Herrera*, 469 N.J. Super. at 569.

²⁸ *Id.*

²⁹ N.J. STAT. ANN. § 2C:11-5.1 (“ . . . a conviction arising under this section shall not merge with a conviction for aggravated manslaughter under the provisions of N.J.S.2C:11-4 , reckless vehicular homicide under the provisions of N.J.S.2C:11-5 or strict liability vehicular homicide under the provisions of section 1 of P.L.2017, c. 165 (C.2C:11-5.3)”).

conviction pursuant to N.J.S. 2C:12-1.2.³⁰

Similar language in N.J.S. 2C:12-1.2(d) prohibits merger “with a conviction of the crime that rendered the person physically incapacitated.”³¹ The Court observed that the act that “physically incapacitated” the victim in *Herrera* was “the collision with defendant’s vehicle,” and that the defendant was not convicted, or even charged, with a crime related to hitting the victim with his vehicle.³² The Court also noted that construing the language of the two provisions in this way “avoid[s] double jeopardy issues.”³³

The *Herrera* Court “consider[ed] whether the Legislature sought to protect different interests in enacting the leaving-the-scene and endangering crimes.”³⁴ The Court determined that the leaving-the-scene statute “focuses specifically on absconding from the scene of a motor vehicle accident,” while the endangering statute “has a broader scope, applying more generally to absconding from the scene of an injury that was caused by the actor in any manner.”³⁵ Both crimes are intended to “protect injured individuals by creating incentives for persons to remain at the scene of an injury,” and also by threatening “criminal sanction to deter absconding.”³⁶ The *Herrera* Court concluded “that both statutes protect the same interests and, in practical effect, offer an alternative basis for punishing the same conduct.”³⁷

The Court assessed the facts in *Herrera* as they related to the two criminal statutes and the purpose underlying them.³⁸ As the trial court stated during sentencing: “the defendant’s act of leaving only occurred once [and it was] the single act of leaving the scene which forms the basis of both offenses.”³⁹ The Appellate Division agreed that “[t]he only criminal conduct attributed to

³⁰ *Herrera*, 469 N.J. Super. at 570 (continuing that “it is especially noteworthy that the specified non-merger crimes all require that a defendant commit a criminally culpable act resulting in death [suggesting] that the Legislature only intended to preclude merger of a leaving-the-scene conviction with crimes that require proof of a voluntary criminal act besides leaving the scene”).

³¹ *Id.* at 571, quoting N.J. STAT. ANN. § 2C:12-1.2(d) (emphasis added).

³² *Herrera*, 469 N.J. Super. at 571.

³³ *Id.* at 572. The *Herrera* Court drew a parallel to the reasoning in *State v. Dilihay*, wherein the New Jersey Supreme Court determined that N.J.S. 2C:35-5 (possession with intent to distribute) should merge with N.J.S. 2C:35-7 (possession with intent to distribute in a school zone), even though N.J.S. 2C:35-7(c) prohibits merger with a conviction pursuant to N.J.S. 2C:35-5. *Id.* at 571, citing *State v. Dilihay*, 127 N.J. 42 (1992). The *Dilihay* Court “concluded that the legislative purpose in enacting the school-zone statute [could] best be served, consistent with double-jeopardy principles, by requiring merger of [school zone] convictions into related first-or second-degree convictions under N.J.S.A. 2C:35-5’ and ‘requir[ing] that any sentence imposed ... include a mandatory minimum sentence no less severe than that set forth [in the school zone statute].” *Id.* at 572 (quoting *Dilihay*, 127 N.J. at 56) (alteration in original).

³⁴ *Herrera*, 469 N.J. Super. at 572.

³⁵ *Id.* (noting that the “general merger statute instructs in this regard that a defendant may not be convicted of more than one offense if ‘[t]he offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct’”), quoting N.J. STAT. ANN. § 2C:1-8(a)(4).

³⁶ *Herrera*, 469 N.J. Super. at 572-73.

³⁷ *Id.* at 573, citing *State v. Miller*, 237 N.J. 15, 33 (2019).

³⁸ *Id.* at 574.

³⁹ *Id.*

the defendant was his decision to leave the scene.”⁴⁰

Applying the “flexible” approach required by the New Jersey Supreme Court, the *Herrera* Court considered “the elements of the two crimes, the Legislature’s intent in creating them, and the specific facts supporting both convictions” and concluded that the “convictions for leaving-the-scene and endangering must merge.”⁴¹

Pending Bills

There are no pending bills involving N.J.S. 2C:1-8. There are bills pending that pertain to N.J.S. 2C:11-5.1⁴² and N.J.S. 2C:12-1.2,⁴³ but they do not address the issue of merger.

Conclusion

Staff requests authorization to conduct further research and outreach to determine whether: (1) N.J.S. 2C:1-8 would benefit from a modification to address the “flexible” approach to analyzing whether criminal convictions should merge, as directed by the New Jersey Supreme Court and discussed in *Herrera*⁴⁴; and (2) N.J.S. 2C:11-5.1 and N.J.S. 2C:12-1.2 would benefit from modifications to clarify that convictions pursuant to each should be merged pursuant to the Appellate Division determination in *Herrera*.⁴⁵

⁴⁰ *Id.*

⁴¹ *Id.* at 574.

⁴² See A.B. 490, 2022 Leg., 220th Sess. (Jan. 11, 2022) (“[p]rovides that leaving scene of motor vehicle accident is crime of first degree if accident results in death of another person”).

⁴³ See A.B. 492, 2022 Leg., 220th Sess. (Jan. 11, 2022) (“[c]larifies that encouraging another person to cause bodily injury, by filming, photographing, or otherwise recording injury-causing act, is form of crime of endangering injured victim”).

⁴⁴ *Herrera*, 469 N.J. Super. at 566.

⁴⁵ *Id.* at 574.