

**To: New Jersey Law Revision Commission**  
**From: Jasmin Rodriguez, Legislative Law Clerk**  
**Re: Application of Mitigating Factor Five in Strict Liability Vehicular Homicide Sentences as Discussed in *State v. Pascucci*, 463 N.J. Super. 203 (App. Div. 2020).**  
**Date: July 06, 2021**

## M E M O R A N D U M

### Project Summary

In New Jersey, it is not a defense to a prosecution for third-degree strict liability vehicular homicide “that the decedent contributed to his or her own death by reckless or negligent conduct or operation of a motor vehicle or vessel.”<sup>1</sup>

In *State v. Pascucci*, the Appellate Division considered whether the statutory prohibition in N.J.S. 2C:11-5.3 subsection d. prohibits a sentencing court from considering whether the “victim of defendant’s conduct induced or facilitated its commission.”<sup>2</sup>

### Statutes Considered

N.J.S. 2C:11-5.3 concerns strict liability vehicular homicide caused by driving a vehicle while intoxicated or operating a vessel under the influence. Subsection d. of that section provides that “[i]t shall not be a defense to a prosecution under this section that the decedent contributed to his own death by reckless or negligent conduct or operation of a motor vehicle or vessel.”

N.J.S. 2C:44-1 contains the criteria for withholding or imposing a sentence of imprisonment. Subsection b.(5) provides that:

b. In determining the appropriate sentence to be imposed on a person who has been convicted of an offense, the court may properly consider the following mitigating circumstances:

\* \* \*

(5) The victim of the defendant’s conduct induced or facilitated its commission.

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### Background

Defendant Jake Pascucci, an off-duty police officer, struck and killed a pedestrian with his car.<sup>3</sup> When Detectives arrived at the scene, they determined that the defendant had been driving

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<sup>1</sup> N.J. STAT. ANN. § 2C:11-5.3 (West 2021).

<sup>2</sup> *State v. Pascucci*, 463 N.J. Super. 203 (App. Div. 2020).

<sup>3</sup> *Id.* at 206.

while he was intoxicated.<sup>4</sup> The Middlesex County Prosecutor charged the defendant with third degree strict liability vehicular homicide pursuant to N.J.S. 2C:11-5.3 subsection a., and driving while intoxicated pursuant to N.J.S. 39:4-50 subsection a.<sup>5</sup>

The Defendant waived his right to have his case presented to a grand jury and pleaded guilty to third degree strict liability vehicular homicide and driving while intoxicated pursuant to a negotiated plea agreement.<sup>6</sup> He stipulated to being legally intoxicated at the time that he struck and killed the victim.<sup>7</sup>

At the sentencing hearing, defense counsel argued that the record did not support the finding of any aggravating factors but it did support several mitigating factors, one of which was “N.J.S. 2C:44-1b(5) (the victim of defendant’s conduct induced or facilitated its commission).”<sup>8</sup> Defense counsel maintained that because the record supported several mitigating factors,<sup>9</sup> the defendant should be sentenced to probation without any prison time.<sup>10</sup> The State argued that mitigating factors did not apply.<sup>11</sup> The Court found that mitigating factors N.J.S. 2C:44-1b.(7), (8), (9), and (10), and aggravating factor N.J.S. 2C:44-1a.(9), applied.<sup>12</sup> Defendant was sentenced to “a five-year term of probation, conditioned on serving 364 days in the Middlesex County Adult Corrections Center and completing an alcohol dependence evaluation.”<sup>13</sup>

A stay of the sentence was granted by the Court pending the outcome of the defendant’s direct appeal.<sup>14</sup>

### Analysis

On appeal the Defendant argued that “the sentencing judge misconstrued the scope of N.J.S.A. 2C:11-5.3d. when he held he was per se precluded from considering the applicability of mitigating factor five” during the sentencing hearing.<sup>15</sup> Although the State conceded that the judge mistakenly believed that he was precluded from finding mitigating factor five, the State maintained that the judge “properly declined to apply that mitigating factor.”<sup>16</sup>

The Appellate Division began its analysis with a plain reading of the text of the strict liability vehicular homicide statute, N.J.S. 2C:11-5.3.<sup>17</sup> In subsection d., the statute provides that

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 206-207.

<sup>6</sup> *Id.* at 207.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> N.J.S. 2C:44-1b(2), (4), (7), (8), (9), (10).

<sup>10</sup> *Id.* at 209.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 209.

<sup>15</sup> *Id.* at 205.

<sup>16</sup> *Id.*

<sup>17</sup> The full title of this statute is the “Strict liability vehicular homicide caused by driving a vehicle while intoxicated or operating a vessel under the influence; degree of crime; causal relationship between conduct and result.”

“[i]t shall not be a defense to a prosecution under this section that the decedent contributed to his own death by reckless or negligent conduct or operation of a motor vehicle or vessel.”<sup>18</sup> The Court determined that “a plain reading of the text... shows that the Legislature intended to preclude a defendant from presenting evidence of the victim’s conduct as an affirmative defense in the prosecution of this offense.”<sup>19</sup> The Court explained that the “judge erroneously construed the language...to preclude him from considering whether the victim’s conduct induced or facilitated her own death, as provided in mitigating factor N.J.S.A. 2C:44-1b(5).”<sup>20</sup>

The Court acknowledged that the record contained an independent eyewitness account of the accident.<sup>21</sup> The statement, provided to a Police Detective at the scene, indicated in relevant part that the victim “walked through the grassy median and casually took a few steps off into the South bound lanes and started sprinting. The car came full speed and never saw her, from what I could tell, and hit her head on.”<sup>22</sup> Although familiar with this statement, the sentencing court opined that “[e]ven if the victim ran into the road the statute makes the offense one of the third-degree in contemplation that... a defendant cannot [at sentencing] argue a contributing act of the victim....”<sup>23</sup>

The Appellate Division concluded that “the judge’s erroneous construction of N.J.S. 2C:11-5.3d. deprived the defendant of a qualitative assessment of all the relevant mitigating factors.”<sup>24</sup> The Appellate Division reversed and remanded the matter “to allow the judge to consider the witness’s statement and determine whether the record supports a finding of mitigating factor number five.”<sup>25</sup>

### **Pending Legislation**

There is no legislation presently pending that concerns N.J.S. 2C:11-5.3d.

### **Conclusion**

Staff seeks authorization to engage in further research and outreach to determine whether N.J.S. 2C:11-5.3 subsection d. should be modified to address the issue raised by *State v. Passucci*.

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<sup>18</sup> N.J. STAT. ANN. § 2C:11-5.3 (West 2021).

<sup>19</sup> *Passucci*, 463 N.J. Super. at 211.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 212.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 212 and 213.