

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: OCEAN COUNTY
INDICTMENT NO. 03-12-1607
APPELLATE NO. A-

STATE OF NEW JERSEY,

Complainant,

vs.

ROBERT J. WIKANDER,

Defendant.

TRANSCRIPT
OF
RESENTENCE

PLACE: Ocean County Courthouse
120 Hooper Avenue
Toms River, New Jersey
DATE: January 30, 2008

B E F O R E:

THE HON. FRANCIS R. HODGSON, JR., J.S.C.

TRANSCRIPT ORDERED BY:

CLAIRE DRUGACH, ESQ. (Office of the Public Defender,
Appellate Section)

A P P E A R A N C E S:

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Assistant Prosecutor
Attorney for the State

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I N D E X

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RESENTENCE

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EXHIBITS

IDENT.

EVID.

(No exhibits marked.)

1 THE COURT: All right. Prosecutor, ready
2 matter?

3 MS. HANLON-SCHRON: Judge, the next matter we
4 have ready is State versus Robert Wikander.

5 THE COURT: Good afternoon, Mr. Sisto.

6 MR. SISTO: Good afternoon, your Honor.

7 THE COURT: Did you have an opportunity to
8 review the appeal rights form with your client?

9 MR. SISTO: I have, your Honor. And he's
10 executed it and it's in the possession of the Court.

11 THE COURT: Okay. Now, just for
12 clarification, this is a remand from an appeal entered
13 by the Appellate Division, an order dated
14 December 10th, 2008. The order was received and filed
15 December 24th, 2008, remanding for the Court to
16 articulate specific reasons as to the consecutive
17 sentence. The sentence as it existed otherwise was
18 left unchanged.

19 Is that your understanding?

20 MR. SISTO: It is, your Honor.

21 THE COURT: All right. Have you had an
22 opportunity to speak with your client about this?

23 MR. SISTO: I have, your Honor. We spoke
24 during the video conference and we spoke today briefly
25 when he entered the courtroom.

1 THE COURT: All right. I'll hear you.

2 MR. SISTO: Thank you, your Honor. Obviously
3 we're here to request that Mr. Wikander be resented
4 to concurrent terms of incarceration, for relevant
5 considerations under Yarbough as follows:

6 One. Whether the crimes in their objectives
7 were predominantly independent of each other. And
8 we're submitting that this can't be said in this case
9 because, frankly, we're submitting that there was no
10 objective at all to the senseless act that was
11 committed by Mr. Wikander. Again, by no objective we
12 mean no purpose. Mr. Wikander's convictions are based
13 on reckless conduct and review of his plea colloquy
14 back in 2003, I believe, and also the relevant
15 second-degree statute notes that it's supported again
16 by reckless conduct as opposed to conduct that was
17 purposeful or conduct that had any objective. No one
18 has ever alleged it was this man's purpose to cause
19 the terrible harm that he did.

20 With that in mind, we're submitting there
21 were no objectives to these crimes, and if somehow the
22 Court finds that there were, we submit that the
23 objectives were not predominantly independent of each
24 other. Thus, we ask the Court to consider and find
25 that the first factor should weigh heavily in favor of

1 a concurrent sentence, concurrent sentences rather.

2 Regarding the second factor, whether the
3 crimes involved separate acts of violence or threats
4 of violence, we noted the Appellate Division noted in
5 their remand order that both crimes stem from the same
6 incident. While we concede the obvious that there
7 were separate two distinct and innocent victims in
8 this case, the crimes involved a single accident and a
9 single act of violence. And again the act of violence
10 was a terrible one, but it can't be fairly said that
11 the victims' simultaneous injuries involved separate
12 acts or separate threats of violence. The number of
13 victims is separate and distinct. As per the Yarbough
14 considerations, we submit that it would be double
15 counting to find that whenever there is or just in
16 this case because there's more than one victim that
17 there would be more than one threat or act of
18 violence. Again, we ask the Court to consider that
19 the second factor also weighs in favor of the
20 concurrent sentences.

21 Regarding the third factor, whether the
22 crimes were committed at different times or separate
23 places, rather than being committed so closely in time
24 and place as to indicate a single period of aberrant
25 behavior, again as supported by the record and noted

1 by the Appellate Division, these crimes stem from the
2 same incident and occurred at the same time and place
3 and occurred essentially simultaneously. It's beyond
4 dispute that they were committed at the same time and
5 place. As such, we submit that the third factor
6 should weigh heavily in favor of concurrent sentences.

7 With respect to the fourth Yarbough
8 consideration, whether any of the crimes involved
9 multiple victims, certainly here there was more than
10 one victim, but it does require some analysis with
11 respect to what the New Jersey Supreme Court meant by
12 multiple victims. It would have made it clear if they
13 had just said more than one victim, then it would be
14 obvious here, but one definition of multiple means
15 involving several or many, another one, more than one.

16 Again we can concede that this one can cut
17 both ways or could cut towards the State but we'd like
18 to Court to consider the following, that particularly
19 some of the progeny since Yarbough, two cases in
20 particular, Carey and Molina, would appear to support
21 the State's position, in light of their holdings that
22 consecutive sentences are appropriate where a
23 defendant causes multiple deaths or serious injuries,
24 multiple persons. That still doesn't resolve what the
25 term multiple means. And we're submitting that based

1 on those two cases, both Carey and Molina, they
2 support the assertion, at least in part, that the term
3 multiple means more than one, or rather more than two,
4 I should say, strike that. Molina involves six
5 victims, two who died, four who suffered injuries,
6 Carey involved four victims, two who died and two who
7 suffered grave injuries.

8 The facts in this case again lends support to
9 the definition of multiple, that means more than two
10 victims, which is not the case here with
11 Mr. Wikander's pleas. Again, we submit that this
12 factor should go towards imposing concurrent sentences
13 but we concede that it could cut both ways and we ask
14 only that if the Court does weigh this factor in favor
15 of consecutive sentences that it not be given great
16 weight in light of differences that I outlined between
17 this case and Carey and Molina.

18 The fifth and final enumerated factor in
19 Yarbough is whether conviction for which the sentences
20 are to be imposed are numerous. Again, we're
21 confronted with the term numerous that we need to
22 define before we conduct an analysis, and I think that
23 the common thread running between every definition of
24 the word numerous is that it involves a large and
25 indefinite number. We're submitting there's an

1 obvious incongruence between the number two, the
2 innocent victims in this case, and a large indefinite
3 number. And with that in mind, again we note he's
4 only pleaded guilty to two offenses, we have two
5 convictions, we submit that that is not a numerous
6 number of convictions and we submit that factor 5
7 should weigh in favor of a concurrent sentence or
8 concurrent sentences.

9 The other Yarbough criteria is that:

10 1. There can be no free crimes in a system
11 for which the punishment shall fit the crime;

12 2. There shall be no double counting of
13 aggravating factors;

14 3. Successive terms from the same offense
15 should not ordinarily be equal to the punishment for
16 the first offense.

17 With respect to the first consideration, we
18 ask the Court to consider that even if Mr. Wikander's
19 sentences were to run concurrently, we submit he would
20 not be given what could appropriately be termed a free
21 crime here. His court history is still going to
22 reflect two separate convictions, against two separate
23 innocent victims. These offenses represent his first
24 and only convictions of any kind as evidenced by the
25 presence of mitigating factor 7 in the JOC, thus, he

1 essentially lived a completely law-abiding life for
2 some 39 years before this terrible accident, this
3 terrible tragedy occurred.

4 From speaking with him, I can represent to
5 the Court that his remorse is obvious to me. I
6 believe that when he is eventually released from
7 prison that the man is going to too terrified to even
8 drive a car, let alone commit another crime. But in
9 the unlikely event that I'm incorrect, he understands
10 that if he ever appears before a judge again, his
11 court history is going to reflect two separate
12 convictions with two separate victims and that's going
13 to weigh heavily in aggravation of any potential
14 future sentence that is handed down to Mr. Wikander.

15 The point is again that we're asking for
16 concurrent sentences, but we submit that if concurrent
17 sentences are handed down, it's not going to be
18 correct to term the disposition as a free crime in any
19 way, shape or form. Moreover, a 7-year concurrent
20 sentence with an 85 percent parole disqualifier which
21 is what we're asking for despite his lack of any prior
22 record and never intended to harm anyone, he must
23 still spend 2,172 days in prison before he can even be
24 considered for parole. He's presently sentenced to
25 serve twice that number of days before he would be

1 considered for parole. And it's worth noting that the
2 sentence is significantly longer than the sentences
3 that were handed down in the aforementioned cases of
4 Carey and Molina, despite the fact that those cases
5 involve deaths and numerous victims and convictions
6 which are not the cases here.

7 Regarding whether or not there was a double
8 counting of aggravating factors, we submit that there
9 was not, but we'd like the Court to note the
10 following: The Yarbough Court explained that where
11 the essential element of a crime is a specific fact,
12 that element may not be used as an aggravating factor
13 to impose a custodial sentence that is longer than the
14 presumptive term or to impose parole ineligibility.

15 Again we're not arguing that this factor was
16 violated but it's worth noting here that while these
17 sentences do not go above the presumptive terms, he
18 was essentially sentenced to consecutive terms that
19 under this rule were as harsh as possible without
20 running afoul of the rule. Under Natale, could be
21 sentenced to effectively consecutive maximum terms for
22 someone like Mr. Wikander with no prior record who did
23 not admit to any of the other aggravating factors at
24 the time of his plea.

25 With respect to the Court's final holding

1 that successive terms for the same offense should not
2 ordinarily can be equal to the punishment for the
3 first offense, Mr. Wikander's sentence would appear to
4 violate this rule unless your Honor finds or the Court
5 finds that there was the presence of extraordinary
6 circumstances.

7 In light of the foregoing and particularly
8 that the number of victims and the number of
9 convictions were not numerous, we're submitting that
10 there is no extraordinary circumstances, as well as
11 the fact that again he has no prior record, and we ask
12 that if the Court is inclined to affirm consecutive
13 sentences, that he be sentenced to or his sentence be
14 reduced upon resentencing from consecutive 7's to a 7
15 with a consecutive 5 or 6.

16 Finally, I draw the Court's attention to some
17 of the language in Yarbough that spoke to the
18 purposeful and heinous acts that were committed by the
19 defendants in that case as opposed to the reckless and
20 unintentional act with still terrible outcome that was
21 committed by Mr. Wikander. The Court wrote, "Their
22 conduct would test the capacity of the most resolute
23 judges to focus on the code's grading of the crime and
24 not the criminal and fashionless sentence." And I
25 think even though there's stark differences between

1 Mr. Wikander and the defendants in Yarbough, that
2 passage, it speaks volumes to what's occurred here.
3 It's nearly impossible for anyone, including myself or
4 the prosecutor and I would imagine your Honor, to
5 conduct an objective and detached analysis when we're
6 talking about a case where two innocent young girls
7 were severely seriously injured and nearly died. But
8 that is what the law requires. The law asks us to be
9 objective and to be fair and that there be some type
10 of consistency in different sentences.

11 And with that said, in light of the
12 foregoing, we're requesting that Mr. Wikander be
13 resentenced to concurrent terms.

14 THE COURT: All right. Robert Wikander, do
15 you have anything to say before I sentence you?

16 THE DEFENDANT: Only that I'm, I remain
17 sorry, your Honor, I remain working on myself, I
18 continue to take programs in prison and go to AA in
19 the prison. I have counseling one-on-one and group
20 therapy at the prison. I continue to try to work on
21 myself and insure that this never reoccurs again. I
22 have said that I am sorry to the Hernandez girls and
23 although those are, you know, those are genuine and
24 they are sincere, my actions are the only things that
25 will speak louder than my words.

1 THE COURT: All right. Prosecutor?

2 MS. HANLON-SCHRON: Judge, I won't be long
3 and I certainly won't be as eloquent as counsel.

4 This matter was remanded by the Appellate
5 Division to come back for this Court to really
6 reconsider the record below and to really amplify the
7 record with regard to whether or not a consecutive
8 sentence is appropriate. It is the State's position
9 that the sentence imposed by the Court below
10 originally was the correct sentence. It's the State's
11 position that nothing has changed since that point in
12 time. It is the State's position that there is ample
13 support in the record for this Court to reimpose the
14 consecutive sentences which were imposed by the judge
15 in this case originally and the State would submit to
16 this Court's discretion.

17 THE COURT: All right. Robert Wikander, you
18 have 45 days from today to appeal from this resentence
19 the Court is about to impose.

20 I would just note that again for the record
21 that this matter is before the Court on resentence
22 from an order in the Appellate Division from
23 December 24th, 2008 which questioned the reasons for
24 Judge Citta's consecutive treatment of two aggravated
25 assault charges in the indictment. The Appellate

1 Division remanded the matter so that this Court could
2 provide, as the Appellate Division indicated, a
3 detailed statement of reasons for the imposition of
4 consecutive sentences.

5 And with that regard, I should note for the
6 record that it is my purpose only to amplify and
7 supplement what was Judge Citta's sentencing,
8 specifically and only with regard to those consecutive
9 sentences and why the consecutive sentences were
10 issued.

11 I would note as mentioned that the crime did
12 involve separate victims and I think it's worth
13 restating what are the facts of that matter.
14 Defendant while intoxicated drove onto the sidewalk in
15 a suburban area about 7:30 p.m. in the evening and
16 struck two sisters, the victims, RH and MH. The
17 persons at the scene described the defendant's vehicle
18 because he wasn't there, he had left, fled the scene.
19 The person at the scene indicated that they were
20 familiar with this vehicle and that this person
21 frequents the area to buy drugs. The police a short
22 time later found the defendant and his vehicle a short
23 distance away from where the incident had occurred.
24 The vehicle was disabled and the defendant was
25 attempting to try to pay somebody to change a flat

1 tire on the front right of his vehicle. The defendant
2 had two bags of cocaine in his possession and was
3 intoxicated at this time.

4 As I've indicated, there were two victims in
5 this matter, both of them were seriously injured. At
6 the time RH was a 10-year-old girl, she fractured, as
7 a result of this, her pelvis was fractured and her
8 knee was injured as well as numerous other what would
9 be termed minor injuries compared to those two serious
10 injuries. MH, an 11-year-old girl, at the time was
11 11 years old, had a complex depressed skull fracture,
12 multiple facial fractures and a radius fracture. Both
13 of these girls were seriously injured.

14 I give very great weight to that factor in
15 Yarbough, there are two separate victims and there
16 should be no free crimes. And this is in accord with
17 State vs. Carey, 168 New Jersey 413 at Pages 427 and
18 431, a 2001 case, and State vs. Molina, 168 New Jersey
19 436 at Pages 441 and 443, a 2001 case, decided on the
20 same day.

21 The sentences, the consecutive sentences are
22 appropriate and I'm going to reimpose the consecutive
23 sentences as they are imposed. The reasons for giving
24 the consecutive sentences are well supported by the
25 facts and are, as I have just indicated, involving two

1 victims and supported by Yarbough and that there
2 should be no free crimes. The sentence remains as
3 Judge Citta had indicated.

4 (End of matter.)

5
6 C E R T I F I C A T E

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8
9 I, Karen L. Schantz-Hulse, C.C.R., License
10 Number XI01263, C.R.R., License Number 30XR00017400,
11 an Official Court Reporter in and for the State of New
12 Jersey, do hereby certify that the foregoing to be
13 prepared in full compliance with the current
14 Transcript Format for Judicial Proceedings and is a
15 true and accurate non-compressed transcript to the
16 best of my knowledge and ability.

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KAREN L. SCHANTZ-HULSE, C.C.R., C.R.R.

21 Dated: 3/10/09
22 Official Court Reporter
23 Ocean County Courthouse
24
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