

To: New Jersey Law Revision Commission
From: Whitney Schlimbach, Counsel
Re: Application of Mitigating Factor Five in Strict Liability Vehicular Homicide Cases
Date: January 10, 2022

MEMORANDUM

Project Summary¹

In 2017, the New Jersey Legislature enacted N.J.S. 2C:11-5.3,² and established the crime of “[s]trict liability vehicular homicide caused by driving a vehicle while intoxicated.” Subsection d. of that statute prohibits as “a defense to a prosecution under this section that the decedent contributed to his or her own death by reckless or negligent conduct or operation of a motor vehicle or vessel.”³ In *State v. Pascucci*,⁴ the Appellate Division held that the limitation in N.J.S. 2C:11-5.3(d) did not preclude a sentencing court from considering evidence that the “victim of defendant’s conduct induced or facilitated its commission,”⁵ commonly referred to as “mitigating factor five.”⁶

In July 2021, the Commission authorized Staff to conduct preliminary research and targeted outreach to determine whether the Appellate Division has previously addressed this issue and the frequency with which it is encountered by those who practice in this area of law.⁷

Statutes Considered

In New Jersey, strict liability vehicular homicide caused by a driver operating a vehicle while intoxicated, is a crime of the third-degree.⁸ The statute 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.”⁹

N.J.S. 2C:44-1 sets forth the aggravating and mitigating factors to be considered by a judge when determining an appropriate sentence.¹⁰ With respect to mitigating factors, the court “may

¹ Preliminary work on this project was conducted by Jasmin Rodriguez, a former Legislative Law Clerk, during her tenure with the New Jersey Law Rev. Comm’n.

² L. 2017, c.165, § 1, eff. July 21, 2017.

³ N.J.S. 2C:11-5.3d.

⁴ 463 N.J. Super. 203 (App. Div. 2020).

⁵ N.J.S. 2C:44-1b.(5).

⁶ *Pascucci*, 463 N.J. Super. at 205.

⁷ N.J. Law Revision Comm’n, *Minutes NJLRC Meeting*, at *10, Jul. 15, 2021, www.njlrc.org (last visited Jan. 6, 2022) (noting that the Appellate Division clearly articulated the law in *Pascucci* and therefore, that it would be useful to know whether the issue addressed in that case was common or “an isolated error that was corrected by the court”).

⁸ N.J.S. 2C:11-5.3.

⁹ N.J.S. 2C:11-5.3d.

¹⁰ N.J.S. 2C:44-1 (“Criteria for imposing or withholding sentence of imprisonment”).

properly consider”¹¹ whether “[t]he victim of the defendant’s conduct induced or facilitated its commission.”¹²

Background

Defendant Jake Pascucci was driving while intoxicated when he struck and killed a pedestrian with his car.¹³ He pled guilty to third degree strict liability vehicular homicide pursuant to N.J.S. 2C:11-5.3, and driving while intoxicated.¹⁴ In support of mitigating factor five at sentencing, the defendant presented eyewitness testimony that described the victim’s conduct just prior to the accident.¹⁵ The State “argued mitigating factor [five] was not applicable because the record did not show the victim induced defendant to drive while intoxicated or otherwise facilitated her own death.”¹⁶

Although the sentencing court stated that it was familiar with the eyewitness testimony,¹⁷ it “concluded that mitigating factor five is inapplicable to this case as a matter of law.”¹⁸ The judge found one aggravating factor - the need for deterrence¹⁹ - and four other mitigating factors,²⁰ sentencing the defendant to a five-year term of probation which the defendant appealed.²¹

Analysis

The primary issue on appeal was whether the sentencing judge erroneously declined to consider evidence in support of mitigating factor five when determining the defendant’s sentence. The Appellate Division explained that the sentencing judge “made clear that in his judgment, he was legally precluded from considering [evidence that the victim contributed to her own death] in

¹¹ See e.g. *State v. Dalziel*, 182 N.J. 494, 504–05 (2005) (“[D]uring oral argument the State properly conceded that where mitigating factors are amply based in the record before the sentencing judge, they must be found. To be sure, they may be accorded such weight as the judge determines is appropriate.”).

¹² N.J.S. 2C:44-1b.(5) (mitigating factor five).

¹³ *Pascucci*, 463 N.J. Super. at 206.

¹⁴ *Id.* at 206-207; see also N.J.S. 39:4-50a.

¹⁵ *Id.* at 211 (the witness testified that the victim “was crossing the street on the North bound side and didn't have the right of way. She 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.”).

¹⁶ *Id.* at 209.

¹⁷ *Id.* at 212.

¹⁸ *Id.* at 205.

¹⁹ N.J.S. 2C:44-1a.(9).

²⁰ N.J.S. 2C:44-1b.(7), (8), (9), and (10) (the defendant’s lack of criminal history or law-abiding lifestyle prior to offense, that the conduct was the result of circumstances that are unlikely to recur, the defendant’s character and attitude in terms of the likelihood of re-offense, and the likelihood the defendant will respond well to probationary treatment).

²¹ *Pascucci*, 463 N.J. Super. at 209 (the court conditioned the term of probation on the defendant “serving 364 days in the Middlesex County Adult Corrections Center and completing an alcohol dependence evaluation” in addition to probation’s recommendations and a new job within 30 days of his release).

determining whether defendant was entitled to assert mitigating factor five” because of the nature of a strict liability offense.²²

The Appellate Division began its analysis with an examination of the plain language of the statute, and determined that the text of the vehicular homicide statute “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.”²³ The Court then concluded that the sentencing “judge erroneously construed the language in N.J.S. 2C:11-5.3d 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).”²⁴

Therefore, the Court held 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,” 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 five.”²⁵

Other Decisions Addressing N.J.S. 2C:11-5.3

The case law involving N.J.S. 2C:11-5.3 consists of five unpublished Appellate Division decisions,²⁶ and one New Jersey Supreme Court decision.²⁷ These cases do not, however, address the relationship between the *mens rea* in that statute and the consideration of the victim’s contributory conduct at sentencing, nor do they address the substance of N.J.S. 2C:11-5.3.²⁸

²² *Pascucci*, 463 N.J. Super. at 212 (the sentencing judge reasoned that “[t]his law was enacted, if you will, to say, regardless of a victim’s contributory negligence, that the driver being a link in the chain that causes the death, by simply being in the vehicle and being under the influence is enough for a conviction. In essence, that the act, the death would not have occurred if the defendant did not get in the car while intoxicated.”).

²³ *Pascucci*, 463 N.J. Super. at 211 (emphasis added).

²⁴ *Id.*

²⁵ *Id.* at 212-13.

²⁶ See *State v. Plaza*, 2021 WL 653188 (N.J. Super. Ct. App. Div. Feb. 19, 2021), *cert. denied*, 247 N.J. 145 (2021); *State v. Swan*, 2021 WL 79175 (N.J. Super. Ct. App. Div. Jan. 11, 2021); *State v. Bell*, 2020 WL 2563186 (N.J. Super. Ct. App. Div. May 21, 2020); *Matter of H.M.S.*, 2020 WL 477208 (N.J. Super. Ct. App. Div. Jan. 30, 2020); *Matter of J.W.*, 2018 WL 1040768 (N.J. Super. Ct. App. Div. Feb. 26, 2018).

²⁷ *State v. Lodzinski*, 246 N.J. 331, *reconsideration granted*, 248 N.J. 451 (2021), and *rev’d*, 2021 WL 6200906 (N.J. Dec. 28, 2021) (addressing the appropriate scope of review on a motion for judgment of acquittal notwithstanding the verdict following the defendant’s conviction for first degree purposeful or knowing murder).

²⁸ *Lodzinski*, 246 N.J. at 394 (Albin, J., dissenting) (explaining the different mental states required by New Jersey homicide statutes); *Plaza*, 2021 WL 653188, at *1 (determining that N.J.S. 2C:11-5.3 was not intended to apply retroactively); *Swan*, 2021 WL 79175, at *1 (referencing a jurisdictional statute addressing certain DWI offenses, including N.J.S. 2C:11-5.3); *Bell*, 2020 WL 2563186, at *1 (advising that criminal statutes like N.J.S. 2C:11-5.3 are available to address harm to multiple victims when the principle of multiplicity does not permit a defendant to be charged with two counts of leaving the scene of an accident); *Matter of H.M.S.*, 2020 WL 477208, at *1-2 (analyzing expungement pursuant to N.J.S. 2C:52-29b, which lists strict liability vehicular homicide as an eligible offense); *Matter of J.W.*, 2018 WL 1040768, at *1-2 (analyzing expungement pursuant to N.J.S. 2C:52-29b).

Consideration of Mitigating Factor Five at Sentencing for Other Strict Liability Crimes

In light of the limited case law discussing N.J.S. 2C:11-5.3, Staff also reviewed decisions involving another strict liability criminal statute, N.J.S. 2C:35-9, to determine whether courts have considered mitigating factor five at sentencing in other contexts. Entitled “Strict liability for drug-induced deaths,” N.J.S. 2C:35-9 makes “any person who manufactures, distributes or dispenses [a qualifying substance] strictly liable for a death which results from the injection, inhalation or ingestion of that substance.”²⁹

The Appellate Division has twice affirmed sentences relying on mitigating factor five for convictions for strict liability drug-induced deaths under N.J.S. 2C:35-9. Like the vehicular homicide statute, N.J.S. 2C:39-5(c) specifically prohibits raising the victim’s contributory conduct as a defense to prosecution.³⁰

In *State v. Rodriguez*,³¹ the Appellate Division affirmed an eighteen-year sentence imposed on a defendant convicted of “first degree strict liability for drug-induced death” under N.J.S. 2C:35-9(a). The sentencing court found four aggravating factors and “found factors five, eight, and nine in mitigation [and] to five she gave moderate weight.”³²

Similarly, in *State v. Hladun*,³³ the Appellate Division affirmed a fifteen-year sentence based on the trial court’s weighing of three aggravating factors and “one mitigating factor in that the victim’s conduct ‘induced or facilitated [the] commission’ of the crime.”³⁴ Before trial in *Hladun*, the court excluded evidence that the victim had previously overdosed on heroin finding that “the evidence was not relevant because the intentional ingestion of the drug by the victim is not a defense under subsection (c)” of N.J.S. 2C:35-9.³⁵

The Appellate Division decisions in *Rodriguez* and *Hladun* align with the holding in *Pascucci*, that the sentencing court is not precluded from considering evidence of the victim’s contributory conduct at sentencing, even if the statute pursuant to which the defendant is convicted does not permit such evidence to be used as a defense to prosecution.

²⁹ N.J.S. 2C:39-5a.

³⁰ N.J.S. 2C:39-5c. (“It shall not be a defense to a prosecution under this section that the decedent contributed to his own death by his purposeful, knowing, reckless or negligent injection, inhalation or ingestion of the substance, or by his consenting to the administration of the substance by another.”).

³¹ 2020 WL 468007 (N.J. Super. Ct. App. Div. Jan. 29, 2020), *cert. denied*, 242 N.J. 498 (2020).

³² *Id.* at *3 (emphasis added) (the Appellate Division did not provide any additional detail regarding the evidence underlying the judge’s reliance on mitigating factor five).

³³ 2010 WL 1030882 (N.J. Super. Ct. App. Div. Mar. 17, 2010).

³⁴ *Id.* at *12 (N.J. Super. Ct. App. Div. Mar. 17, 2010).

³⁵ *Id.*, at *7.

Outreach

Following the guidance of the Commission during the July 2021 meeting, Staff conducted targeted outreach to knowledgeable individuals and organizations³⁶ including: the Criminal Law Section of the New Jersey State Bar Association, and the New Jersey Office of the Public Defender, as well as the defendant's attorney and the Deputy Attorney General assigned in *State v. Pascucci*.

To this time, Staff has not received any responses to this outreach.

Pending Legislation

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

Conclusion

Following the Commission's direction, Staff undertook a review of the case law concerning N.J.S. 2C:11-5.3, and engaged in targeted outreach to determine whether the issue raised in *Pascucci* was an isolated error corrected by the Appellate Division. Research revealed that the Appellate Division has affirmed sentencing court reliance on mitigating factor five in the context of other strict liability crimes, and no other decision was found in which a sentencing judge construed the language in N.J.S. 2C:11-5.3 in the same manner as the sentencing court in *Pascucci*.

Staff recommends that the Commission conclude work in this area.

³⁶ N.J. Law Revision Comm'n, *Minutes NJLRC Meeting*, at *10, Jul. 15, 2021, www.njlrc.org (last visited Jan. 6, 2022).