

**CONSECUTIVE SENTENCES – MULTIPLE VICTIMS – AMICUS CURIAE
BRIEF OF NJCVLC TO SUPREME COURT IN STATE V. CAREY**

POINT II

**THE APPELLATE DIVISION’S DECISION
TO REDUCE DEFENDANT’S SENTENCE IS
ERRONEOUS AND MUST BE REVERSED.**

The opinion of the Appellate Division represents a misapplication of this Court’s decision in State v. Yarbough, 100 N.J. 627 (1985), cert. den. 475 U.S. 1014 (1986). In Yarbough, the Court outlined “specific standards” to guide courts in exercising discretion to impose concurrent or consecutive terms in the sentencing process. Id. at 630. Therein the Court noted the overriding policy consideration:

We determine that in fashioning consecutive or concurrent sentences under the Code [of Criminal Justice], sentencing goals that punishment fit the crime, not the criminal, and that there is a predictable degree of uniformity in sentencing. Id.¹

In Yarbough, the defendant was convicted on three counts of aggravated sexual assault upon an 11 year old in violation of N.J.S.A. 2C:14-2a and four counts of hindering apprehension in violation of N.J.S.A. 2C:29-3b. He was sentenced to three consecutive terms of imprisonment for the sexual assault convictions and two concurrent and two consecutive terms for the hindering apprehension convictions.

The Court looked to the guidelines adopted by the United States Sentencing Commission in seeking to establish criteria to be followed by the sentencing courts of this State. Id. at 642-43.

The “general sentencing guidelines” for concurrent or consecutive-sentencing decisions established by the Court included:

(1) There can be no free crimes in a system for which the punishment shall fit the crime;

...

(3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominantly independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors. Id. at 643-44.

In the case at bar the Appellate Division relied predominantly on the fact that the crimes resulted from “a single act of recklessness . . .” (App. Div. Decision, p. 11). It concluded that the imposition of “fourteen years of imprisonment subject to six years of parole ineligibility was disproportionate under the circumstances. Id. It determined that defendant, who was found guilty of four separate crimes of violence, should serve a

penalty for just one. While the court in Yarbough stated that “There can be no free crimes ...”, defendant wound up with three. Furthermore, while there were significant “multiple victims” created by defendant, the Appellate division held that he should be punished for only causing one. Id. at 643-44.

The holdings of the courts recognizing the discretion of the sentencing judge is fully set forth by the State of New Jersey in its brief. In the numerous cases cited therein, it is clear that it is not deemed to be an abuse of discretion by the trial judge where consecutive sentences are imposed despite the fact that there has been only one act or incident. See State’s Brief, pp. 7-8.

In the case at bar, the trial court judge properly considered the Yarbough criterion that there can be no free crimes in a system for which the punishment shall fit the crime. Furthermore, the court gave due respect to the number of victims and the impact of the crime upon the victims. The court’s sentence may not be modified unless the trial court was “clearly mistaken” and if the court did err in sentencing, “a remand to the trial court for resentencing is strongly to be preferred.” State v. Kromphold, 2000 WL 124453 (NJ) (Docket No. 47, 090) at pg. 6:

In its discussion of Yarbough, the Appellate Division commented that, “We acknowledge that there were, of course, two victims.” (App. Div. Decision, p.11). It is apparent that the perception of the term “victims” in this case is significantly different as between the sentencing judge and the appellate court.

There were not simply “two” victims in this case. William Ferguson’s life was taken from him at the young age of 21 years while Melissa Snook, the mother of two infants, was just 24. Left behind to grieve this loss are the parents, the grandparents, brothers and sisters of William Ferguson and Melissa Snook. The New Jersey Constitution declares that as a matter of substantive right, these loved ones are no fewer victims in the eyes of the law. And what of their aunts and uncles and cousins, and their friends, their neighbors, their co-workers and all those people who continue to grieve over their death? The magnitude of loss experienced by many of these individuals was presented to the sentencing judge when he considered all of the factors in determining just punishment for Joseph Carey.² Furthermore, another victim, Michael DiGangi was just 17 years old at the time when the vehicle he was driving was struck by defendant. Having sustained multiple fractures to his leg, this young man has already undergone four surgical operations. Melissa Snook’s sister Joyce was only 18 years old when she lost her sister to defendant’s actions. With multiple fractures of both legs and a collapsed lung, Joyce has undergone three operations.

The river of grief which flows as a result of defendant’s conduct is as wide and deep today as it was when it began in 1995. The Appellate Division concluded that “in this case fourteen years of imprisonment subject to six years of parole ineligibility was disproportionate under the circumstances.” (Appellate Division’s Decision, p.11). Such a conclusion does not give due regard to all of the victims of defendant’s criminal actions nor to the seriousness of the physical and emotional injuries caused.

The Supreme Court of the United States has recognized that the victim has a substantial right to be included in the criminal justice proceedings. This recognition of the rights of the victim is clearly demonstrated in the United States Supreme Court's decision to permit victim impact testimony in capital murder cases in Payne v. Tennessee, 111 S.Ct. 2597 (1991).

In 1996 the New Jersey Supreme Court followed the philosophy of the Court in Payne when it upheld the constitutionality of the New Jersey statute [N.J.S.A. 2C:11-3c(6)] which permitted victim impact testimony in death penalty cases. See State v. Muhammad, 145 N.J. 23 (1996). Commenting on the important historical development of victims' rights in the State of New Jersey, the court in Muhammad commented:

The victim impact statute is merely one of the latest efforts by the Legislature to increase the participation of crime victims in the criminal justice system. Id. at 33.

State v. Kromphold, is apposite to the case at bar. Therein the defendant, while driving intoxicated, struck another vehicle. Four individuals were injured and the defendant was convicted of two counts of aggravated assault and one count of assault by auto. The defendant was sentenced to a ten year term of imprisonment with five years of parole ineligibility on each of the two counts of aggravated assault. The court determined that those sentences were to run consecutively because there were “multiple victims.”³ The court also imposed concurrent terms for the assault by auto and motor vehicle convictions. Id. at 3. The multiple victims factor was not rejected by the Appellate Division or the Supreme Court and stood as a valid reason for the consecutive sentences. In addition, the Supreme Court reversed the Appellate Division’s rejection of

the aggravating factor based upon the “gravity and seriousness of harm inflicted on the victims” Id. It is therefore, reasonable to conclude that this Court recognizes that the number of victims and the degree of harm sustained are sufficiently permissible factors in imposing consecutive sentences.

Not one of the victims of Joseph Carey must be allowed to become a "faceless stranger." See State v. Muhammad, 145 N.J. 48 and Justice O’Connor’s dissenting opinion in South Carolina v. Gathers, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989). In his concurring opinion in Payne v. Tennessee, III S.Ct. 2597 (1991), Justice Souter stated:

Every defendant knows, if endowed with the mental competence for criminal responsibility that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, "survivors," who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt."

Id., at 2615-2616. (Souter, J. concurring).

In imposing consecutive terms for the vehicular homicide convictions, the trial court properly gave due consideration to the victims in this case. There was no disregard

of the Yarbough criteria by the trial judge. To the contrary, the trial court followed the Supreme Court guidelines explicitly. Furthermore, the trial court clearly followed the language and spirit of the Victim's Rights Amendment to the New Jersey Constitution by recognizing and respecting the crime victims and treating them with "fairness, compassion and respect." If the trial court did not articulate the aggravating factors with sufficient particularity, the appropriate remedy is remand and not reversal. See State v. Kromphold, supra at 6.

CONCLUSION

Based on the foregoing it is respectfully requested that the application of the New Jersey Crime Victims' Law Center for leave to appear as amicus curiae be granted.

Respectfully submitted

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¹ The Court restated these principles at pp. 636-37.

²In addition to the victim impact statements presented in writing and at the time of sentencing, the presentence report included many letters from the numerous additional victims.

³In accordance with Sentencing Guideline 3d, see State v. Yarbough at 644.