

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket No. SRP-25-410

STATE OF MAINE
Appellee

v.

ZACHARY CONWAY
Defendant/Appellant

On appeal from a Sentence in the Cumberland County Superior Court

Brief of Appellant, Zachary Conway

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PROCEDURAL HISTORY

A criminal complaint was filed against Zachary Conway on October 21, 2019. [R. 3]. An indictment for three counts of robbery, one count of kidnapping, one count of aggravated assault and one count of theft against Conway was returned on December 5, 2019, by a Grand Jury sitting in Cumberland County. CUMCD-CR-19-5690. [R. 4].

Following a jury trial Mr. Conway was convicted of all charges on April 8, 2022. [R. 13]. He was sentenced on May 5, 2022, to fourteen years in the Department of Corrections, all but eight years suspended, and four years' probation on Counts I-IV. [R. 15]. On Count V, he received a three-year sentence, concurrent with Counts I-IV. [R. 16]. A timely notice of appeal was filed. [R. 17]. A timely Application for Sentence Review was not filed. [R. 17]. The Law Court affirmed Mr. Conway's convictions on February 9, 2023. *State v. Conway*, 2023 WL 11988614 (Me. Feb. 9, 2023).

Thereafter, a Motion to Correct Sentence was filed and Counts II-III were merged with Count I for sentencing. [R. 18; 38].

On February 13, 2024, Mr. Conway filed a Petition for Post-Conviction Review, with an Amended Petition filed on July 10, 2024. [R. 20, 21]. On August 1, 2025, the lower court (McKeon, J.), found that Mr. Conway's trial counsel was ineffective for failing to file an Application for Sentence Review and granted his

Petition for Post Conviction relief on this issue—the court denied all other claims in the Petition. [R. 55]. Counsel filed a timely Application for Sentence Review and this Court subsequently granted the Application. [R. 19, 56]. After counsel filed an agreed upon motion to supplement the record on appeal, this Court (Connors, J.), ordered the parties brief the issue of whether the record on appeal can be supplemented. [R. 57].

STATEMENT OF THE FACTS

Trial:

Steven Price testified that in October 2019 he lived in Bridgton with his wife and two kids. [Tr. I: 22]. Mr. Price knew Zachary Conway – they had met informally and found that they had some things in common. [Tr. I: 23-24]. Mr. Price and Zach smoked marijuana together. [Tr. I: 25]. Mr. Price had marijuana that he “usually” kept in the basement -- He grew it, and sometimes he had a lot in his basement. [Tr. I: 25-26]. Zach knew that Mr. Price kept this marijuana, and sometimes went into the basement with him. [Tr. I: 26]. Zach came by every couple of weeks for marijuana and gave Mr. Price “monetary donations” for a supply of marijuana. [Tr. I: 26].

Mr. Price knew Zach as “Kuwala” because that was how Zach had introduced himself. [Tr. I: 27]. Around the beginning of October 2019, Zach owed Mr. Price between \$800 and \$1000 for marijuana. [Tr. I: 28]. Zach texted that he

would come with the money on October 5. [Tr. I: 28]. Mr. Price told Zach that he would be at work. [Tr. I: 29]. While at work Mr. Price learned that his home had been robbed. [Tr. I: 32].

Kristina Parker testified that she lived in Bridgton, Maine and was married to Steven Price. [Tr. I: 75]. She knew Zach Conway and had met him three or four years previously and had seen him somewhat regularly at her home. [Tr. I: 76-77]. Kristina testified that on October 5, 2019, sometime after 1:00 p.m., when she was home alone, she heard a car pull up. [Tr. I: 79]. Ms. Parker opened the front door and Zach was standing on her porch. [Tr. I: 80]. Zach stated he was there to see Mr. Price, and Ms. Parker told Zach that he knew Mr. Price would not be there. [Tr. I: 80]. Zach walked back to his car and a person with a shaved head got out of it. [Tr. I: 82]. A second guy got out of the car a few moments later. [Tr. I: 82]. Ms. Parker told the group they would have to come back later when her husband would be home. [Tr. I: 83].

Zach asked to use the bathroom, and Kristina said yes. [Tr. I: 84]. Then the short kid asked to use the bathroom and Kristina said yes to him also. [Tr. I: 84]. She then walked inside too and closed the house door behind her. [Tr. I: 84]. When Kristina got to her kitchen sink, the guys in the bathroom came out with guns pointed at her, and the third guy came into the house with a blue crowbar. [Tr. I: 92]. When Mr. Conway and the other male came out of the bathroom, they asked

Ms. Parker where everything was— they asked for the money and weed and went for the basement door. [Tr. I: 93].

Ms. Parker stood in front of the basement door, not letting them downstairs. [Tr. I: 93]. Ms. Parker was then hit on the back of the head with the crowbar -- the guns were still pointing at her. [Tr. I: 93-94]. The kid with the shaved head, holding a gun told the guy with the crowbar to hit her again. [Tr. I: 94]. When she was on the ground Zach kicked her in the ribs. [Tr. I: 94]. Zach and the guy with the shaved head went downstairs. [Tr. I: 95]. Ms. Parker tried to leave the house, but the guy with the crowbar stopped her from leaving – he put the crowbar to her neck and strangled her with it. [Tr. I: 95]. On the way out the “bald kid” said that if she called the cops, they were going to kill her and her son, and they knew where her daughter was. [Tr. I: 95].

Sentencing Hearing:

Prior to Mr. Conway’s trial, on June 15, 2021, his co-Defendant, Brandon Desaulniers plead guilty to Robbery (Class A), Kidnapping (Class A) and Aggravated Assault (Class B) for the same incident that occurred on October 5, 2019. [R. 68]. Mr. Desaulniers was sentenced to 10 years, all but four (4) years eleven (11) months suspended, with four (4) Years Probation [R. 68]. (CUMCD-CR-2019-05821).

At the sentencing hearing and in their sentencing memorandum, Mr. Conway's attorneys requested a sentence that essentially mirrored that of his co-defendant, Mr. Desaulniers, arguing that any difference in the sentence between the two men would punish Mr. Conway for exercising his Constitutional right to pursue a trial. [R. 69; R. 103]. The State, while agreeing that the conduct of the two men was identical, [R. 100], claimed that the circumstances of Mr. Desaulniers plea set his sentence apart. [R.100].

The lower court, in setting Mr. Conway's sentence at fourteen (14) years with all but eight years (8) suspended, first discussed the basic sentence under the *Hewey* analysis. [R. 27]. The court noted that Mr. Desaulniers case and sentence is "as close to another case as there is," because it is the same conduct. [R. 28]. The court, nevertheless, ignored that it was Mr. Desaulniers who threatened the life of Ms. Parker's children if she called the police, [R. 79], and instead focused on the fact that Mr. Conway knew Ms. Parker and brought his friends there to steal from Ms. Parker and Mr. Price, even though he did not bring all of the weapons used in the incident. [R. 29]. In doing so, the court set the basic sentence at twelve (12) years. [R. 29].

Under the second step of the *Hewey* analysis, the lower court added the use of dangerous weapons and pecuniary gain as aggravating factors. [R. 31]. When considering mitigating factors, while claiming that it did not consider Mr.

Conway’s exercise of his Constitutional right to trial in the decision under the theory of a “trial tax,” the lower court noted that Mr. Conway’s remorse came at a later point, at the sentencing hearing, and therefore gave his remorse little value. [R. 31].

ISSUES FOR REVIEW

- I. Whether the lower court abused its sentencing power by failing to give weight to the Mr. Conway’s mitigating circumstance of remorse and accountability punishing him simply because he expressed it after trial, rather than plead guilty?
- II. Whether this court does not need to supplement the record on appeal with documents from the co-defendant’s case?

SUMMARY OF THE ARGUMENT

After Mr. Conway exercised his State and Federal Constitutional right to trial, he was sentenced to a term of fourteen years in the Department of Corrections, all but eight years suspended, and four years’ probation on Counts I-IV. [R. 15].¹ At the time of sentencing, Mr. Conway expressed his deep and heartfelt remorse for his participation in the incident and the effects it had on Ms. Parker. [Tr. 25-26]. He apologized to the court, and everyone involved “from the

¹He received a three-year sentence on Count V, concurrent with Counts I-IV. [R. 16].

bottom of his heart and the depth of [his] soul.” [Tr. 26]. However, in sentencing Mr. Conway, the lower court gave this remorse “little value” because in the courts conclusion, the remorse was “late,” having occurred at the sentencing hearing. [Tr. 43]. Mr. Conway’s co-defendant, Brandon Desaulniers, who plead guilty, received a much more favorable sentence of 10 years, all but four (4) years eleven (11) months suspended, for conduct that all parties agreed was “identical.”

This disparity in sentences was clearly based upon the lower court’s failure to give Mr. Conway mitigating circumstances credit for his showing of remorse, simply because he exercised his right to trial, and thus had no opportunity to express his remorse prior to sentencing. In failing to consider Mr. Conway’s remorse as a mitigating circumstance, the lower court abused its sentencing power and this Court must vacate the sentence and remand for further sentencing.

In doing so, this Court need not supplement the trial court record by including documents and testimony from Mr. Desaulniers case because it would place information before this Court that was not considered by the sentencing judge.

ARGUMENT

Mr. Conway's sentence should be vacated and remanded to the lower court for resentencing because it is an abuse of the lower court's sentencing power. *See State v. Murray-Burns*, 2023 ME 21, ¶ 16, 290 A.3d 542, 548 (holding that on a discretionary sentence appeal the defendant may set forth constitutional sentencing arguments as well as those allowed pursuant to 15 M.R.S. §§ 2151-2157). When reviewing the sentencing court's application of the *Hewey* analysis this Court reviews the basic sentence de novo for misapplication of principle and reviews the maximum sentence and the final sentence for an abuse of discretion. *State v. Ketcham*, 2024 ME 80, ¶ 35, 327 A.3d 1103, 1113. In addition, the Court also reviews the statutory steps for whether the sentencing court disregarded the relevant sentencing factors or abused its sentencing power. *State v. Bentley*, 2021 ME 39, ¶ 10, 254 A.3d 1171, 1175.

In conducting a statutory review of a criminal sentence this Court must consider:

- 1. Propriety of sentence.** The propriety of the sentence, having regard to the nature of the offense, the character of the offender, the protection of the public interest, the effect of the offense on the victim and any other relevant sentencing factors recognized under law.
- 2. Manner in which sentence was imposed.** The manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.

15 M.R.S. § 2155.

In reviewing Mr. Conway's sentence, this Court must also follow the statutory objectives for sentence review:

1. **Sentence correction.** To provide for the correction of sentences imposed without due regard for the sentencing factors set forth in this chapter;
2. **Promote respect for law.** To promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process;
3. **Rehabilitation.** To facilitate the possible rehabilitation of an offender by reducing manifest and unwarranted inequalities among the sentences of comparable offenders; and
4. **Sentencing criteria.** To promote the development and application of criteria for sentencing which are both rational and just.

15 M.R.S. § 2154. In so doing, this Court should conclude that Mr. Conway's sentence does not meet these objectives, is an abuse of the lower court's sentencing power, and remand the case pursuant to 15 M.R.S. § 2156 (1-A).

I. THE LOWER COURT ABUSED ITS SENTENCING POWER BY FAILING TO GIVE WEIGHT TO THE DEFENDANT'S MITIGATING CIRCUMSTANCE OF REMORSE AND ACCOUNTABILITY SIMPLY BECAUSE HE EXPRESSED IT AFTER TRIAL, AT SENTENCING RATHER THAN BY PLEADING GUILTY.

In imposing a sentence for a crime other than murder, the lower court undertakes a three-step *Hewey* analysis. 17-A M.R.S. § 1602(1)(A-C)) (2024).

First, the court determines a basic term of imprisonment “by considering the particular nature and seriousness of the offense as committed by the individual.” 17-A M.R.S. § 1602(1)(A). Second, the court determines the maximum term by considering “all other relevant sentencing factors, both aggravating and mitigating, appropriate to the case.” 17-A M.R.S. § 1602(1)(B). Lastly, the court determines if any portion of the sentence should be suspended. 17-A M.R.S. § 1602(1)(C).

There are a number of mitigating factors that a sentencing court can consider in step two of the statutory analysis, including, for example, the defendant's remorse and taking responsibility. *State v. Ellis*, 2025 ME 56, ¶ 23, 339 A.3d 794, 802, *and cases cited*.

Here the sentencing judge increased Mr. Conway’s basic sentence of twelve years to a maximum fourteen years because it found that the aggravating circumstances outweighed the mitigating circumstances. [R. 32]. The court listed the aggravating factors as motivation for pecuniary gain, use of a dangerous weapon, and victim impact. [R. 30-32]. Weighed against these aggravating factors were Mr. Conway’s lack of criminal record, steps Mr. Conway was taking to better himself while incarcerated, and Mr. Conway’s age. [R. 30-31]. In addition, the court discussed the issue of remorse:

It brings me to remorse, and it brings me to the long debate about whether or not there is a “trial tax.” I do – I do agree that Mr. Conway certainly had the right to exercise his right to trial. I’m not considering the fact that he exercised that right as an aggravation. I do not –

therefore on the remorse front, I've heard some remorse today, but it does come late at a sentencing hearing, so I – I'm going to give it little value.

[R. 31].

While the sentencing court did not count Mr. Conway's "late" remorse as an aggravating factor, failing to give Mr. Conway credit for the remorse he exhibited at his sentencing hearing as a mitigating circumstance, had the same effect. In *State v. Ellis*, this Court recently examined whether a defendant's silence and failure to affirmatively express remorse could be considered an aggravating circumstance in sentencing. 2025 ME 56, at ¶ 24. The Court held that a defendant cannot be punished for exercising his right to have a trial and remain silent. *Ellis*, 2025 ME 56, at ¶ 26. The Court explained that any consideration of a defendant's failure to take responsibility or express remorse as an aggravating circumstance must be based upon an allocution demonstrating a lack of remorse. 2025 ME 56, at ¶ 24.

Here, this Court is faced with analyzing a slightly different twist – can the lower court base its sentencing and findings of lack of mitigation on the fact that the defendant did not express remorse until after the trial because he exercised his Constitutional right to proceed to trial? Because Mr. Conway had no mechanism for expressing remorse during the trial process without admitting guilt, the lower court determined that Mr. Conway's remorse and taking responsibility occurred at

a late date (after trial) and therefore attributed little value to this important factor. [R. 31]. In essence, Mr. Conway did not receive the benefit of his genuine remorse because he expressed it after exercising his right to trial.

The lower court's failure to consider Mr. Conway's remorse because it was expressed after trial is an abuse of its sentencing power because it punishes Mr. Conway for exercising his Federal and State Constitutional right to trial. U.S. CONST. amend. VI; ME. CONST. art. I, § 6 (both guaranteeing defendants the right to a trial by jury). It is particularly clear that Mr. Conway was punished for exercising his right to trial since Mr. Desaulniers' sentence was significantly lower for conduct that was indisputably identical to that of Mr. Conway, [R. 100], and the lower court explicitly cited Mr. Conway's "late" remorse as having "little value." [R. 31]. Although the lower court did identify other aggravating and mitigating circumstances in its sentencing analysis, "[a] sentence based in part on an impermissible consideration is not made proper simply because the sentencing judge considered other permissible factors as well, and the quantitative role the impermissible factor played in such decision does not detract from the nature of the constitutional violation." *Ellis*, 2025 ME 56, at ¶ 28. (citation and quotation marks omitted).

Here, the impermissible factor was a factor of omission – the lower court failed to give Mr. Conway credit for his clear remorse simply because it occurred

after trial. As this Court determined, any sentence based in part on the defendant's exercise of his Constitutional right to trial, cannot stand:

It is sufficient to render a sentence invalid if it reasonably appears from the record that the trial court relied in whole or in part upon the defendant's election to stand trial. We need not conclude that the sentencing court in fact relied upon an improper consideration, and any doubt as to whether the defendant was punished for exercising his right to trial must be resolved in favor of the defendant.

Ellis, 2025 ME 56, at ¶ 29 (emphasis added) (citations and quotations omitted). Therefore, because the lower court relied upon an improper factor in determining Mr. Conway's maximum sentence, thereby abusing its sentencing power, this Court must vacate the sentence and remand for new sentencing.

II. THIS COURT NEED NOT SUPPLEMENT THE RECORD ON APPEAL WITH DOCUMENTS FROM THE CO-DEFENDANT'S CASE.

This Court should deny the request to supplement the record on appeal to include document and/or testimony from the co-defendant, Brandon Desaulniers' case.

Maine Rules of Appellate Procedure provide that "The record on appeal shall consist of the trial court clerk's record and exhibits filed in the trial court, the reporter's transcript of the proceedings, if any, and a copy of the docket entries." Me. R. App. P. 5(a). Rule 5 allows for supplementation of the record on appeal when "difference arises as to whether the record on appeal truly discloses what

occurred in the trial court, or if anything material to either party is omitted from the record on appeal.” Me. R. App. P. 5(e). As this Court has noted, Rule 5 is meant only to supplement a record that has misstated or omitted evidence that should properly be before this Court, not “to add to the record evidence that was not considered by the District Court.” *Beane v. Maine Ins. Guar. Ass’n*, 2005 ME 104, ¶ 11, 880 A.2d 284, 286–87 (citing *Tisdale v. Rawson*, 2003 ME 68, ¶¶ 13–14, 822 A.2d 1136, 1140). Drawing on its prior decision in *Tisdale*, this Court reasoned that the purpose of Rule 5 is not:

[T]o give litigants the opportunity to create a record on appeal by entering new evidence to aid the appellate court's analysis of the issues before it. An appellate court must limit its review to the record developed by the trial court. An omission refers to the inadvertent omission of documentary presentation of evidence otherwise presented to the court, rather than evidence that the parties neglected to offer in any fashion.

Id.

Here, the lower court considered the information about Mr. Desaulniers conduct, plea, sentence, and the considerations that ultimately went into the plea offer, when sentencing Mr. Conway. [R. 98-100, 101, 28-29] In accepting this evidence at the time of Mr. Conway’s sentencing, the lower court had all of the information necessary before it to sentence him. Supplementing the record on appeal with information not placed before the lower court would place this Court in a position of having more knowledge than the sentencing court and would allow

for admission of evidence that was not part of the trial court record in contravention of Rule 5 and this Court's decision in *Beane*.

Therefore, this Court should deny the motion to supplement the trial court record to include information about Mr. Desaulniers case that was not before the sentencing court in Mr. Conway's case.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's sentence and remand for new sentencing.

Date: May 28, 2026

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CERTIFICATE OF SERVICE

I, Michelle R. King, attorney for Zachary Conway hereby certify that on this date I made service of the foregoing Appellant's Brief and Appendix, by email, to the following counsel:

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