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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1116-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SILVIA BRODRICK,

Defendant-Appellant.

Telephonically argued May 23, 2017 –
Decided September 20, 2017

Before Judges Hoffman and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment
No. 15-02-0321.

Robert A. Honecker, Jr., argued the cause
for appellant (Ansell Grimm & Aaron, PC,
attorneys; Mr. Honecker, on the briefs).

Monica do Outeiro, Assistant Prosecutor,
argued the cause for respondent (Christopher
J. Gramiccioni, Monmouth County Prosecutor,
attorney; Ms. do Outeiro, of counsel and on
the brief).

PER CURIAM

Defendant Silvia Brodrick pled guilty to two counts of second-degree fraudulent contracting, N.J.S.A. 2C: 21-34(b). Consistent with the plea agreement, the court sentenced defendant as a third-degree offender, and imposed a three-year flat term of imprisonment on each count, to run concurrently. Defendant now appeals her convictions and sentence. We affirm.

I

N.J.S.A. 2C:21-34(b) states in relevant part:

A person commits a crime if the person knowingly makes a material representation that is false in connection with the negotiation, award or performance of a government contract. If the contract amount is for \$25,000.00 or above, the offender is guilty of a crime of the second degree. . . .

During the plea colloquy, defendant admitted the following.

From June 2010 through July 2011, defendant operated a day care facility in Asbury Park. In 2010, on behalf of the day care, defendant entered into a year-long contract with the Asbury Park Board of Education (Board) to provide it with services. The contract required the day care identify its employees for the Board.

Defendant informed the Board A.A. was employed as a custodian; however, L.S. in fact rendered the services A.A. was

hired to provide.¹ Advised by defendant A.A. was a day care employee, the Board conducted a background check on him, who was "cleared." Not knowing he was in fact working at the day care, the Board did not conduct a background check on L.S. During the plea colloquy, defendant admitted the failure of a staff member to undergo a background check was a breach of the day care's contract with the Board.

After the contract expired, in 2011 defendant entered into another year-long contract with the Board. She admitted she again made "that same misrepresentation" in the second contract; specifically, even though L.S. was the custodian for the day care, she informed the Board the custodian was A.A. She also noted when the contracts were being implemented, she received checks from the Board made payable to A.A.; however, she deposited those checks and used the proceeds to pay L.S. Defendant admitted she was guilty of making a material misrepresentation to the Board about the custodian's identity. Finally, she acknowledged the contract amount for each contract exceeded \$25,000.

¹ We employ the use of initials to protect the privacy of these two individuals.

In addition to pleading guilty to two counts of violating N.J.S.A. 2C:21-34(b)², defendant agreed to enter into a consent order prohibiting her or any business in which she is a principal to submit a bid to or conduct any business with the State or any of its political subdivisions for a term of twenty years. In exchange, the State consented to recommend to the court that it impose a prison term appropriate for a third-degree crime, and that the term of imprisonment be four years on each count.

II

On appeal, defendant asserts the following for our consideration:

POINT I — N.J.S.A. 2C:21-34(b) IS UNDULY OVERBROAD, FACIALLY VAGUE, AND VAGUE AS APPLIED TO THE DEFENDANT. THEREFORE, THE STATUTE MUST BE DEEMED UNCONSTITUTIONAL AND THE CONVICTION AND SENTENCE OF THE DEFENDANT MUST BE VACATED.

A. N.J.S.A. 2C:21-34(b) is overbroad.

B. N.J.S.A. 2C:21-34(b) is facially vague.

C. N.J.S.A. 2C:21-34(b) is vague as applied.

POINT II — THE LOWER COURT COMMITTED PLAIN ERROR IN ACCEPTING THE DEFENDANT'S PLEA

² Each count pertained to one of the two contracts.

BASED UPON AN INSUFFICIENT FACTUAL BASIS AS
REQUIRED PURSUANT TO RULE 3:9-2.

POINT III — THE LOWER COURT WAS CLEARLY
MISTAKEN IN ITS EXERCISE OF DISCRETION AT
THE SENTENCING PROCEEDINGS BELOW.

POINT IV — THE PRINCIPLES OF FUNDAMENTAL
FAIRNESS PERMIT VACATING THE CONVICTIONS IN
THIS MATTER OR, ALTERNATIVELY, A REMAND FOR
THE IMPOSITION OF A NON-CUSTODIAL SENTENCE.

We do not address the arguments raised in Point I. These contentions could have been but were not raised before the trial court, and defendant did not reserve the right to appeal these issues at the time of her plea. See R. 3:9-3(f). As we observed in State v. Marolda, 394 N.J. Super. 430 (App. Div.), certif. denied, 192 N.J. 482 (2007):

A plea of guilty amounts to a waiver of all issues, including constitutional claims, that were or could have been raised in prior proceedings. Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973) (explaining that "a guilty plea represents a break in the chain of events which has preceded" and holding that a defendant who "has solemnly admitted in open court that he is in fact guilty of the offense . . . may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred" before the plea was entered).

[State v. Marolda, 394 N.J. Super. 430, 435 (App. Div.), certif. denied, 192 N.J. 482 (2007).]

Generally, Rule 3:9-3(f) "is directed to pretrial issues such as the admissibility of statements, pretrial identifications, and sound recordings, [but this rule] extends to purely legal questions as well." State v. Vasquez, 129 N.J. 189, 194 (1992); see also Pressler & Verniero, Current N.J. Court Rules, comment 7 on R. 3:9-3 (2017). There are exceptions to the rule issues not raised before or reserved at the time of a plea are waived, see R. 3:5-7(d), but none applies here. Accordingly, we decline to consider the arguments in this point.

Defendant next contends there was no factual basis to her plea and, thus, the trial court erred in accepting it. We disagree.

On behalf of the day care, defendant entered into two, year-long contracts with the Board to provide it with services. The contract required the day care identify its employees. Defendant knowingly misrepresented the custodian's true identity twice, thwarting the Board's ability to conduct a criminal background check on the employee who in fact performed services for the day care.

Defendant admitted she made a material misrepresentation to the Board, and there is no question such misrepresentation was made in connection with the award or performance of a government contract. As for the grading of these two offenses, defendant

acknowledged the amount of each contract exceeded \$25,000. We are satisfied there was an adequate factual basis for defendant's plea, as required by Rule 3:9-2.

Defendant also argues portions of the recording of the plea proceeding were inaudible, and thus a remand is necessary "to ensure that the factual basis in this matter was sufficient." However, the trial court heard defendant's application to settle the record of the plea proceeding. The only portion defendant wanted settled was defendant's answer to one question. The court ultimately agreed defendant's recollection of the answer she provided was accurate, and entered an order on May 13, 2016, correcting the record, accordingly. When we reviewed the record, we read the answer to the subject question as corrected.

Defendant next claims there was no support for imposing a term of imprisonment because the mitigating factors outweighed the one aggravating factor found by the court. Specifically, the court found aggravating factor nine, N.J.S.A. 2C:44-1(a)(9) (the need to deter defendant and others from violating the law). The court also found the following mitigating factors, see N.J.S.A. 2C:44-1(b): one (defendant's conduct did not cause serious harm); two (defendant did not contemplate her conduct would cause or threaten serious harm); six (defendant compensated or was willing to compensate the victim); seven

(defendant has no prior criminal record); eight (defendant's conduct was the result of circumstances unlikely to recur, in light of the terms of the consent order); and ten (defendant is particularly likely to respond affirmatively to probationary treatment).

Although the mitigating factors outweighed the aggravating ones, as the court noted, defendant was convicted of second-degree offenses. Although the State recommended she be sentenced as though the offenses were third-degree ones, nevertheless, they remained second-degree offenses.

There is a presumption of imprisonment for second-degree offenses, even if the mitigating factors outweigh the aggravating ones, unless "having regard to the character and condition of the defendant, it is of the opinion that [her] imprisonment would be a serious injustice which overrides the need to deter such conduct by others." N.J.S.A. 2C:44-1(d). As stated by our Supreme Court in State v. Jabbour, 118 N.J. 1 (1990):

[T]he [Criminal] Code establishes a presumption of imprisonment applicable to first-and second-degree crimes unless, "having regard to the character and condition of the defendant, * * * imprisonment would be a serious injustice which overrides the need to deter such conduct by others." N.J.S.A. 2C:44-1d.

[However,] [t]he "serious injustice" exception to the presumption of imprisonment applies only in "'truly extraordinary and unanticipated circumstances.'" Roth, supra, 95 N.J. at 358. Thus, the presumption is not overcome merely because the defendant is a first offender or because the mitigating factors preponderate over the aggravating factors. Id. at 368; State v. Kelly, 97 N.J. 178, 219-20 (1984); State v. Gonzalez, 223 N.J. Super. 377, 393 (App. Div.), certif. denied, 111 N.J. 589 (1988). Nor is the presumption overcome merely because the mitigating factors so outweigh the aggravating factors as to justify downgrading the offense. N.J.S.A. 2C:44-1f(2). In that setting, a trial court may reduce a prison term, but it still must imprison the defendant. Jarbath, supra, 114 N.J. at 413; State v. Gerstofer, 191 N.J. Super. 542, 546 (App. Div.), certif. denied, 96 N.J. 310 (1984). To avoid the presumption of imprisonment applicable to first- or second-degree offenses, the trial court must find that imprisonment would be a serious injustice that overrides the need to deter others. Rarely will general deterrence not be furthered by imprisonment for serious crimes. Jarbath, supra, 114 N.J. at 408. To forestall the deterrent effect of incarceration, the defendant must be idiosyncratic. Ibid.

[Id. at 6-7.]

Citing Jabbour and decisional authority applying the above principles, here, the trial court did not find defendant's imprisonment met the "serious injustice" exception to the presumption of imprisonment. The court noted:

I find that the mitigating factors outweigh the aggravating factors. I'm not satisfied

that the standards of Jabbour . . . apply to the point where . . . this sentence will not serve any deterrent purpose.

The legislature made this magnitude of a contract a second-degree offense and carries with it a presumption, and unless the legal standards are met to overcome [that] presumption, a prison sentence is warranted.

Accordingly, . . . I hereby sentence the defendant to [the] New Jersey State prison for a period of three years.

We are satisfied the trial court's sentencing decision is supported by the facts and law, making it unnecessary we intervene and to either adjust or remand this matter for resentencing.

We have examined defendant's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(2).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION