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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3658-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM T. STELTZ,

Defendant-Appellant.

Submitted July 11, 2017 — Decided November 6, 2017

Before Judges Nugent and Accurso.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment Nos.
08-09-0207 and 09-06-2098.

Joseph E. Krakora, Public Defender, attorney
for appellant (Michele A. Adubato,
Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Emily Anderson,
Deputy Attorney General, of counsel and on
the brief).

PER CURIAM

Defendant William Steltz appeals from a January 22, 2016
order denying his petition for post-conviction relief but
amending his judgment of conviction to reflect the jail credits

negotiated as part of his 2009 plea. He contends the PCR court erred in finding his claim – that the judgments of conviction, in addition to not accurately reflecting his jail credits, did not accurately reflect the minimum term the judge imposed at sentencing – was barred by R. 3:22-5. He also claims he was deprived of the effective assistance of counsel and was entitled to a hearing on his claims. The State, although opposing defendant's petition seeking resentencing in the Law Division, now contends "there are two [different] issues with defendant's sentence that require a remand."

Because we previously decided the identical issues defendant raised in his petition regarding the length of his minimum term and calculation of jail credits, we affirm, pursuant to R. 3:22-5, the decision to deny defendant's petition but reverse amendment of the judgments of conviction to "correct" the calculation of jail credits. We further remand to correct an illegal sentence on counts four and six of State Grand Jury Indictment No. 08-09-0207.

Defendant pled guilty to four counts of drug and weapon charges contained in two separate indictments in exchange for the State's recommendation of an aggregate sentence of twenty years with ten years of parole ineligibility and the dismissal

of the remaining charges.¹ Specifically, defendant pled guilty to count four, first-degree distribution of cocaine, N.J.S.A. 2C:35-5b(1) and 2C:35-5c; count six, first-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(1); and count thirteen, second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7b(1) of State Grand Jury Indictment No. 08-09-0207 and to count nine, first-degree distribution of a controlled dangerous substance, N.J.S.A. 2C:35-5a(1) and 2C:35-5b(1) of Camden County Indictment No. 09-06-2098.

At sentencing, defendant's counsel stated:

I understand what the aggregate sentence is under the agreement. I will keep my comments very short, really[.] [B]ased on the fact that there are concerns here that Mr. Steltz is going to help the State or County in any further prosecutions in this matter[,] [w]e'd ask that this matter be treated as a cap plea and he be sentenced at the minimum lower cap of 20, do 10.

With that we would submit.

The judge pronounced sentence as follows:

¹ The weapon defendant pled guilty to possessing on December 11, 2007, a date defendant admitted he was in possession of more than five ounces of cocaine with intent to distribute, was an assault rifle. During the plea colloquy, the judge explained to defendant that his exposure on the charges to which he pled guilty was seventy years, thirty-five without parole, leaving aside that defendant was extended-term eligible.

These are very serious charges, we know. The . . . three first degree possession with intent charges and one second degree certain persons offense as a result of a weapon. So I'm going to give you somewhat of a break in consideration, the fact that you took responsibility.

These cases would have been significant prosecutions by the State. They would have had to expend many resources in prosecution, two separate and distinct cases. It would have been protracted trials.

As a result of your taking responsibility early on, again, I'm going to give you the benefit of somewhat of a reduction from what I'll consider to be a cap. Whenever the State makes a recommendation, whether or not they infer it or say it, I consider that to be a cap.

Under State v. Warren,² you always have a right to argue for something less and I'll give you a somewhat lesser sentence, although not significantly. . . .

Under State Grand Jury Indictment Number 207, under Counts Four and Six, you'll receive, instead of the 15-year sentence, five without parole, a 14-year sentence, three without parole. They will run concurrent with one another.

Under Indictment 2098, Count Nine, you'll receive a 10-year sentence, five years without parole. That will also run concurrent to Counts Four and Six of 207.

And you'll receive a consecutive sentence under Count Thirteen. That's the certain person offense. Five years, five without parole.

² State v. Warren, 115 N.J. 433 (1989).

The aggregate sentence is a 19-year sentence, eight years without parole.

The judgments of conviction reflected the sentence imposed on each count of both indictments and included the statement that the "aggregate total sentence is nineteen (19) years, eight (8) years without parole."

Two months later, the Parole Board wrote to the sentencing judge, with a copy to defendant, asking for clarification of the sentence. The Board noted that running the sentence on count nine of the Camden County Indictment (ten years, five-year mandatory minimum) concurrent with the aggregate sentence imposed on counts four and six of the State Grand Jury indictment (fourteen years, three-year mandatory minimum) while running count thirteen of that indictment (five years, five-year mandatory minimum), consecutively would result in an aggregate sentence of nineteen years, ten-year mandatory minimum, not nineteen years, eight-year mandatory minimum as stated in the judgments of conviction. In response to that letter, the sentencing judge amended the statement of reasons for both judgments of conviction to reflect an aggregate sentence on both indictments of nineteen years, ten years without parole. See State v. Matlack, 49 N.J. 491, 502, cert. denied, 389 U.S. 1009, 88 S. Ct. 572, 19 L. Ed. 2d 606 (1967) (permitting correction of

"inadvertent clerical-type errors" so the defendant receives the sentence the trial court intended).

Several months later, defendant moved to correct the judgments of conviction. Defendant claimed the sentence actually imposed was an aggregate nineteen years with eight years' parole ineligibility, not the nineteen years with ten years' parole ineligibility as reflected in the amended judgments of conviction. Defendant also complained his jail credits were improperly calculated. He claimed he only received jail credits through February 12, 2009, the date of his prior sentencing on a Gloucester County indictment, and not through January 8, 2010, his sentencing on the two indictments at issue here. The sentencing judge denied his request, noting that N.J.S.A. 2C:39-4.1 mandated a sentence of five years, five years to be served without parole, "to run consecutive to any other sentence imposed at the same time."

We affirmed in an unreported opinion. State v. Steltz, No. A-2461-11 (App. Div. March 12, 2013). We said "[t]he two JOCs and accompanying statements of reasons clearly establish that the five-year period of parole ineligibility for I-2098 must run consecutive to the five-year period of parole ineligibility for the weapons charge under I-207." Id. at 4. As to the jail credits, we relied on State v. Hemphill, 391 N.J. Super. 67, 71

(App. Div.), certif. denied, 192 N.J. 68 (2007), holding that jail credits are "impermissible if the confinement is due to service of a prior-imposed sentence [on] another charge." See Steltz, supra, slip op. at 4-5.

Defendant subsequently filed two more motions seeking correction of his sentence in the trial court. Those motions were denied by different judges in 2013 and 2014, presumably based on the prior adjudication.

In January 2015, defendant filed a pro se petition for post-conviction relief claiming ineffective assistance of counsel in connection with his sentence. Defendant was subsequently assigned counsel who filed an amended petition on his behalf. In his amended petition, he again sought correction of the judgments of conviction to reflect an aggregate sentence of nineteen years with eight years of parole ineligibility and additional jail credits through January 7, 2010, the day before his sentencing on those convictions. He contended his counsel was ineffective because he failed to ensure he received all the jail credits negotiated and for failing to file an appeal when the judgments were incorrectly amended to increase his mandatory minimum term. He also claimed counsel was ineffective for failing to advise that a consecutive sentence was not mandated for the crimes to which defendant pled guilty.

After hearing argument on the petition, the judge partially granted and partially denied defendant relief. The judge found defendant was not wrongly denied the assistance of counsel on his prior motions or appeal to this court. The judge further noted that this court referred defendant's request for counsel to the Office of the Public Defender, which declined representation, a decision we did not disturb. Cf. State v. A.L., 440 N.J. Super. 400, 418-19 (App. Div. 2015) (noting jurisdiction of that issue in the Appellate Division pursuant to R. 2:9-1(a)).

The judge further determined based on a review of the plea colloquy and the sentencing transcript that the sentencing judge intended to and did sentence defendant to an aggregate term of nineteen years, ten to be served without parole. Finding defendant had already presented his claim regarding his parole ineligibility term to this court, which rejected it, the judge deemed it procedurally barred pursuant to R. 3:22-5 (prior adjudication on the merits of any ground for relief is conclusive).

The judge, however, took a different view of the calculation of defendant's jail credits. Stating she was "not quite sure how the issue of jail credits has not been addressed or fixed," the judge found the State and defendant's counsel

"agreed that the defendant would get jail credits starting – well, aggregate, starting on June 26th, 2008, up until the date of sentencing, which was January 8th, 2010." "[B]ased upon the fact that the record is clear," the judge amended the judgments of conviction to reflect "561 days negotiated and concurrent jail credit."

On appeal, defendant contends he was entitled to an evidentiary hearing and that he was denied the effective assistance of counsel. He further argues his claims were not barred by R. 3:22-5 because he did not raise ineffective assistance in the prior proceeding.

The State contends defendant's arguments are without merit. The State does not address the court's grant of the additional jail credits but insists the matter must be remanded for resentencing because the judge ran the conviction on count nine of Camden County Indictment No. 09-06-2098 (first-degree distribution) concurrent to counts four (first-degree distribution) and six (first-degree possession with intent to distribute) of State Grand Jury Indictment No. 08-09-0207, but consecutive to count thirteen (certain persons offense) of the same indictment, which it contends violates the "basic tenet" of State v. Rogers, 124 N.J. 113 (1991). The State further argues the sentence on counts four and six is illegal because the

three-year periods of parole ineligibility on the concurrent fourteen-year terms violate N.J.S.A. 2C:35-5b(1).

We think it obvious that defendant's arguments as to his sentence, both the parole ineligibility term and the calculation of jail credits, are plainly barred by R. 3:22-5. Defendant made a motion to the sentencing judge to correct his sentence raising the identical two issues. When the sentencing judge denied his motion, he appealed to this court. Having considered defendant's arguments, the sentencing transcript and the judgments of conviction, we concluded "the record fully supports the judge's determination that the total parole ineligibility for both indictments was ten years." Steltz, supra, No. A-2461-11, slip op. at 4. As to the calculation of jail credits, we noted "the computation did not include any days after defendant began serving his Gloucester County sentence on other charges. The current record contains no support for defendant's claim that the agreed upon jail time should be changed to include that period." Ibid.

Our prior adjudication of those two issues on the merits in defendant's prior appeal is dispositive and bars defendant's claim for post-conviction relief. See State v. Marshall, 173 N.J. 343, 350-53 (2002). Although the trial court held that R. 3:22-5 barred its consideration of defendant's claim as to his

parole-ineligibility term, it failed to apply the Rule to defendant's claim as to jail credits, although it too was identical to the claim we resolved.

Jail credits are not discretionary. State v. Hernandez, 208 N.J. 24, 48-49 (2011), mod. on other grounds, State v. C.H., 228 N.J. 111 (2017). "After the first sentence is imposed . . . a defendant is not entitled to jail credits for time spent in custody when later sentenced on other pending charges." State v. Rippy, 431 N.J. Super. 338, 349 (App. Div. 2013), certif. denied, 217 N.J. 284 (2014). As we previously held, defendant is not entitled to jail credits for the period following his sentencing on February 12, 2009, on the Gloucester County indictment and January 8, 2010, his sentencing on the two indictments at issue here. We thus reverse the order amending the judgments of conviction to award jail credits for that period.

We find no support for the State's argument that running the sentence on the certain persons offense consecutive to the three first-degree drug charges violated Rogers, because one of those drug charges was contained in a separate indictment. Rogers prohibits the imposition of "partially-concurrent and partially-consecutive sentences," e.g., "two 30-year prison terms, the second to be concurrent with the first for a term of

15 years and consecutive to the first for a term of 15 years," resulting in an aggregate sentence of 45 years. Rogers, supra, 124 N.J. at 114, 118. The Supreme Court prohibited such sentences, even though they are not expressly forbidden by the Code of Criminal Justice, because their variability would severely undermine the goal of greater uniformity in sentencing. Ibid.

The State offers no case to support its assertion that running a sentence on two counts of a multi-count indictment concurrent to one another and concurrent to the sentence on the sole count of a separate indictment, but making the remaining count consecutive to all three is prohibited by Rogers. Such a sentence would not appear to pose the problems of wide variability that concerned the Rogers Court. Indeed, the Court has recently made clear in the context of awarding jail credits on consecutive sentences under two different indictments that "[t]he appropriate course of action is to view the separate sentences together and apply jail credit to the front end of the aggregate sentence." C.H., supra, 228 N.J. at 121-22. Although not squarely on point, it does undermine the State's argument that the aggregate sentence imposed here violated the Code. We find the State's argument based on Rogers no basis to remand for a new sentencing.

The State also contends, however, apparently for the first time, that the sentence imposed is illegal because the three-year ineligibility terms imposed on counts four and six of State Grand Jury Indictment No. 08-09-0207 were less than one-third of the base terms of fourteen years, a violation of N.J.S.A. 2C:35-5b(1). We agree defendant's sentence as to those counts is illegal because it "include[s] a disposition that is not authorized by our criminal code." See State v. Schubert, 212 N.J. 295, 308 (2012).


Because an illegal sentence "may be corrected at any time before it is completed[,]" id. at 309 (quoting State v. Murray, 162 N.J. 240, 247 (2000)), and as defendant can have no expectation of finality in the sentence he has continued to challenge, see State v. Rodriguez, 97 N.J. 263, 271 (1984), we remand for resentencing in accordance with N.J.S.A. 2C:35-5b(1). See State v. Baker, 270 N.J. Super. 55, 77 (App. Div.) (holding a court may correct an illegal sentence to impose a legislatively-mandated period of parole ineligibility, even if it involves an increase in the defendant's aggregate sentence), aff'd o.b., 138 N.J. 89 (1994).

In sum, we affirm the court's denial of defendant's petition insofar as it relates to defendant's claims as to his parole ineligibility term; reverse the amendment of the

judgments of conviction as it relates to jail credits; and remand for resentencing on counts four and six of State Grand Jury Indictment No. 08-09-0207 in conformity with N.J.S.A. 2C:35-5b(1), and application of reinstated jail credits in accordance with C.H., supra, 228 N.J. at 121-22. We do not retain jurisdiction.

Affirmed in part; reversed in part; and remanded for resentencing in conformance with this opinion.

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


CLERK OF THE APPELLATE DIVISION