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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3718-15T1
A-4144-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ISAIAH H. CHIA,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAREN COLEY,

Defendant-Appellant.

Submitted May 16, 2017 — Decided August 14, 2017

Before Judges Espinosa, Suter and Grall.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Indictment Nos.
15-06-0987 and 15-05-0721.

Joseph E. Krakora, Public Defender, attorney for appellant Isaiah Chia in A-3718-15 (Rebecca Gindi, Assistant Deputy Public Defender, of counsel and on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant Daren Coley in A-4144-15 (John Douard, Assistant Deputy Public Defender, of counsel and on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent in A-3718-15 (Erin M. Campbell, Assistant Prosecutor, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent in A-4144-15 (Kerry J. Salkin, Assistant Prosecutor, on the brief).

PER CURIAM

The defendants in these appeals¹ were charged with offenses that exposed them to the Graves Act requirement that they be sentenced to a term of imprisonment that includes a minimum term of incarceration. N.J.S.A. 2C:43-6(c). Each pled guilty to one count of second-degree possession of a handgun without a permit required by N.J.S.A. 2C:58-4, contrary to N.J.S.A. 2C:39-5(b) (count one) pursuant to a plea agreement. In each case, the State agreed to a Graves Act waiver and to recommend a sentence of five years with a one-year period of parole ineligibility but did not consent to the defendants' request that a probationary term be

¹ We calendared the appeals back-to-back and consolidated them for purposes of writing a single opinion.

imposed pursuant to the Graves Act "safety valve" exception under N.J.S.A. 2C:43-6.2 (section 6.2). Thereafter, each defendant filed a motion, asking the assignment judge to determine that a probationary sentence was appropriate in "the interests of justice." The motions were denied and defendants were sentenced to the terms recommended by the State in their plea agreements.

Defendants appeal from the sentences that were imposed, arguing, among other things, they were entitled to a hearing on the motions they filed. We affirm, substantially for the reasons set forth by Judge Peter F. Bariso, Jr. in his thoughtful written opinions denying each defendant's motion.

Chia presents the following arguments for our consideration in his appeal:

POINT I

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE MR. CHIA WAS SENTENCED WITHOUT A HEARING.

POINT II

BECAUSE THE PRESIDING JUDGE FOUND MITIGATING FACTORS SEVEN, EIGHT, NINE AND TEN, AND ONLY AGGRAVATING FACTOR NINE AT A HEARING WHERE MR. CHIA WAS PRESENT, THE MATTER SHOULD BE REMANDED TO THAT COURT TO IMPOSE A PROBATIONARY SENTENCE.

POINT III

ALTERNATIVELY, BECAUSE THE ASSIGNMENT JUDGE APPLIED INCORRECT LEGAL PRINCIPLES WHEN IT

"SENTENCED" MR. CHIA, A REMAND FOR RESENTENCING IS REQUIRED.

Coley presents the following arguments for our consideration in his appeal:

POINT I

PURSUANT TO A WAIVER OF THE GRAVES ACT MANDATORY MINIMUM SENTENCE, JUDGE BARISO FAILED TO HOLD A HEARING AT WHICH MR. COLEY HAD AN OPPORTUNITY TO PRESENT AN EFFECTIVE CASE FOR PROBATION. MOREOVER, JUDGE BARISO'S DENIAL OF PROBATION WAS BASED ON AN INCORRECT UNDERSTANDING OF RELEVANT LAW. U.S. CONST., AMENDS. V, VI, XIV; N.J. CONST., ART. I, PARS. 1, 9, 10.

A. Judge Bariso Failed To Hold A Hearing On The Ground That It Was Not Required By The Principle Of Fundamental Fairness, Thereby Depriving Mr. Coley Of His State And Federal Rights To Due Process.

B. Judge Bariso's Application And Weighing Of Aggravating And Mitigating Factors, Which Differed From Those Applied By Judge Venable, Were Not Supported By The Record.

After appellate briefs were filed in this matter, the Supreme Court decided State v. Nance, 228 N.J. 378 (2017), which addressed procedural issues regarding N.J.S.A. 2C:43-6.2. At our invitation, the parties filed supplemental briefs.

In his supplemental brief, Chia argued:

POINT I

BECAUSE NANCE CLARIFIED THAT SENTENCING UNDER N.J.S.A. 2C:43-6.2 IS A TWO-STEP PROCESS AND MR. CHIA HAS A CONSTITUTIONAL RIGHT TO BE PRESENT AT SENTENCING, THIS MATTER MUST BE REMANDED FOR RESENTENCING WITH INSTRUCTIONS THAT MR. CHIA BE AFFORDED A FULL HEARING AT BOTH STAGES OF SENTENCING.

POINT II

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE COUNSEL AND THE SENTENCING JUDGE ERRONEOUSLY BELIEVED THE SENTENCING JUDGE DID NOT HAVE DISCRETION TO SENTENCE MR. CHIA TO A BASE TERM BELOW THE FIVE YEARS AGREED TO IN THE PLEA.

In his supplemental brief, Coley argued:

BECAUSE THE RIGHT TO ALLOCUTE AND THE RIGHT TO COUNSEL AT A SENTENCING HEARING IS SO DEEPLY WOVEN INTO OUR RIGHTS TO DUE PROCESS, NANCE'S SILENCE ON THE MATTER IMPLIES THAT THE RIGHT TO A HEARING RETAINS ITS FULL FORCE IN GRAVES ACT WAIVER CASES. BY BEING DEPRIVED OF A HEARING, MR. COLEY WAS DENIED ONE OF HIS MOST FUNDAMENTAL DUE PROCESS RIGHTS. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. ART. I, PARS 1 & 10.

I.

Section 6.2, the "safety valve" for the mandatory minimum term of incarceration imposed by N.J.S.A. 2C:43-6(c) of the Graves Act, "was enacted to authorize 'the reduction of sentence for a person convicted of a first offense under the Graves Act if the prosecutor makes a motion before the assignment judge stating that the interests of justice would not be served by the imposition of

the mandatory minimum term under the Graves Act.'" Nance, supra, 228 N.J. at 391 (emphasis added) (quoting S. Law, Pub. Safety & Def. Comm., Statement to S. 827 (Sept. 19, 1988) and citing Assemb. Judiciary Comm., Statement to S. 827 (Nov. 21, 1988)).

Section 6.2 states:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under (a) subsection c. of N.J.S.[A.] 2C:43-6 for a defendant who has not previously been convicted of an offense under that subsection, or (b) subsection e. of N.J.S.[A.] 2C:39-10 for a defendant who has not previously been convicted of an offense under chapter 39 of Title 2C of the New Jersey Statutes, does not serve the interests of justice, the assignment judge shall place the defendant on probation pursuant to paragraph (2) of subsection b. of N.J.S.[A.] 2C:43-2 or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole. The sentencing court may also refer a case of a defendant who has not previously been convicted of an offense under that subsection to the assignment judge, with the approval of the prosecutor, if the sentencing court believes that the interests of justice would not be served by the imposition of a mandatory minimum term.

[N.J.S.A. 2C:43-6.2 (emphasis added).]

Notably, section 6.2 authorizes the court to consider imposing a probationary term only upon motion of the prosecutor. Ibid. In State v. Benjamin, 228 N.J. 358 (2017), a case decided the same day as Nance, the Supreme Court explained:

The relief that section 6.2 affords can arise in two ways: either the prosecutor makes a motion to the assignment judge for a waiver of the mandatory minimum penalty, or the sentencing judge refers the matter to the assignment judge if the prosecutor approves the referral. In either scenario, the prosecutor must approve the waiver before the assignment judge or his or her designee imposes one of the two reduced penalties.

[Id. at 368-69 (citations omitted).]

The option available to a defendant who lacks the prosecutor's consent to the application of section 6.2 is to file an Alvarez² motion "to appeal the denial of a waiver to the assignment judge upon a showing of patent and gross abuse of discretion by the prosecutor." Id. at 364; see, e.g., State v. Mastapeter, 290 N.J. Super. 56, 64-65 (App. Div.), certif. denied, 146 N.J. 569 (1996).

In Benjamin, supra, the Court reaffirmed the standard a defendant must satisfy to successfully challenge the prosecutor's decision, stating,

[S]ince the Appellate Division's 1991 decision in Alvarez, . . . defendants have been able to seek judicial review of prosecutors' waiver decisions. In order to do so, a defendant must, by motion to the assignment judge, demonstrate "arbitrariness constituting an unconstitutional discrimination or denial of equal protection" in the prosecutor's decision. Alvarez, supra, 246 N.J. Super. at 148; [State v.] Watson, [346 N.J. Super. 521, 535 (App. Div. 2002)] (explaining defendant must show "prosecutor's refusal [was] a patent

² State v. Alvarez, 246 N.J. Super. 137 (App. Div. 1991).

and gross abuse of discretion") [, certif. denied, 176 N.J. 278 (2003)]. Once a defendant makes this threshold showing, the defendant can obtain a hearing to review the prosecutor's decision if the assignment judge concludes that the "interests of justice" so require. Alvarez, supra, 246 N.J. Super. at 148-49.

[228 N.J. at 372-73 (fourth alteration in original) (emphasis added).]

Neither defendant alleged in the trial court that the prosecutor's refusal to consent to a probationary term was arbitrary or a patent and gross abuse of discretion and, on appeal, they have conceded there was no arbitrariness. Nonetheless, in each case, Judge Bariso weighed the aggravating and mitigating factors and, in a thoughtful and extensive written statement of reasons, found no grounds for the relief requested, denied the motion and held "a hearing [was] not required in the interests of justice."

Despite the clear language of section 6.2 and the continued vitality of Alvarez, defendants contend Judge Bariso's decision constituted a "sentencing" and all the rights that attach at a sentencing apply. They assert a right to a hearing exists because "[c]riminal defendants are constitutionally entitled to a sentencing hearing before the sentencing court, in accordance with due process of law." They cite Rule 3:16(b), which provides a "defendant shall be present at every stage of the trial,

including . . . the imposition of sentence," and Rule 3:21-4(b), which provides,

Sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. Before imposing sentence the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment.

We are unpersuaded by defendants' arguments. Each was afforded the full panoply of rights at his sentencing. Although Judge Bariso's decision that the request for a probationary term should be denied had an effect on the range of sentence that could be imposed, it did not constitute a sentencing; it was a decision on defendants' Alvarez motion. Defendants may not avoid the burden they shouldered in seeking such relief without the prosecutor's consent by attempting to cast a decision on an Alvarez motion as a "sentencing."

In Benjamin, supra, 228 N.J. at 373, the Court reviewed the procedural safeguards that apply to a defendant's challenge to the prosecutor's decision to deny a Graves Act waiver and found they afforded defendants meaningful judicial review of that decision. The Court determined defendants are not entitled to discovery of files that reveal prosecutors' decisions on other Graves Act waiver requests, ibid., observing it had "never mandated discovery to aid

defendants in demonstrating arbitrary and capricious conduct or disparate treatment without a preliminary showing," id. at 374. That the motion decision here concerned that issue, rather than a "sentencing," as defendants contend, is apparent by the Court's following sentence: "As stated in Alvarez, a defendant may obtain a hearing to review the prosecutor's decision only after he or she has demonstrated in a motion that the prosecutor abused his or her discretion." Ibid. (emphasis added) (citing Alvarez, supra, 246 N.J. Super. at 148-49).

Defendants did not demonstrate any abuse of discretion by the prosecutor and have conceded there was none. Defendants' arguments that they were entitled to a hearing without meeting that burden are, therefore, lacking in merit.

II.

We next address Chia's arguments that, notwithstanding Judge Bariso's decision, the sentencing judge had discretion to impose a probationary term or a sentence less than that recommended in the plea agreement. As a preliminary matter, we note that because defendant raises these arguments for the first time on appeal, they are subject to review for plain error. R. 2:10-2.

At sentencing, Chia's counsel began her argument by stating, "Your Honor, at this point, does not have any discretion. There is only one sentence that the [c]ourt can impose." She closed her

argument by saying, "the defense would ask that the [c]ourt sentence Mr. Chia to five years New Jersey State Prison with one year of parole ineligibility."

A.

The underlying premise for the argument presented in Point II of Chia's initial brief was that the sentencing judge had discretion to impose a probationary sentence despite Judge Bariso's decision denying the motion for a probationary sentence. Although this argument had support in our decision in State v. Nance, 442 N.J. Super. 268 (App. Div. 2015), aff'd in part and rev'd in part, 228 N.J. 378 (2017), our conclusion to that effect was expressly reversed by the Supreme Court:

We reverse the panel's ruling that sentencing judges have the discretion to elect one of the two alternative sentences set forth in Section 6.2. In accordance with the plain language of section 6.2, the assignment judge, not the sentencing judge, has the authority to decide whether a defendant will be sentenced to a term of probation or a term of incarceration with a one-year period of parole ineligibility.

[Nance, supra, 228 N.J. at 385-86.]

The argument advanced in Chia's initial brief therefore lacks any merit.

B.

In his supplemental brief, Chia argued that a remand is necessary because both the sentencing judge and the parties believed the sentencing judge lacked discretion to impose a sentence below the five-year term recommended by the prosecutor. In Nance, the Supreme Court clarified the scope of discretion a sentencing judge has after the assignment judge has denied a motion for a probationary sentence under section 6.2:

[S]ection 6.2 [does not] permit the sentencing court to choose between the statutory alternatives; the authority to elect one of the two sentences set forth in section 6.2 is clearly vested in the assignment judge. The sentencing court's task is to devise a sentence that comports with the assignment judge's ruling and the sentencing provisions of the Code [of Criminal Justice]; although the court may impose the sentence recommended by the State under the plea agreement, it is not required to do so.

[Id. at 394 (emphasis added) (citation omitted).]

Thus, after Judge Bariso denied defendant's Alvarez motion, the sentencing judge was required to sentence Chia "to a one-year custodial term during which he . . . is disqualified from being paroled," Benjamin, supra, 228 N.J. at 368, but she was not required to impose the five-year term the State agreed to recommend in the plea agreement. As Chia has correctly pointed out, the sentencing judge and both counsel all proceeded on the premise

that the sentencing judge lacked discretion to impose a different sentence.³ Therefore, we reverse Chia's sentence and remand for resentencing in accordance with the principles set forth by the Court in Nance.⁴

Any argument raised in defendants' initial and supplemental briefs not specifically addressed in this opinion lack sufficient merit. R. 2:11-3(e)(2).

Accordingly, we affirm Coley's sentence and reverse Chia's sentence and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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


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³ Coley's sentencing did not suffer from the same infirmity. His counsel urged the court to sentence him one degree lower than the second-degree offense to which he pled guilty. She asked the court "to sentence Mr. Coley to a three year sentence with 12 months parole ineligibility." The sentencing judge acknowledged her "hands [were] tied regarding the probationary term," but noted, "[t]he question is [whether] to sentence as if one degree lower." Thereafter, she weighed the aggravating and mitigating factors and concluded Coley's request should be denied.

⁴ In light of this disposition, we need not address the argument presented by Chia in Point III of his initial brief. However, we note that Chia has argued in this point heading and Coley has argued in Point I(B), that section 6.2 eliminates the general presumption of imprisonment for second-degree offenses provided by N.J.S.A. 2C:44-1(d), and N.J.S.A. 2C:43-6.2 makes imprisonment and probation "co-equal sentencing options." This argument was explicitly rejected by the Supreme Court. Nance, supra, 228 N.J. at 386; Benjamin, supra, 228 N.J. at 368.