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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5496-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN D. HOLLABAUGH, a/k/a
SHAWN DAVID HOLLABAUGH, SEAN
HOLABAUGH and SHAUN HOLABAUGH,

Defendant-Appellant.

Submitted March 8, 2017 — Decided September 14, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New
Jersey, Law Division, Middlesex County,
Indictment Nos. 08-04-0724 and 11-05-0671, and
Accusation Nos. 11-12-0350 and 12-02-0049.

Joseph E. Krakora, Public Defender, attorney
for appellant (Ruth E. Hunter, Designated
Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor,
attorney for respondent (Jason M. Boudwin,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant appeals from the July 2, 2015 order of the trial court denying his motion for a reduction of sentence. We affirm.

This case has an extensive procedural history, all of which is pertinent to this appeal. On October 17, 2008, defendant pled guilty to third-degree burglary, N.J.S.A. 2C:18-2, charged in Indictment No. 08-04-0724 (the 2008 indictment), and on February 27, 2009, he received a three-year suspended sentence, N.J.S.A. 2C:43-2(b).¹ Thereafter, defendant violated the conditions of his suspended sentence by pleading guilty to two disorderly persons offenses² and two motor vehicle violations.³ On April 28, 2010, he was re-sentenced to five years probation conditioned upon serving 364 days in the county jail.

On December 8, 2011, defendant entered a negotiated guilty plea to third-degree possession of a controlled dangerous substance, namely oxycodone, N.J.S.A. 2C:35-10(a)(1), charged in

¹ Defendant pled guilty while he was completing the Intensive Supervision Program (ISP) for an unrelated charge. When defendant appeared for sentencing, he had successfully completed ISP.

² The disorderly persons offenses consisted of bad checks, N.J.S.A. 2C:21-5, and shoplifting, N.J.S.A. 2C:20-11(c)(4), for which he received a one-year probationary term on each offense, to run concurrent with each other.

³ The motor vehicle violations consisted of careless driving, N.J.S.A. 39:4-97, and driving while license revoked, N.J.S.A. 39:3-40. The mandatory fines, penalties and driver's license suspension were imposed along with a concurrent ten-day jail term on the driving while license revoked violation.

Indictment No. 11-05-0671 (the 2011 indictment), and third-degree theft, N.J.S.A. 2C:20-3, charged in Accusation No. 11-12-0350 (the 2011 accusation). In exchange, the State recommended a five-year probationary sentence in drug court, as an alternative to a prison sentence. Pursuant to the plea agreement, if defendant violated his drug court probation, the alternative sentence recommendation was a five-year term with a two-and-one-half year period of parole ineligibility on the drug possession charge, a consecutive four-year term with a two-year period of parole ineligibility on the theft charge, and a consecutive sentence on the 2008 indictment. On February 2, 2012, defendant was sentenced in accordance with the plea agreement, despite the court finding that aggravating factors three, six and nine, N.J.S.A. 2C:44-1(a)(3), (6), (9), substantially outweighed mitigating factor ten, N.J.S.A. 2C:44-1(b)(10).

While defendant's sentencing was pending on the drug possession and theft charges, he was released from jail but was subject to certain conditions, including undergoing drug testing. Five days after he was released from jail, he violated a court order by leaving the courthouse after he failed a drug test. As a result, he was charged in Accusation No. 12-02-049 (the 2012 accusation) with two counts of third-degree bail jumping, N.J.S.A. 2C:29-7. On February 22, 2012, defendant entered another

negotiated guilty plea to the 2012 accusation. In accordance with this plea agreement, defendant received a concurrent five-year probationary sentence in drug court as an alternative to a concurrent five-year term of imprisonment on each count if he violated his probation. The court found the same aggravating and mitigation factors as those found at the February 2, 2012 sentencing.

On April 10, 2013, defendant pled guilty to violating his drug court probation and was sentenced to a four-year term of imprisonment with a two-and-one-half year period of parole ineligibility on the 2011 accusation; an aggregate consecutive five-year term of imprisonment with a two-and-one-half year period of parole ineligibility on the 2012 accusation; a concurrent five-year term of imprisonment with a two-and-one-half year period of parole ineligibility on the 2011 indictment; and a concurrent four-year term of imprisonment on the 2008 indictment, for an aggregate term of nine years with a five-year period of parole ineligibility. The court found the same aggravating factors, but no longer found mitigating factor ten based on defendant's violation of probation.

Defendant's direct appeal was heard by the excessive sentence panel, R. 2:9-11, during which the State conceded that the two-and-one-half year period of parole ineligibility imposed on the

2011 accusation was an illegal sentence. By order dated September 16, 2014, the panel remanded the matter

for reconsideration of sentence in light of State v. Bishop, 429 N.J. Super. 533 (App. Div. 2013) (noting that for persons convicted of third or fourth degree offenses "with a prior record, there is no presumption either for or against state prison;" and further noting the analytical framework for sentencing on a violation of probation as set forth in State v. Baylass, 114 N.J. 169, 178 [(1989)] "does not apply to prison-bound offenders sentenced to special probation").

At the remand hearing conducted on November 13, 2014, defendant was resentenced to an aggregate nine-year term of imprisonment with a four-and-one-half year period of parole ineligibility resulting from the reduction of the period of parole ineligibility imposed on the 2011 accusation. After considering Baylass, supra, and Bishop, supra, the sentencing judge found the same aggravating factors and reiterated that defendant had violated his drug court probation and was subject to the alternative prison sentence in accordance with the terms of his previously negotiated plea agreement.

On April 2, 2015, defendant appealed his resentence, which was heard by a different excessive sentence panel.⁴ On September

⁴ The State correctly pointed out during oral argument that, in fact, under the terms of defendant's December 8, 2011 and February 22, 2012 plea agreements, if he violated his probation, his

28, 2015, we affirmed the sentence finding that "the court imposed sentence following a violation of probation in accordance with the standards set forth in . . . State v. Baylass" Further, we concluded that "the findings of fact regarding aggravating and mitigating [f]actors were based on competent and credible evidence in the record, that the court correctly applied the sentencing guidelines . . . and that the court did not abuse its discretion in imposing the sentence."

Prior to appealing his resentence, on March 3, 2015, defendant filed a motion for reduction of sentence pursuant to Rule 3:21-10(b)(4) and (5), arguing that a sentence without a period of parole ineligibility, or concurrent rather than consecutive sentences were more appropriate. Defendant urged the court to reduce or modify his sentence, again claiming that "[a]lthough the alternative sentences on the plea forms contemplated parole disqualifiers, the [c]ourt did not give a sufficient basis for imposing maximum sentences and maximum parole disqualifiers" in violation of Baylass, supra. On July 2, 2015, Judge Dennis Nieves denied defendant's motion in a written opinion, finding that

alternative sentence called for "three consecutive terms," a five-year term with a two-and-one-half year parole disqualifier on the 2011 indictment, a consecutive four-year term with a two-year parole disqualifier on the 2011 accusation, and a consecutive five-year term on the 2008 indictment.

"[defendant's] sentence does not fall within the purview of [Rule] 3:21-10(b)(4) and (b)(5)."

Judge Nieves reasoned:

Pursuant to [Rule] 3:21-10(b)(4), the [c]ourt may "change[] a sentence as authorized by the Code of Criminal Justice." Subsection (b)(5) allows the [c]ourt to "correct[] a sentence not authorized by law including the Code of Criminal Justice[.]"

Here, [defendant] received an aggregate sentence of 9 years imprisonment with a 4.5 year period of parole ineligibility. That is exactly what he bargained for. Although there appears to have been a mix-up as to which indictments were to run consecutive versus concurrent, the overall expected period of imprisonment was not affected.

In fact, the illegal portion of [defendant's] sentence was remedied at his resentencing on November 13, 2014. Thus, there is nothing left to bring [defendant's] sentence within the ambit of subsection (b)(4) or (b)(5) of the Rule.

Additionally, [defendant's] argument that the [c]ourt did not provide a sufficient factual basis for the sentence imposed is unfounded. Contrary to the [d]efense's assertions, [the sentencing judge] did discuss the various aggravating and mitigating factors, finding that no mitigating factors existed.

This appeal followed.⁵ On appeal, defendant raises the following points for our consideration:

POINT I

THE IMPOSITION OF AN AGGREGATE NINE-YEAR SENTENCE WITH A FOUR AND A HALF YEAR PAROLE INELIGIBILITY TERM VIOLATED STATE v. BAYLASS, 114 N.J. 169 (1989), AND MUST BE REDUCED.

POINT II

THE IMPOSITION OF DISCRETIONARY PERIODS OF PAROLE INELIGIBILITY WAS UNCONSTITUTIONAL AND MUST BE VACATED BY THIS COURT. U.S. CONST. AMEND. VI, XIV; N.J. CONST. ART. 1, ¶¶ 1, 12.

Defendant renews his argument that his "aggregate nine-year sentence with a [four-and-one-half-year] parole ineligibility term for defendant's violations of probation was contrary to [Baylass, supra]." We disagree and affirm substantially for the reasons expressed in Judge Nieves' cogent written opinion. See State v. Robinson, 217 N.J. 594, 603-04 (2014) (noting whether a sentence "violates sentencing guidelines and legislative policies . . . is a question of law which is reviewed de novo."). Further, we addressed defendant's resentence on the merits in his direct appeal and found no error by the sentencing judge. If an issue raised in an appeal has been determined on the merits in a prior appeal,


⁵ The appeal was originally presented on an excessive sentence calendar but was transferred to a plenary calendar by order dated March 9, 2016.

it cannot be re-litigated in a later appeal of the same case.
State v. Cusick, 116 N.J. Super. 482, 485 (App. Div. 1971).

Defendant also asserts for the first time on appeal that the imposition of "the discretionary periods of parole ineligibility" "violated the Sixth Amendment pursuant to Apprendi [v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)] and Alleyne [v. United States, ____ U.S. ____, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)]." We reject defendant's contention because Alleyne did not call into question the constitutionality of statutes granting judges discretion to impose a minimum term of imprisonment based on facts not presented to a jury. Id. at ____, 133 S. Ct. at 2163, 186 L. Ed. 2d at 330.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION