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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-5646-14T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KRIS B. MYERS,

Defendant-Appellant.

Submitted May 30, 2017 – Decided June 21, 2017

Before Judges Sabatino and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
13-11-3313.

Kris Myers, appellant pro se.

Mary Eva Colalillo, Camden County Prosecutor,
attorney for respondent (Linda A. Shashoua,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Kris B. Meyers appeals from a May 5, 2015 order denying his post-conviction motion for admission into the drug court program. We affirm.

I.

We derive the following facts from the record. Defendant robbed a food store while armed with a knife. Defendant brandished a large knife in a case during the robbery to place the store clerk in fear. Defendant then removed \$80 from the store's cash register. Defendant claims that he committed the robbery because he was addicted to heroin.

On November 14, 2013, a Camden County grand jury returned an indictment charging defendant with first-degree robbery, N.J.S.A. 2C:15-1(a)(2) (count one); third-degree possession of a weapon (knife) for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count two); and fourth-degree unlawful possession of a weapon (knife) (count three).

On June 25, 2014, defendant entered into a plea agreement with the State to plead guilty to a downgraded count of second-degree robbery, N.J.S.A. 2C:15-1(a)(2), in exchange for the State's dismissal of the other charges, and the State's recommendation of up to an eight-year term of imprisonment with the associated eighty-five-percent parole ineligibility period and mandatory parole supervision under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On September 24, 2014, the trial court sentenced defendant in accordance with the terms of the plea agreement, imposing a

six-year term of imprisonment, with an eighty-five percent period of parole ineligibility, followed by a three-year period of parole supervision. The trial court also imposed applicable fines and penalties, and dismissed counts two and three.

On January 14, 2014, defendant moved for a change in custody to a drug treatment program pursuant to Rule 3:21-10(b)(1). On February 23, 2015, the trial court denied the motion, finding that defendant had failed to provide an affidavit of present drug or alcohol addiction made by a qualified expert. The trial court further found that defendant had failed to provide documentation showing that he had been accepted into a New Jersey licensed treatment program.

Defendant's sentence was affirmed on direct appeal by a sentencing panel, which found that his sentence was not manifestly excessive or unduly punitive and did not constitute an abuse of discretion. State v. Myers, No. A-2257-14 (App. Div. May 4, 2015). The Supreme Court denied certification on September 30, 2015. State v. Myers, 223 N.J. 281 (2015).

Defendant also moved for admission into drug court. On May 5, 2015, the trial court denied that motion, finding defendant to be statutorily ineligible for admission into drug court because he was serving a mandatory minimum period of incarceration. Defendant presently appeals from that order.

On May 11, 2015, defendant filed a motion with this court for permission to seek drug court. We denied defendant's motion on October 23, 2015.

Defendant raises the following arguments on appeal:

POINT ONE

THE COURT RELIED ON IMPROPER FACTS IN DENYING THE DEFENDANT'S MOTION SEEKING ADMISSION INTO DRUG COURT PURSUANT TO N.J.S.A. 2C:35-14.

POINT TWO

THE DEFENDANT SHOULD BE ADMITTED INTO THE DRUG COURT PROGRAM BECAUSE HE MEETS THE MOST STRINGENT STANDARDS FOR ADMISSION.

POINT THREE

THE COURT FAILED TO APPRECIATE THE DEFENDANTS DRUG DEPENDENCY, DENYING A FAIR CONSIDERATION FOR TREATMENT THROUGH THE NEW JERSEY DRUG COURTS.

II.

"When an appellate court reviews a trial court's analysis of a legal issue, it does not owe any special deference to the trial court's legal interpretation." State v. Schubert, 212 N.J. 295, 303-04 (2012). "[A]ppellate review of legal determinations is plenary." Id. at 304 (quoting State v. Handy, 206 N.J. 39, 45 (2011)). The issues presented here are legal in nature, and thus our review is plenary. See State v. Maurer, 438 N.J. Super. 402, 411 (App. Div. 2014).

"Drug Courts are specialized courts within the Superior Court that target drug-involved 'offenders who are most likely to benefit from treatment and do not pose a risk to public safety.'" State v. Meyer, 192 N.J. 421, 428-29 (2007) (quoting Manual for Operation of Adult Drug Courts in New Jersey (Manual) at 3 (July 2002)). The basic objective of N.J.S.A. 2C:35-14 (the Drug Court statute) "is to allow deserving prison-bound offenders the opportunity for 'special; probation,' an opportunity to recover from the throes of their addiction and the cycle of their involvement with the criminal justice system." Id. at 428.

At the time defendant engaged in plea negotiations with the State, he was under indictment for first-degree robbery. Conviction of a first-degree crime renders a defendant ineligible for special probation under N.J.S.A. 2C:35-14 (the Drug Court statute). N.J.S.A. 2C:35-14(b)(1). Although defendant ultimately was not convicted of first-degree robbery, he did not apply for admission into Drug Court before sentencing, let alone before entering into the plea agreement. The plea agreement did not indicate defendant's intention to apply to Drug Court or reserve his right to do so. Defendant did not move to withdraw his guilty plea. Instead, defendant first sought admission into Drug Court while he was already serving his NERA prison term.

We discern no error in the trial court's denial of defendant's motion for a change in custody to a drug treatment program pursuant to Rule 3:21-10(b)(1). Under Rule 3:21-10(b)(1), an order may be entered during a custodial term to permit a defendant to enter a treatment or rehabilitation program for drug or alcohol addiction. "However, when a parole ineligibility minimum term is required by statute, a court has no jurisdiction to consider a R. 3:21-10(b) application." State v. Brown, 384 N.J. Super. 191, 194 (App. Div. 2006). Defendant is still serving the parole ineligibility period of a NERA term, rendering him ineligible for relief under the specific pathway of Rule 3:21-10(b)(1). State v. Le, 354 N.J. Super. 91 (Law Div. 2002); see also State v. Diggs, 333 N.J. Super. 7, 8 (App. Div.), certif. denied, 165 N.J. 678 (2000) (inmate serving period of parole ineligibility pursuant to N.J.S.A. 2C:35-7 cannot be transferred to a drug treatment program until the expiration of the minimum term); State v. Mendel, 212 N.J. Super. 110, 113-14 (App. Div. 1986) (inmate serving mandatory minimum term under the Graves Act, N.J.S.A. 2C:43-6(c), is ineligible for relief under Rule 3:32-10(b)(1)).

As the trial court also correctly noted, defendant failed to provide an affidavit of present drug or alcohol addiction made by a qualified expert in support of his motion. He also failed to

provide documentation showing that he had been accepted into a New Jersey licensed treatment program.

On an application for transfer to a narcotics treatment program the burden rests upon the applicant to establish that he is an appropriate candidate for such relief. To that end, he is obliged to establish such facts as would move the judge to exercise his discretion favorably. The mere assertion or even proof that he is willing to participate in such programs or that institutions offering such programs would accept him as a patient is insufficient.

[State v. McKinney, 140 N.J. Super. 160, 163 (App. Div. 1976).]

"A motion filed pursuant to [Rule 3:21-10(b)] shall be accompanied by supporting affidavits and such other documents and papers as set forth the basis for the relief sought." R. 3:21-10(c). For this additional reason, defendant's motion was properly denied as a result of his failure to submit appropriate supporting affidavits and documents. See McKinney, supra, 140 N.J. Super. at 163-64.

Defendant further contends that the trial court erred by denying his post-judgment motion for admission into Drug Court. We disagree. The trial court found defendant ineligible for Drug Court based on his conviction for second-degree robbery.

Prior to 2012, a charge or conviction for second-degree robbery made a defendant ineligible for special; probation. State

v. Ancrum, ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 10-11). However, in 2012, the Legislature amended N.J.S.A. 2c:35-14(a)(7) to remove robbery from the list of ineligible pending charges, and N.J.S.A. 2C:35-14(b)(2) to exclude second-degree robbery from the ineligible NERA offenses. Ibid. The Legislature broadened the scope of special probation to allow individuals convicted of second-degree robbery to be eligible for Drug Court. While the trial court incorrectly ruled that defendant was statutorily ineligible for Drug Court, we affirm the denial of defendant's motion for admission to Drug Court, reaching this conclusion for a different reason than that expressed by the trial court.¹

"The procedure for admission to and participation in Drug Court is set forth in the Manual because 'Drug Courts are a creature of the judiciary'. . . ." Maurer, supra, 438 N.J. Super. at 412 (quoting State v. Clarke, 203 N.J. 166, 174 (2010) (citation and internal quotation marks omitted)). The Manual contemplates the filing of applications for admission to Drug Court prior to sentencing, not thereafter. "Defendants may make application to the drug court program at any time following an arrest and up to

¹ See State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (stating an appellate court is "free to affirm the trial court's decision on grounds different from those relied upon by the trial court").

plea cutoff." Manual, supra, at 19. In addition, a sentencing judge reviewing a violation of probation (VOP) report "may consider making a referral to Drug Court if the offender appears to be incapable of responding to traditional probationary supervision and would benefit from participation in Drug Court." Id. at 20. If that occurs, "the VOP hearing should be adjourned so that an application to drug court can be processed." Ibid. The third avenue for admission into Drug Court is on motion of the defendant, or the court's own motion. N.J.S.A. 2C:35-14. "If an applicant is found both legally and clinically acceptable for the drug court program, a formal plea bargain should therefore be offered to the applicant defendant which identifies drug court participation as an alternative sentence. Id. at 23.

Defendant did not move for admission to Drug Court until 2015, considerably after he was sentenced and began serving a NERA term in State prison. We are aware of no authority permitting a defendant to seek admission to drug court while serving a prison term. His application was untimely and properly denied.

Our ruling is without prejudice to defendant seeking post-conviction relief due to any alleged ineffective assistance of his prior counsel. We intimate here no views about the merits of such a future application.

Affirmed.

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

