SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0488-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MICHAEL NATHMAN,

Defendant-Appellant.

Argued December 12, 2017 – Decided March 22, 2018

Before Judges Fisher, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Hunterdon County, Accusation No. 16-03-0119.

Paul E. Zager argued the cause for appellant (Palumbo, Renaud & De Appolonio, attorneys; Jeff Thakker, of counsel; Anthony N. Palumbo, on the brief).

Jeffrey L. Weinstein, Assistant Prosecutor, argued the cause for respondent (Anthony P. Kearns, III, Hunterdon County Prosecutor, attorney; Jeffrey L. Weinstein, of counsel and on the brief).

PER CURIAM

Defendant Michael Nathman appeals from a judgment of conviction following his waiver of indictment and guilty plea to a three-count accusation charging first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1) (count one); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(4) (count two); and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b) (count three); each of the counts involved separate victims, all under the age of seventeen.[1] Defendant was sentenced on count one to a fifteen-year State prison sentence without parole eligibility, concurrent to five-year and eighteen-month terms on counts two and three, respectively. Pursuant to the plea agreement,[2] the State waived the provisions of N.J.S.A. 2C:14-2(a) – which mandates a sentence between twenty-five years and life imprisonment with, at least twenty-five years of parole ineligibility – and recommended the fifteen-year term pursuant to N.J.S.A. 2C:14-2(d) which provides:

> Notwithstanding the provisions of subsection a. of this section, where a defendant is charged with a violation under paragraph (1) of subsection a. of this section, the prosecutor, in consideration of the interests of the victim, may offer a negotiated plea agreement in which the defendant would be

[1] The victims' ages were twelve (count one), fourteen (count two) and sixteen (count three).

[2] Defendant did not provide the plea form in his appendix, claiming it was "not sufficiently legible." We rely on State's submission of the plea form in its appendix as well as the trial court's review of the plea form on March 29, 2016.

sentenced to a specific term of imprisonment of not less than [fifteen] years, during which the defendant shall not be eligible for parole. In such event, the court may accept the negotiated plea agreement and upon such conviction shall impose the term of imprisonment and period of parole ineligibility as provided for in the plea agreement, and may not impose a lesser term of imprisonment or parole or a lesser period of parole ineligibility than that expressly provided in the plea agreement. The Attorney General shall develop guidelines to ensure the uniform exercise of discretion in making determinations regarding a negotiated reduction in the term of imprisonment and period of parole ineligibility set forth in subsection a. of this section.

Defendant contends:

[POINT I]

[DEFENDANT'S] PLEA UNDER N.J.S.A. 2C:14-2 WAS ACCOMPANIED BY A CONTENTION THAT THE STATUTE IS INVALID; HE HAS PRESERVED HIS ARGUMENT FOR PURPOSES OF THE WITHIN APPEAL.

[POINT II]

N.J.S.A. 2C:14-2 IS UNCONSTITUTIONAL AND OTHERWISE INVALID, THEREBY NECESSITATING THE VACATION OF [DEFENDANT'S] CONVICTION.

A. N.J.S.A. 2C:14-2 IS INVALID, AS THE LEGISLATURE IS UNCONSTITUTIONALLY INTERFERING WITH PROSECUTORIAL DISCRETION IN PLEA BARGAINING.

B. N.J.S.A. 2C:14-2 IS INVALID AS AN UNCONSTITUTIONAL INTRUSION UPON JUDICIAL INDEPENDENCE.

> C. THE EFFECT OF N.J.S.A. 2C:14-2(d) IS TO COMPROMISE EFFECTIVE ASSISTANCE OF COUNSEL IN PLEA NEGOTIATIONS IN PROSECUTIONS UNDER N.J.S.A. 2C:14-2(a).
>
> D. N.J.S.A. 2C:14-2(d) IS INVALID AS IT DEPRIVES DEFENDANTS OF THE RIGHT TO ALLOCUTE.
>
> E. N.J.S.A. 2C:14-2 IS INVALID, AS THE SENTENCE -- AND, MORE PARTICULARLY, THE SENTENCING -- CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.
>
> F. EVEN IF N.J.S.A. 2C:14-2(d) WERE OTHERWISE VALID, THE PROSECUTOR DID NOT FOLLOW ANY KNOWN GUIDELINES.

We decline to address these issues because they were not preserved for appeal.

As conceded in defendant's merits brief, he did not raise the arguments set forth in Point I and Points II (A), (B), (C), (D) and (F) to the trial court. Defendant orally raised the cruel and unusual punishment issue (Point II (E)) during a colloquy with the judge during sentencing proceedings:

> [DEFENSE COUNSEL:] This is a mandatory sentence. This is not a sentence where this court has discretion to give him less than what's been agreed upon, the statutory [fifteen] years with no parole.
>
> I question the constitutionality of that in my own mind as to whether in fact that might be cruel and unusual punishment. And in thinking about it, Judge, the reason I'm thinking it is that . . . I've defended people involved with murders and manslaughters and rapes and kidnappings and a lot of other things where judges in cases such as that had

> some discretion to do some things. But you don't. You don't have discretion because of the statute to do less than the [fifteen] years.
>
> THE COURT: Well, I would have if he was sentenced to [twenty-five] to life.
>
> [DEFENSE COUNSEL]: Exactly. But that's not what the plea was, the plea is the [fifteen] years.
>
> THE COURT: And he agreed to that.
>
> [DEFENSE COUNSEL]: And he agreed to that. I ask the [c]ourt to go along with the plea recommendation.

Defendant never filed a motion challenging the statute, nor is there any record he gave notice of his challenge to the State or supported his argument with a brief. Defense counsel's passing comment on the constitutionality of the statute — which the State, understandably, did not address — prompted only the judge's brief comment, "There is no issue regarding constitutionality in this [c]ourt's mind regarding a mandatory [fifteen]-year parole . . . ineligibility term."

Rule 3:9-3(f) provides in pertinent part:

> With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty reserving on the record the right to appeal from the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant shall be afforded the opportunity to withdraw his or her plea.

Except for three exceptions inapplicable to this case, "[g]enerally, a guilty plea constitutes a waiver of all issues which were or could have been addressed by the trial judge before [a] guilty plea." State v. Robinson, 224 N.J. Super. 495, 498-99 (App. Div. 1988). "[F]ailure to enter a conditional plea . . . bars appellate review," even of constitutional issues. State v. J.M., 182 N.J. 402, 410 (2005) (citing Robinson, 224 N.J. Super. at 503-04).

Contrary to defendant's contention that this issue could not have been raised prior to sentencing, this is a statutory — not a sentencing — issue. This is not a case where the consequences of the sentencing statute were not known or knowable by defendant prior to sentencing. We find inapposite State v. Peters, 129 N.J. 210 (1992), and State v. Vasquez, 129 N.J. 189 (1992), where the Court held a defendant did not "waive the right to appeal the prosecutor's attempt to apply the parole ineligibility term [as set forth in N.J.S.A. 2C:35-7] on violation of his probation" after the State had initially waived the parole ineligibility term when it agreed to a probationary sentence. Vasquez, 129 N.J. at 192, 195. See also Peter, 129 N.J. at 216-17, 220. The Court concluded

> the appeal concerned sentencing after a violation of probation, and the plea did not amount to a waiver of the defendant's right

> to appeal the issues addressed to that future proceeding. . . . Otherwise[,] a defendant would have to raise issues concerning a sentence that had not yet been imposed for a violation [of probation] that had not yet occurred and might never occur. That procedure would be akin to raising a claim that was not yet ripe for judicial review.
>
> [Vasquez, 129 N.J. at 194 (emphasis added) (citations omitted).]

Here, the judge thoroughly reviewed with defendant the sentencing provisions under N.J.S.A. 2C:14-2(a) and (d) during the plea colloquy; defendant said he understood all that the judge reviewed, had reviewed the consequences of his plea with his counsel, had all his questions answered and still wished to plead guilty. He knew, at the latest, on March 29, 2016 — the date of the plea — of the mandatory provisions of N.J.S.A. 2C:14-2 and of the proscription against the judge imposing a lesser sentence; he could have filed a motion at any time prior to the August 12, 2016 sentencing.

He neither filed a motion nor preserved his right to challenge the statute's constitutionality. The plea forms[3] reflect that defendant did not preserve the right to appeal "the denial of

[3] Question 4(e) of the plea form provides: "Do you further understand that by pleading guilty you are waiving your right to appeal the denial of all other pretrial motions [other than those preserved by Rule 3:5-7(d) or Rule 3:28(g)] except the following"; the lines that followed on defendant's plea form were blank, and the accompanying "yes" was circled.

[any] pretrial motions"; indeed, no motions related to the present argument were filed. Defense counsel's comments during the sentencing proceedings were insufficient to reserve defendant's appeal rights. See State v. Davila, 443 N.J. Super. 577, 583, 586 (App. Div. 2016) (deeming defense counsel's "casual mention" during the plea hearing of "'all of the motions' that had been decided by the judge and were listed in his plea form" insufficient to satisfy the requirements of Rule 3:9-3(f)).

The applicability of the waiver provision is especially important because the State, in deciding to offer the reduced sentence pursuant to section (d), must consider the interests of the victim. One of those interests is the closure implicitly promised in allowing the State to extend plea offers that deviate from the much harsher sentences required under section (a). See State v. Smullen, 118 N.J. 408, 418 (1990) (recognizing "child-sexual-assault cases are extremely difficult, both for the defendants and the victims [and c]ourts taking pleas are undoubtedly conscious of the need to end the suffering"). That consideration is meaningless if a defendant initially accepts a plea offer and later — without any notice to the State — challenges the very statute under which the reduced plea was offered.

In light of defendant's failure to enter a conditional plea pursuant to Rule 3:9-3(f) — or to even properly raise that issue

to the trial court – we will not consider his challenge to the statute.

Dismissed.