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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-0628-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HAROLD S. MAGBY,

Defendant-Appellant.

Submitted January 10, 2018 – Decided February 1, 2018

Before Judges Koblitz and Manahan.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Indictment No.
14-01-0139.

David P. Schroth, attorney for appellant.

Angelo J. Onofri, Mercer County Prosecutor,
attorney for respondent (Olivia Mills,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant Harold S. Magby appeals from the trial court's
sentence of three years imprisonment with three years of parole
ineligibility. Defendant entered into a plea agreement with the
State, wherein defendant pled guilty to third-degree possession

of cocaine with intent to distribute it within a school zone, N.J.S.A. 2C:35-7(a), N.J.S.A. 2C:35-5(a)(1). Defendant previously pled guilty to the same crime nine years earlier. The plea agreement recommended a sentence of three years of imprisonment with three years of parole ineligibility. Defendant reserved the right to argue for a lesser sentence at the sentencing hearing. Because the court was not clear in its sentencing reasons, we reverse and remand for another sentencing hearing.

At sentencing, defendant argued that under N.J.S.A. 2C:35-7(b), the court had discretion to deviate from the plea agreement's recommended sentence and could waive or reduce defendant's parole ineligibility or even place defendant on probation. The State argued that N.J.S.A. 2C:35-7(b) did not apply to defendant because a provision of that statute specifically exempted defendant because he was subject to an extended term under N.J.S.A. 2C:43-6(f). On appeal the State modified its argument, abandoning its original theory and arguing for the first time that defendant was ineligible for sentencing pursuant to 2C:35-7(b) because a gun was found in defendant's home.¹

Without analyzing N.J.S.A. 2C:35-7(b), or determining clearly whether the statute applied to defendant, the court reviewed

¹ We do not address the propriety of the court's consideration of facts not admitted by defendant at his guilty plea hearing. See Alleyne v. United States, 570 U.S. 99 (2013).

aggravating and mitigating factors under N.J.S.A. 2C:44-1(a) and (b) and determined that the aggravating factors outweighed the mitigating factors. The court also noted that the plea agreement's recommended sentence was fair under the circumstances and imposed the sentence recommended by the State.

The record reveals that, as a result of items found in defendant's home, which was located within 1000 feet of a school, defendant was charged in Indictment No. 14-01-0139-I with: third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (Count I); second-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and 2C:35-5(b)(2) (Count II); third-degree possession of cocaine with intent to distribute on or near school property, N.J.S.A. 2C:35-7(a), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(2) (Count III); second-degree possession of a firearm during the course of a drug offense, N.J.S.A. 2C:39-4.1(a) (Count IV); and second-degree certain person not to possess a firearm, N.J.S.A. 2C:39-7(b)(1) (Count V).

Defendant originally pled guilty to Count IV of the indictment, second-degree possession of a firearm during the course of a drug offense. The original plea agreement called for a maximum sentence of five years of incarceration with three and a half years of parole ineligibility.

More than a year later, with consent from the State, defendant asked the court to vacate the original guilty plea. He then entered into a new plea agreement, pleading guilty to Count III, third-degree possession of cocaine with the intent to distribute it on or near school property. In exchange, the State agreed to recommend a sentence of a three-year term of imprisonment with three years of mandatory parole ineligibility. In return for the guilty plea, the State would not seek an extended term, although an extended term would be required if sought by the State, N.J.S.A. 2C:43-6(f).

Defendant argues on appeal:

- I. THE TRIAL COURT ERRED IN SUGGESTING IT WAS BOUND BY THE TERMS OF THE NEGOTIATED PLEA AGREEMENT CALLING FOR PAROLE INELIGIBILITY AND MISUNDERSTOOD THE TERMS OF THE AGREEMENT WARRANTING REMAND FOR RESENTENCING.
- II. THE TRIAL COURT ERRED IN GIVING PRO FORMA "SLIGHT CREDIT" TO MITIGATING FACTOR NUMBER 11 AND EQUATING DEFENDANT'S HARDSHIP TO THAT OF "ANY DEFENDANT" LEAVING LOVED ONES BEHIND UPON BEING SENTENCED TO JAIL.

A person who possesses illegal drugs with intent to distribute violates N.J.S.A. 2C:35-5(a). A person who violates N.J.S.A. 2C:35-5(a) while on any school property used for school purposes or within 1000 feet of such school property is guilty of a third-degree crime. N.J.S.A. 2C:35-7(a). A person who violates N.J.S.A.

2C:35-7(a) "shall, except as provided in [N.J.S.A.] 2C:35-12, be sentenced by the court to a term of imprisonment." Ibid. "[T]he term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, or three years, whichever is greater, during which the defendant shall be ineligible for parole." Ibid.

"Notwithstanding the provisions of [N.J.S.A.] 2C:35-12 or [N.J.S.A. 2C:35-7(a)], the court may waive or reduce the minimum term of parole ineligibility required under [N.J.S.A. 2C:35-7(a)] or place the defendant on probation pursuant to [N.J.S.A. 2C:43-2(b)(2)]." N.J.S.A. 2C:35-7(b)(1). To make this determination, the court must consider:

(a) the extent of the defendant's prior criminal record and the seriousness of the offenses for which the defendant has been convicted;

(b) the specific location of the present offense in relation to the school property, including distance from the school and the reasonable likelihood of exposing children to drug-related activities at that location;

(c) whether school was in session at the time of the offense; and

(d) whether children were present at or in the immediate vicinity of the location when the offense took place.

[Ibid.]

The sentencing court, however, "shall not waive or reduce the minimum term of parole ineligibility or sentence the defendant to probation if it finds that:"

(a) the offense took place while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or while on any school bus; or

(b) the defendant in the course of committing the offense used or threatened violence or was in possession of a firearm.

[N.J.S.A. 2C:35-7(b)(2).]

At sentencing, the State argued that "the [c]ourt is bound by the terms of the plea agreement," and could not reduce the sentence. The State argued that, because defendant could have been subject to a mandatory extended term, the court did not have the authority to waive or reduce the sentence under N.J.S.A. 2C:35-7(b)(1). Defendant argued that the court could waive or reduce the minimum term of parole ineligibility under N.J.S.A. 2C:35-7(b)(1). The court did not determine whether it had the discretion under N.J.S.A. 2C:35-7(b)(1) to reduce defendant's sentence.

The trial court made several findings regarding aggravating factors pursuant to N.J.S.A. 2C:44-1(a). The court found support for aggravating factor number three, the risk of reoffending, N.J.S.A. 2C:44-1(a)(3), was high because defendant was previously convicted of the same crime. The court found support for

aggravating factor number six, the severity of defendant's prior criminal record, N.J.S.A. 2C:44-1(a)(6), because defendant had a prior juvenile adjudication and the prior adult conviction. The court also found support for aggravating factor number nine, the need for deterrence, N.J.S.A. 2C:44-1(a)(9).

The trial court also made several findings regarding mitigating factors pursuant to N.J.S.A. 2C:44-1(b). The court did not find support for mitigating factor number eight, defendant's conduct was the result of circumstances unlikely to recur, N.J.S.A. 2C:44-1(b)(8), because defendant had previously pled guilty to the same crime.

The trial court, however, did find support for mitigating factor number nine, defendant's character and attitude indicate an unlikelihood of reoffending, N.J.S.A. 2C:44-1(b)(9), because "recently he's turned his life around and I give great credit to all the letters that the [c]ourt has received and reviewed." The court gave "slight credit" for mitigating factor number eleven, incarceration would entail excessive hardship, N.J.S.A. 2C:44-1(b)(11). Lastly, the court found support for mitigating factor twelve, cooperation with law enforcement, N.J.S.A. 2C:44-1(b)(12).

The trial court stated it would emphasize aggravating factor nine because of the "need to deter this defendant and others in the community from selling controlled dangerous substances." For

that reason, the court found "that the aggravating factors outweigh the mitigating factors." Additionally, the trial court found that the plea agreement was fair because the defendant "was facing exposure much greater than the negotiated plea" and imposed a sentence of three years of imprisonment with three years of parole ineligibility.

A trial court must state its reasons for the sentence imposed, R. 3:21-4(g). Failure to give complete, specific reasons can result in a remand. See State v. Martelli, 201 N.J. Super. 378, 385 (App. Div. 1985). "At the time of sentencing, the court must 'state reasons for imposing such sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence.'" State v. Fuentes, 217 N.J. 57, 73 (2014) (alteration in original) (quoting Rule 3:21-4(g)). "Central to the success of [the sentencing] process is the requirement that the judge articulate the reasons for imposing sentence." State v. Case, 220 N.J. 49, 54 (2014). Inconsistent and unclear findings will require a remand, even though a remand may not result in a lesser sentence than the one initially imposed. State v. Sene, 443 N.J. Super. 134, 144-45 (App. Div. 2015), certif. denied, 224 N.J. 282 (2016). "We apply a deferential standard of review to the sentencing court's determination, but not to the interpretation of a law." State v. Bolvito, 217 N.J.

221, 228 (2014). We must ensure that the trial court followed the appropriate sentencing guidelines. We must: 1) "require that an exercise of discretion be based upon findings of fact that are grounded in competent, reasonably credible evidence;" 2) "require that the factfinder apply correct legal principles in exercising its discretion;" and 3) modify sentences when the facts and law show "such a clear error of judgment that it shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363-64 (1984).

Here the court did not determine if defendant was eligible for a lesser term under N.J.S.A. 2C:35-7(b)(1). Defendant reads the court's language that "he's not entitled to probation given the negotiated plea and what he pled guilty to" to mean that the court found defendant ineligible under N.J.S.A. 2C:35-7(b)(1). The court also stated:

I note [defense counsel] has urged the [c]ourt to find an exception. However, I have reviewed [his] memorandum and [the assistant prosecutor's] and I find given all the factors I must consider, given the fact I just found the aggravating factors, I just found, which outweigh the mitigating factors, the [c]ourt finds that this defendant does not meet it within that exception. That he was facing exposure much greater than the negotiated plea. So I feel that the prosecutor has taken in consideration in reaching this plea, all- and, in effect, has waived the aggravating/mitigating factors already. I find this is a fair sentence under all the circumstances and will impose that.

Although it seems clear the court did not apply N.J.S.A. 2C:35-7(b)(1), we cannot clearly discern why the court found defendant to be ineligible. We thus remand for resentencing.

As the court will be finding aggravating and mitigating circumstances anew, we also point out that the court's findings that defendant's risk of reoffending is high, aggravating factor three, as well as mitigating factor nine, an unlikelihood of reoffending, appear inconsistent. Recognizing this inconsistency, the court outlined the evidence in favor of each factor. At sentencing, however, the court must make findings based on the evidence. Either the court, on balance, finds a likelihood of recurrence or not. A court may find aggravating and mitigating factors that appear internally inconsistent, so long as the findings are supported by a reasoned explanation and "grounded in competent, credible evidence in the record." Case, 220 N.J. at 67 (holding that while aggravating factor three (risk defendant will reoffend) "stood as counterpoise" to mitigating factor seven (no prior record), the two factors could coexist in a case, so long as they were based on the evidence); see also Fuentes, 217 N.J. at 63 (explaining that "any determination that aggravating factor nine and mitigating factor eight are applicable to the same case should be specifically explained"). The court must resolve

conflicting evidence to find, on balance, whether defendant is or is not likely to reoffend.

We thus reverse and remand to afford the parties an opportunity to present their sentencing arguments anew and the court to make complete findings. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION