SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2961-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTOPHER M. KRAFSKY,
a/k/a C-MONEY,

Defendant-Appellant.

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Submitted January 31, 2018 – Decided March 20, 2018

Before Judges Fuentes and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Indictment Nos., 11-07-0477, 12-03-0185 and 14-11-0769.

Joseph E. Krakora, Public Defender, attorney for appellant (John Douard, Assistant Deputy Public Defender, of counsel and on the brief).

Michael H. Robertson, Somerset County Prosecutor, attorney for respondent (Paul H. Heinzel, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Christopher M. Krafsky of first-degree drug-induced death, a strict liability crime under N.J.S.A.

2C:35-9(a). He appeals from the February 5, 2016 conviction and the sentence of twelve years with an eighty-five percent period of parole ineligibility imposed on Indictment No. 14-11-0769, which was imposed concurrent to an aggregate three-year term for a violation of probation based on the February 2016 conviction. The probation had been imposed on two indictments charging third-degree drug offenses, Indictment Nos. 11-07-0477 and 12-03-0185.

We recite only those facts presented at trial that relate to the issues raised by defendant on appeal. The victim died from a heroin overdose during the night of December 23, 2013, in the basement of his mother's home. The parents had been divorced for many years. She discovered his body when she awoke at 5:00 a.m. Police Officer Robert Meszaros found the victim had communicated by text with an individual named "MAT" the night before. Defendant was the service subscriber for MAT's number.

Meszaros testified he arranged a meeting with defendant in a shopping mall. Defendant admitted to the officer that on December 23 he had sold the victim $50 worth of heroin, which defendant had obtained from "Toot." Meszaros then took defendant to the patrol car to record a statement, at which time defendant invoked his right to remain silent. At trial, defendant testified that he and the victim together went to see Toot, who sold each of them heroin on that date.

The victim's father testified that the night of December 23 at about 11:00 p.m., he took his son to see another man and a quick exchange occurred between the two men on the street, after which the father took the victim back to his mother's house. The father was too far away to identify the other man.

On this appeal, defendant argues:

> POINT I: THE PROSECUTOR COMMITTED REVERSIBLE ERROR DURING HER SUMMATION BY DRAWING JURORS' ATTENTION TO MR. KRAFSKY'S FAILURE TO TELL MESZAROS THAT HE AND JOHNSON JOINTLY OWNED THE HEROIN. THE PROSECUTOR THEREBY VIOLATED MR. KRAFKSY'S FIFTH AMENDMENT RIGHT TO SILENCE, AND IGNORED LONGSTANDING NEW JERSEY CASE LAW PROHIBITING THE STATE FROM COMMENTING ON DEFENDANT'S SILENCE. U.S CONST. AMENDS. V, XIV.
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> POINT II: IN SUMMATION, THE PROSECUTOR COMMITTED MULTIPLE ACTS OF MISCONDUCT, MOST NOTABLY WHEN SHE RIDICULED DEFENSE COUNSEL AND MR. KRAFSKY'S DEFENSE.
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> POINT III: THE JUDGE'S IMPOSITION OF A TWELVE-YEAR PRISON TERM, WITH AN 85% PERIOD OF PAROLE INELIGIBILITY WAS MANIFESTLY EXCESSIVE.

In Point I and II defendant argues that the prosecutor's summation impermissibly commented on defendant's right to remain silent and ridiculed the defense. Our Supreme Court recently stated: "This Court has long recognized that '[p]rosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence.'"

State v. Cole, 229 N.J. 430, 457 (2017) (alteration in original) (quoting State v. Frost, 158 N.J. 76, 82 (1999)).

The prosecutor commented on defendant's admission to Meszaros that he had sold the victim the fatal dose of heroin, which conflicted with defendant's trial testimony that Toots had sold the victim the heroin. Defendant frames the prosecutor's argument as a comment on what defendant failed to tell Meszaros, analogizing the situation to State v Muhammad, 182 N.J. 551, 569-74 (2005). In Muhammad, the defendant told the police at the scene that he shot the victim, but nothing else. At trial, the defendant raised self-defense. Our Supreme Court held that the fact "the defendant gave only a partial account to the police at or near the time of his arrest did not open the door to prosecutorial questioning about what the defendant did not tell to the police." Id. at 571. Here defendant did not omit a defense, he changed his story. Our Supreme Court recently determined: "Because we find that defendant waived his right to remain silent, cross-examination regarding facts to which he testified at trial, but omitted in his statement to police, was proper." State v. Kucinski, 227 N.J. 603, 623 (2017). Defendant gave a voluntary incriminating statement to the police that he contradicted at trial. The State is entitled to comment on that discrepancy.

Defendant also objects that the prosecutor made improper comments in summation belittling his defense. Indeed, the prosecutor improperly urged the jury not to be "scared into indecision by what you just heard from [defense counsel]," and told the jurors not to "cower away from" doing their job several times during her summation. She also pointed to the victim's parents and grandparents who were seated in the courtroom and reminded the jury that they lost "a son" and "a grandson." These comments attempted to play on the jury's sympathies rather than comment on the evidence. See State v. Blakney, 189 N.J. 88, 96 (2006) ("the assistant prosecutor's duty is to prove the State's case based on the evidence and not to play on the passions of the jury or trigger emotional flashpoints, deflecting attention from the hard facts on which the State's case must rise or fall.").

Our Supreme Court has discussed improper prosecutorial comments:

> Not every improper prosecutorial statement will warrant a new trial. Rather, a reviewing court may reverse only if the prosecutor's comments were "so egregious that [they] deprived the defendant of a fair trial." The court's inquiry should consider "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them."
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> [State v. Daniels, 182 N.J. 80, 96-97 (2004)

(alteration in original) (first quoting Frost, 158 N.J. at 83, then quoting State v. Smith, 167 N.J. 158, 182 (2001).]

Defense counsel brought these comments to the court's attention after the summation, but stated: "And so I'm clear, I'm not asking for any remedy. I'm not even asking for a mistrial because I think it would - - we don't want a mistrial." Defendant is not permitted to point out a problem, petition the court not to remedy the situation by way of a curative instruction, nor declare a mistrial, and then prevail on appeal arguing that the trial judge should have declared a mistrial over the objection of defense counsel. See State v. A.R. 213 N.J. 542, 561 (2013) (where the Court discusses invited error in a criminal context).

Finally, in Point III, defendant argues that his sentence was manifestly excessive. The first-degree conviction carried a possible sentence of ten to twenty years. Defendant was thirty-three years old and had five prior indictable convictions. Defense counsel argued for a ten-year custodial sentence. The State sought a twenty-year term. On appeal, defendant states that his overwhelming remorse should have led to a lesser sentence.

The court found aggravating factors (3), risk of re-offense, (6), extent of prior convictions, and (9), need for deterrence. N.J.S.A. 2C:44-1(a)(3), (6) and (9). The court also found mitigating factors (2), defendant did not anticipate his conduct

would cause great harm, and (12), he cooperated with the police. N.J.S.A. 2C:44-1(b)(2) and (12). The judge found the aggravating factors outweighed the mitigating factors, but nonetheless imposed a sentence on the low end of the permissible ten to twenty-year term.

Having considered the record, we conclude the findings of fact regarding aggravating and mitigating factors were based on competent and credible evidence in the record, the court correctly applied the sentencing guidelines enunciated in the Code, and the court did not abuse its discretion in imposing the sentence. See State v. Cassady, 198 N.J. 165, 180-81 (2009). The sentence does not "shock the judicial conscience." State v. Roth, 95 N.J. 334, 364-65 (1984).

Affirmed.