

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
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-3235-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TONY O. BRINSON, a/k/a
MAPLES GREGORY,

Defendant-Appellant.

Argued November 13, 2017 – Decided January 24, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Indictment No. 14-
02-0450.

James K. Smith, Jr., Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
James K. Smith, Jr., of counsel and on the
briefs).

John C. Tassini, Assistant Prosecutor, argued
the cause for respondent (Joseph D. Coronato,
Ocean County Prosecutor, attorney; Samuel
Marzarella, Chief Appellate Attorney and John
C. Tassini, on the brief).

PER CURIAM

Defendant Tony O. Brinson appeals from his sentence following his conviction for second-degree distribution of cocaine. We affirm the court's imposition of an eight-year custodial term, vacate the court's imposition of a forty-one-month period of parole ineligibility and remand for resentencing.

I.

Defendant was charged in an indictment with third-degree possession of a controlled dangerous substance (CDS), cocaine, N.J.S.A. 2C:35-10(a)(1) (count one); third-degree distribution of cocaine, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count two); third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count three); third-degree distribution of cocaine, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3) (count four); and second-degree distribution of cocaine, N.J.S.A. 2C:5(a)(1) and N.J.S.A. 2C:35-5(b)(2) (count five). The charges were founded on two alleged sales of cocaine to an undercover police officer.

Defendant was previously convicted of third-degree distribution of CDS, N.J.S.A. 2C:35-5(a)(1). As a result, if he was convicted of any of the possession with intent or distribution charges (counts one, two, four or five) in the indictment, he was eligible for sentencing, upon application by the State, to a mandatory extended term sentence and minimum period of parole ineligibility pursuant to N.J.S.A. 2C:43-6(f).

Defendant negotiated a plea agreement with the State. The agreement required that defendant plead guilty to second-degree distribution of CDS as charged in count five. The State agreed to recommend an eight-year custodial sentence and forty-one-month period of parole ineligibility and dismissal of the remaining charges. The State also agreed not to request imposition of an extended term sentence under N.J.S.A. 2C:43-6(f).

The record shows the parties understood defendant's conviction for distribution exposed him to a mandatory extended term sentence and period of parole ineligibility under N.J.S.A. 2C:43-6(f). Prior to the entry of defendant's plea, the State prepared a Plea Negotiation Worksheet in accordance with the Attorney General guidelines issued pursuant to our Supreme Court's decision in State v. Brimage, 153 N.J. 1 (1998). The worksheet showed defendant's "[m]ost serious Brimage-eligible offense" was for second-degree distribution, and defendant's conviction for the offense subjected him to a mandatory extended term sentence under N.J.S.A. 2C:43-6(f).

Defendant's plea form also shows the parties anticipated defendant would enter his plea in accordance with the Brimage guidelines. The form expressly states "THIS IS A NEGOTIATED PLEA PURSUANT TO BRIMAGE," followed by the notation "(8/41)," indicating the eight-year custodial term and forty-one month

period of parole ineligibility the parties agreed would be the sentence imposed. The plea form lists the "[s]tatutory [m]aximum" sentence that could be imposed under "BRIMAGE" was "20/10," an extended term of twenty years with a ten-year period of parole ineligibility for a second-degree offense. In the "Supplemental Plea Form for Drug Offenses," defendant acknowledged that he "and the [p]rosecutor entered into an[] agreement to provide for a lesser sentence or period of parole ineligibility than would otherwise be required[.]"

During the plea proceeding, the prosecutor advised the court that the parties "negotiated a plea pursuant to Brimage," and defense counsel agreed. The court explained to defendant that his maximum sentencing exposure was twenty-years with a ten-year period of parole ineligibility, he was "Brimage eligible," and the State agreed to recommend that he be sentenced to eight years with a forty-one-month period of parole ineligibility. The court accepted defendant's plea to second-degree distribution in accordance with the plea agreement.

At the sentencing proceeding, defense counsel acknowledged this is a "Brimage case," but asked the court to impose a sentence less severe than the negotiated sentence. The prosecutor advised the court, without objection, that the plea arrangement was "negotiated . . . according to State v. Brimage," and requested

imposition of the negotiated sentence. The prosecutor also argued that the judge could not reduce the negotiated sentence "under the guidelines of State v. Brimage," and the court agreed. The court imposed the negotiated sentence "pursuant to Brimage." This appeal followed.

Defendant presents the following argument:

BECAUSE BOTH ATTORNEYS AND THE JUDGE INCORRECTLY BELIEVED THAT THE SENTENCE IN THIS CASE WAS BEING IMPOSED PURSUANT TO N.J.S.A. 2C:35-12 and STATE v. BRIMAGE, 153 N.J. 1, (1998), THE MATTER SHOULD BE REMANDED FOR A RESENTENCING.

II.

A.

Prior to addressing defendant's argument, we summarize some well-established principles governing sentencing for offenses under the Comprehensive Drug Reform Act of 1987 (CDRA), N.J.S.A. 2C:35-1 to 36-1. The CDRA was enacted to "provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders." Brimage, 153 N.J. at 8 (quoting N.J.S.A. 2C:35-1.1). To that end, the CDRA provides for mandatory sentences and periods of parole ineligibility for various offenses. Ibid.; see, e.g., N.J.S.A. 2C:43-6(f) (providing for a mandatory extended term sentence and period of parole ineligibility upon the request of the prosecutor for certain

second-time drug offenders); see also State v. Bridges, 252 N.J. Super. 286, 291 (App. Div. 1991) (summarizing CDRA provisions establishing ordinary and extended term sentences and periods of parole ineligibility).

The CDRA provides an exception to the otherwise mandatory sentences and periods of parole ineligibility. N.J.S.A. 2C:35-12 permits a prosecutor "through a negotiated plea agreement . . . [to] waive the minimum mandatory sentence specified for any offense under the CDRA." Brimage, 153 N.J. at 3. The statute "relieve[s] certain defendants accused of drug crimes from the act's mandatory prison sentences and periods of parole ineligibility" otherwise required under the CDRA. State v. Thomas, 253 N.J. Super. 368, 373 (App. Div. 1992).

"[T]he purpose of N.J.S.A. 2C:35-12 is to permit the prosecutor to make an agreement 'which provides for a lesser sentence or [lesser] period of parole ineligibility' within the 'range of ordinary or extended sentences authorized by law' for violating the [CDRA].'" Bridges, 252 N.J. Super. at 290-91. Permitting the State to negotiate a waiver of the CDRA's mandatory sentencing requirements provides "incentives for defendants to cooperate with law enforcement authorities," "encourage[s] plea bargaining," and promotes "the prompt disposition of drug-related criminal charges and . . . imposition of punishment." State v.

Thomas, 392 N.J. Super. 169, 178 (App. Div. 2007) (citing Brimage, 153 N.J. at 9).

Plea agreements under N.J.S.A. 2C:35-12 are governed by Attorney General Guidelines that were mandated by our Supreme Court in Brimage. 153 N.J. at 24-25; see Revised Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12 (July 15, 2004). The guidelines are intended to provide uniform standards for plea offers for CDRA offenses, and reduce the chance of disparity in sentencing. Brimage, 153 N.J. at 13. Thus, negotiated plea agreements under N.J.S.A. 2C:35-12 must be made in accordance with the Brimage guidelines. Id. at 24-25.

In pertinent part, N.J.S.A. 2C:35-12 provides:

Whenever an offense defined in this chapter specifies a mandatory sentence of imprisonment which includes a minimum term during which the defendant shall be ineligible for parole, [or] a mandatory extended term which includes a period of parole ineligibility, . . . the court upon conviction shall impose the mandatory sentence . . . unless the defendant has pleaded guilty pursuant to a negotiated agreement . . . which provides for a lesser sentence, [or] period of parole ineligibility The negotiated plea . . . agreement may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law, [or] a specified period of parole ineligibility In that event, the court at sentencing shall not impose a lesser term of imprisonment, [or] lesser period of parole ineligibility . . . than that expressly

provided for under the terms of the plea or post-conviction agreement.

[N.J.S.A. 2C:35-12.]

The plain language of the statute limits a court's sentencing discretion where a plea agreement provides for a custodial sentence or minimum period of parole ineligibility less than otherwise mandated by the CDRA. "[A] trial judge who accepts a plea agreement in which the State recommends a sentence less severe than the sentence mandated by the [CDRA] may not impose an even lesser sentence." Thomas, 253 N.J. Super. at 373; see also Brimage, 153 N.J. at 9 (finding that N.J.S.A. 2C:35-12 requires the sentencing court to impose the negotiated sentence "and prohibits the court from imposing a lesser term of imprisonment than that specified in the agreement"). "However, unless the prosecutor's recommendation is for a 'lesser sentence or period of parole ineligibility' than the [CDRA] mandates, [N.J.S.A. 2C:35-12] does not limit a judge's sentencing discretion to accepting or rejecting the recommendation." Thomas, 253 N.J. Super. at 374.

B.

Here, defendant argues the sentencing court erred by rejecting his request for imposition of a less severe sentence because it erroneously believed N.J.S.A. 2C:35-12 required that

it impose the negotiated sentence. Defendant asserts that N.J.S.A. 2C:35-12 applies only where a negotiated plea includes a recommendation for the imposition of sentence less than an otherwise mandatory sentence under the CDRA, and that he was subject to a mandatory sentence and period of parole ineligibility under N.J.S.A. 2C:43-6(f) only if the State requested an enhanced sentence. He reasons that because the State agreed not to request the enhanced sentence, he was not subject to a mandatory CDRA sentence and therefore the court erred by finding N.J.S.A. 2C:35-12 limited its sentencing discretion. We are not persuaded.

Defendant's argument requires a determination of N.J.S.A. 2C:35-12's application to the circumstances presented here. We turn first, as we must, to the statute's plain language because that is the best indicator of legislative intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005). We "read and construe[]" a statute's words and phrases "with their context," giving them "their generally accepted meaning, according to the approved usage of the language," "unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated." N.J.S.A. 1:1-1; see also State v. Regis, 208 N.J. 439, 447 (2011).

N.J.S.A. 2C:35-12 applies "[w]henver an offense defined in this chapter specifies a mandatory sentence of imprisonment . . .

[or] period of parole ineligibility" (emphasis added). The statute was enacted as part of the CDRA in chapter 106 of the laws of 1987. See L. 1987, c. 106, ¶ 1. The statute therefore applies where the CDRA "specifies" a mandatory sentence or parole ineligibility period for an offense. N.J.S.A. 2C:35-12.

Our Supreme Court has found that "'[s]pecify' means to name in a specific or explicit manner; to state precisely or in detail, to point out, to particularize, or to designate by words one thing from another." Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116, 124 (1967). Applying that definition here, we are satisfied defendant pleaded guilty to an offense for which the CDRA specified a mandatory sentence and parole ineligibility period.

N.J.S.A. 2C:43-6(f) is part of the CDRA, State v. Laqaes, 127 N.J. 23, 35 (1992), and was enacted in the same chapter of the laws of 1987 as N.J.S.A. 2C:35-12, see L. 1987, c. 106 ¶ 12. N.J.S.A. 2C:43-6(f) identifies in a specific manner CDRA offenses for which mandatory sentences and periods of parole ineligibility shall be imposed on the prosecutor's request. See State v. Patterson, 435 N.J. Super. 498, 516 (App. Div. 2014) (noting that N.J.S.A. 2C:43-6(f) includes a "list of offenses eligible for a mandatory extended term"); Cannel, New Jersey Criminal Code Annotated, cmt. 6 on N.J.S.A. 2C:43-6(f) (2017) ("The sentencing

provision added [in N.J.S.A. 2C:43-6(f)] requires mandatory minimum or parole ineligibility terms for those previously convicted of certain offenses").

More particularly, N.J.S.A. 2C:43-6(f) provides that where, as here, a defendant with a prior conviction for distribution of CDS is convicted of a second offense the court "shall upon application of the prosecuting attorney be sentenced . . . to an extended term . . . , notwithstanding that extended terms are ordinarily discretionary with the court." The statute further provides the custodial term "shall, except as may be provided in N.J.S.A. 2C:35-12, include . . . a minimum term," "fixed at, or between, one-third and one-half of the sentence imposed . . . or three years, whichever is greater" N.J.S.A. 2C:43-6(f). We are therefore satisfied defendant pleaded to an offense for which the CDRA specifies a mandatory extended term and parole ineligibility period. See N.J.S.A. 2C:35-12 and N.J.S.A. 2C:43-6(f).

Application of N.J.S.A. 2C:35-12 is not conditioned upon the otherwise necessary request by the State under N.J.S.A. 2C:43-6(f) for imposition of a mandatory extended term sentence and parole

ineligibility period.¹ N.J.S.A. 2C:35-12 applies only where the State and a defendant enter into a plea agreement involving an offense for which the CDRA specifies a mandatory sentence or period of parole ineligibility. As noted, N.J.S.A. 2C:43-6(f) specifies a mandatory extended term sentence and parole ineligibility period for second-degree distribution of CDS under the circumstances presented here.

We reject defendant's contention he was not subject to the mandatory sentencing requirements of N.J.S.A. 2C:43-6(f) because the State agreed not to request imposition of the mandatory sentence. N.J.S.A. 2C:35-12 expressly allows the State to bargain away its right to require imposition of mandatory sentences, and

¹ The Brimage guidelines provide that the State must "formally apply for an extended term pursuant to N.J.S.A. 2C:43-6(f) where it is necessary to "'structure' the plea agreement to permit imposition of the sentence prescribed" by the required calculations. Revised Attorney General Guidelines, at 10-11 and 35. The prosecutor is required to structure the plea agreement where "the aggravating circumstances . . . accumulate in a single case" such that the authorized disposition under the guidelines "exceed[s] the maximum term of parole ineligibility that could actually be imposed as a matter of law upon conviction of a single count." Id. at 35. Here, the authorized disposition, which included a forty-one month period of parole ineligibility, did not exceed the maximum period of parole ineligibility of five years that could be imposed as a matter of law for defendant's second-degree offense. See N.J.S.A. 2C:43-6(b). Thus, there was no requirement that the State structure the plea agreement under Section 3.2 of the guidelines and formally apply for an extended term under N.J.S.A. 2C:43-6(f).

that the statute's purpose is to permit the State to waive mandatory sentences for CDRA offenses as an incentive for drug offenders to cooperate with law enforcement and to permit the efficient handling of CDRA cases. See Thomas, 392 N.J. Super. at 178; Bridges, 252 N.J. Super. at 290-91; see also Cannel, New Jersey Criminal Code Annotated, cmt. 4 on N.J.S.A. 2C:35-12 (2017) (quoting 1987 Legislative Assembly Judiciary Committee Commentary to the Comprehensive Drug Reform Act).

Defendant's argument ignores that he pleaded in accordance with the Brimage guidelines. The Brimage worksheet, the plea forms and colloquy show defendant entered into a Brimage plea subject to the requirements of N.J.S.A. 2C:35-12. His assertion that counsel and the court were confused about the applicability of N.J.S.A. 2C:35-12 is a contrivance that is contradicted by the record. Indeed, defendant has not sought relief from his plea agreement based on any purported confusion or misunderstanding about its terms and conditions. The record indisputably establishes he entered into the agreement pursuant to N.J.S.A. 2C:35-12 and in accordance with the Brimage guidelines.

The State's agreement not to request the imposition of an extended term under N.J.S.A. 2C:43-6(f) did not render N.J.S.A. 2C:35-12 inapplicable. The agreement simply constituted the State's waiver of a mandatory sentence otherwise specified for

defendant's offense. The State's agreement to waive a mandatory CDRA sentence is not inconsistent with N.J.S.A. 2C:35-12 and does not render it inapplicable. To the contrary, the State's agreement to waive an otherwise mandatory sentence is an essential ingredient of a negotiated plea agreement under N.J.S.A. 2C:35-12. That is precisely what occurred here.

We next consider whether the court sentenced defendant in accordance with the statute's requirements. Under N.J.S.A. 2C:43-6(f), the mandatory extended term sentence specified for defendant's conviction for second-degree distribution offense is from ten to twenty years. See N.J.S.A. 2C:43-7(a)(3) and -7(c). Defendant's plea agreement provided for a lesser custodial sentence of eight years. The court was therefore required to impose the eight-year sentence pursuant to the plea agreement. N.J.S.A. 2C:35-12; see also Thomas, 253 N.J. Super. at 373 (finding that where the court accepts a plea agreement recommending a sentence less than that mandated by the CDRA, the court "may not impose an even lesser sentence"). The court's imposition of the eight-year custodial term is affirmed.

Under N.J.S.A. 2C:43-6(f), the minimum mandatory parole eligibility period for defendant's conviction was one-third of the minimum mandatory extended term sentence of ten years, or forty months. Defendant's plea agreement included a recommended parole

ineligibility period of forty-one months, a term one month greater than the minimum parole ineligibility period otherwise specified by N.J.S.A. 2C:43-6(f). Where a plea agreement provides for a sentence greater than that specified by the CDRA for the offense, N.J.S.A. 2C:35-12 does not limit the court's sentencing authority, and the judge retains discretion to impose a lesser term. Thomas, 253 N.J. Super. at 374; see also Revised Attorney General Guidelines, at 12 (stating that where the guidelines "require a prosecutor to tender a plea offer that is greater than the minimum term of parole ineligibility that the court is required to impose by law, then the Brimage offer becomes . . . a non-binding sentencing recommendation to the court, which the court [is] free to accept or reject").

The court erred in concluding it was bound by N.J.S.A. 2C:35-12 to impose the negotiated parole ineligibility period. We therefore vacate the court's imposition of the parole ineligibility period and remand for resentencing to permit the court to consider the parole ineligibility term. See N.J.S.A. 2C:43-6(b) (providing general standard for imposition of a parole ineligibility term). We do not offer an opinion on the parole ineligibility period, if any, that should be imposed.

Affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. 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