SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0664-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAKE PASCUCCI,

Defendant-Appellant.

Argued April 7, 2022 – Decided April 20, 2022

Before Judges Haas and Mawla.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Accusation No. 18-04-0261.

Philip Nettl argued the cause for appellant (Benedict and Altman, attorneys; Steven D. Altman and Philip Nettl, on the briefs).

David M. Liston, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; David M. Liston, of counsel and on the brief).

PER CURIAM

Defendant Jake Pascucci appeals from a December 4, 2020 judgment sentencing him to jail and probation following a guilty plea to third-degree strict liability vehicular homicide, N.J.S.A. 2C:11-5.3(a). We affirm.

The underlying facts are as follows:

> At approximately 8:15 p.m. on September 22, 2017, defendant . . . , an off-duty City of Long Branch Police Officer, was driving . . . on Ocean Boulevard when he struck and killed a pedestrian at the intersection of Ocean Boulevard and South Broadway. The victim was [K.B.,] a sixty-six-year-old woman. The detectives who responded to the scene detected an odor of alcoholic beverage emanating from defendant's breath and his person and noticed his speech and movements were slow and lethargic. Defendant invoked his right to consult with an attorney and declined to provide a statement to the detectives.
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> [State v. Pascucci, 463 N.J. Super. 203, 206 (App. Div. 2020).]

Defendant was transported to the hospital and consented to provide a blood sample for toxicological testing. Ibid. The test results showed his blood alcohol content (BAC) was 0.088%, above the presumptive level of intoxication pursuant to N.J.S.A. 39:4-50(a). Ibid.

Defendant entered a negotiated plea agreement. Id. at 207. At the plea hearing, he understood the State would ask the court to sentence him to probation on condition he served 364 days in the Middlesex County jail. Ibid.

Defendant then "stipulated that at the time he struck and killed [the victim], he was 'under the influence with a blood alcohol reading of .08 or in excess,' which made him legally intoxicated under N.J.S.A. 39:4-50(a)." Ibid.

The record contained the interview of an eyewitness who told detectives K.B. did not have the right of way and did not use the crosswalk when she stepped in front of defendant's vehicle. Id. at 211. The defense argued the judge should consider K.B.'s conduct pursuant to mitigating factor N.J.S.A. 2C:44-1(b)(5) but the judge declined to find it, believing he was precluded from doing so by "the nature of [the] statute" of the underlying offense defendant pled guilty to. Id. at 212. "The judge found aggravating factor N.J.S.A. 2C:44-1(a)(9), and mitigating factors N.J.S.A. 2C:44-1(b)(7), (8), (9), and (10), and sentenced defendant to a five-year term of probation, conditioned on serving 364 days" in jail and several other conditions not relevant to this appeal. Id. at 209.

We concluded the judge erred because N.J.S.A. 2C:11-5.3(d) precludes "a defendant from presenting evidence of the victim's conduct as an affirmative defense in the prosecution of [the] offense," but did not apply to the qualitative assessment of the mitigating factors, including "whether the victim's conduct induced or facilitated her own death, as provided in mitigating factor N.J.S.A.

2C:44-1(b)(5)." Id. at 211. We remanded, directing the sentencing judge to apply all the relevant mitigating factors to the facts of the case. Id. at 212-13.

At the resentencing hearing, the defense submitted an updated psychological report, reiterating an earlier finding that defendant presented a "very low risk" of reoffending and "could readily be managed in the community." The defense also submitted a report from an accident investigator who concluded that "[w]hile alcohol became an integral part of the investigation, the actions of [K.B.] cannot be disregarded. From the accident investigators, witnesses and time and distance breakdowns, the main cause of this accident is the actions of [K.B.]"

The defense repeated its arguments from the prior sentencing and various friends and family members again spoke in support of defendant and K.B. The State argued N.J.S.A. 2C:44-1(b)(5) did not apply, but if the judge found it did, he should not assign it great weight. The judge found the factor applicable and assigned it "moderate weight" based on the eyewitness account indicating K.B. attempted to cross the intersection against a green light, and the fact that defendant was not speeding or driving recklessly. The judge also found mitigating factors N.J.S.A. 2C:44-1(b)(7), (8), (9) and (10).

The judge found aggravating factor N.J.S.A. 2C:44-1(a)(9) and gave it slight weight. Unlike the previous sentencing, where he found only a general need to deter, on re-sentencing the judge found specific and general deterrence applicable. As to the latter, the judge reasoned:

> With regard to general deterrence, [the prosecutor] is correct. There is and needs to be a message that consuming alcohol to the extent that you're over the legal limit and operating a motor vehicle will carry with it consequences. I don't find by applying this factor [as] argued by [defense counsel] . . . would be double counting . . . .
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> Double counting . . . is when an element of the offense is used or cited as an aggravating factor to increase punishment. . . . But I'm not relying on the victim's death as the need for the deterrence. . . . [O]ur [L]egislature has increased vehicular homicide penalties, and it follows that the need for deterrence increases as part of this legislative plan to reduce drinking and driving.
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> . . . .
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> Factor [nine] . . . deals with the need to deter. No element of the offense is being used to increase punishment. This factor deals with curtailing the defendant and others from committing similar offenses and crimes.
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> And I also realize that in many cases general deterrence sometimes has little weight in the sentencing. But this is an offense, by its very nature, makes general deterrence more meaningful. The purpose behind New Jersey['s] [drunk] driving statute

> is to curb the havoc, . . . the destruction caused by intoxicated drivers. And the public must see that a drunk driver will not be shielded from jail . . . if that individual causes harm or injury to another while intoxicated, even if they previously led a law-abiding life.
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> . . . .
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> The need for general deterrence is particularly meaningful when a drunk driver kills another.

The judge reduced defendant's custodial and probation terms to 240 days in county jail and three years of probation and imposed the same fines and fees as in the first sentence.

Defendant moved for reconsideration and argued that by using his intoxication to find the deterrence aggravating factor, the judge impermissibly double-counted an element of the offense. The judge denied the motion, noting he "specifically went through the factors" of N.J.S.A. 2C:11-5.3(a) and did not rely on any of the statute's elements in finding general deterrence.

Defendant filed a motion to reduce or change the sentence pursuant to Rule 3:21-10 and the judge held another hearing and sentenced defendant for a third time. Defense counsel requested the judge consider a sentence imposed in

an unrelated Monmouth County case,[1] where a drunk driver struck and killed a pedestrian and received ninety days in jail. The judge declined because he was not bound by the case and defendant's sentencing required an independent assessment of the applicable aggravating and mitigating factors.

The judge noted the expert and eyewitness evidence indicating K.B. was crossing against traffic. He reiterated N.J.S.A. 2C:44-1(b)(5) applied and gave it "moderate weight" and also found mitigating factors N.J.S.A. 2C:44-1(b)(7), (8), (9) and (10). The judge also found N.J.S.A. 2C:44-1(a)(9). He acknowledged the discrepancy between finding general but not specific deterrence at the first sentencing hearing and finding both specific and general deterrence applicable at the second sentencing hearing, and concluded that "[s]pecific deterrence will not apply" because it was not established at the first hearing. Accordingly, the judge found the mitigating factors continued to outweigh the aggravating and reduced the custodial term to 180 days, maintaining the probation term and other provisions of the sentence previously imposed.

Defendant raises the following points on appeal:

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[1] Defendant's case was originally venued in Monmouth Vicinage but was transferred to Middlesex Vicinage because he worked on assignments with the Monmouth County Prosecutor's Office.

I. THE TRIAL COURT IMPOSED A DE FACTO PRESUMPTION OF IMPRISONMENT THAT THE LEGISLATURE HAS NOT, BY USING DEFENDANT'S VIOLATION OF N.J.S.A. 39:4-50 – AN ELEMENT OF THE OFFENSE – AS THE SOLE REASON FOR INCARCERATION.

II. THE SENTENCING COURT FAILED TO CONSIDER DEFENDANT'S EXTRAPOLATED BAC IN MITIGATION.

III. THE SENTENCING COURT'S FINDINGS REGARDING AGGRAVATING FACTOR [NINE] WERE NOT SUPPORTED BY THE RECORD.

IV. AS APPLIED BY THE SENTENCING COURT, THE ABSENCE OF STANDARDS FOR INCARCERATION IN THE STRICT LIABILITY VEHICULAR HOMICIDE STATUTE LEADS TO A POTENTIAL FOR DUE PROCESS DEPRIVATION.

I.

Our review of a sentencing decision is limited. State v. Miller, 205 N.J. 109, 127 (2011). We do "not substitute [our] judgment for that of the trial court." State v. Burton, 309 N.J. Super. 280, 290 (App. Div. 1998). We "must affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (alteration in original) (quoting State v. Roth,

95 N.J. 334, 364-65 (1984)). This standard applies to sentences that result from guilty pleas. State v. Sainz, 107 N.J. 283, 292 (1987).

II.

Defendant argues he received a jail term "simply because he was in violation of N.J.S.A. 39:4-50, and because someone died, both of which are elements of the offense to which he pled guilty." He asserts the sentencing judge improperly considered the elements of the offense in the sentencing.

N.J.S.A. 39:4-50 prohibits an individual with a BAC of 0.08% or more from operating a motor vehicle. N.J.S.A. 2C:11-5.3 states:

> a. Criminal homicide constitutes strict liability vehicular homicide when it is caused by driving a vehicle while intoxicated in violation of [N.J.S.A.] 39:4-50 . . . .
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> b. Strict Liability vehicular homicide is a crime of the third degree, but the presumption of non[-]imprisonment set forth in subsection e. of [N.J.S.A.] 2C:44-1 shall not apply.

N.J.S.A. 2C:45-1(e) provides: "When the court sentences a person who has been convicted of a crime to be placed on probation, it may require him to serve a term of imprisonment not exceeding 364 days as an additional condition of its order."

"A sentence imposed pursuant to a plea agreement is presumed to be reasonable because a defendant voluntarily '[waived] . . . his right to a trial in return for reduction or dismissal of certain charges, recommendations as to sentence and the like.'" State v. Fuentes, 217 N.J. 57, 70-71 (2014) (alteration in original) (quoting State v. Davis, 175 N.J. Super. 130, 140 (App. Div. 1980)). Nevertheless, the sentence must comply with the Criminal Code's sentencing guidelines. Id. at 71.

A sentencing court "must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Id. at 74-75 (citing State v. Yarbough, 100 N.J. 627, 645 (1985)). This prohibition avoids punishing a defendant twice, namely, after a jury has already convicted the defendant and then using the same elements as an aggravating factor in the sentencing. Id. at 75-76.

Here, there was no reversible sentencing error. The judge analyzed the aggravating and mitigating factors and explained his findings, including why a custodial sentence was appropriate as follows:

> The [c]ourt continues to find the need to deter and a term of . . . [c]ounty [j]ail is appropriate here. The plea agreement recognizes up to 364 days for a crime in the third degree. The factual basis for the plea, being defendant drove under the influence with a BAC of .[0]88 or higher. The strong public policy to deter

> drinking [and] driving, to ensure the public safety by preventing the commission of offenses through deterrence, and a message to the community that those who drink and drive, and put others at risk will be subject to punishment.

The judge noted defendant was aware of the consequences of drunk driving and disregarded them.

Contrary to defendant's arguments, the judge did not impose a custodial term merely because defendant violated N.J.S.A. 39:4-50. The judge clearly explained a custodial term was warranted because of the "strong" need to deter the public from drinking and driving.

The judge acknowledged the Legislature removed the presumption of non-incarceration from N.J.S.A. 2C:11-5.3. "When the presumption [of non-incarceration] does not apply, the court should weigh the aggravating and mitigating factors in determining whether to incarcerate the defendant or to place him or her on probation." State v. Baylass, 114 N.J. 169, 177 (1989).

The judge's conclusion the mitigating factors preponderated over the sole aggravating factor, and his consideration of a strong need to deter the public from drinking and driving were supported by the record. The decision to impose a custodial term less than half the 364 days contemplated by the plea agreement does not shock the judicial conscience nor was it an abuse of discretion.

III.

Defendant argues the judge should have applied mitigating factor N.J.S.A. 2C:44-1(b)(4) because he provided an expert toxicologist's report calculating his BAC to be substantially lower than 0.088 at the of the accident. He claims the judge failed to consider this evidence.

N.J.S.A. 2C:44-1(b)(4) requires the court to consider whether "[t]here were substantial grounds tending to excuse or justify the defendant's conduct, though failing to establish a defense[.]" A finding of a mitigating factor must be supported by the evidence in the record. State v. Blackmon, 202 N.J. 283, 296-97 (2010) ("[T]hose mitigating factors that are suggested in the record, or are called to the court's attention, ordinarily should be considered and either embraced or rejected on the record.").

In State v. Tischio, 107 N.J. 504, 506 (1987), the Supreme Court stated, "a defendant may be convicted under N.J.S.A. 39:4-50(a) when [the defendant's BAC was tested] within a reasonable time after the defendant was actually driving . . . ." The Court held the BAC at the time of the test "constitutes the essential evidence of the offense." Ibid. Further, "extrapolation evidence is not probative of this statutory offense and hence is not admissible." Ibid. Extrapolation evidence "uses the results of . . . a breathalyzer test to demonstrate

the blood-alcohol level at the time [the] defendant was actually driving . . . ." Ibid.

At the second sentencing, the judge stated: "I do not find that [N.J.S.A. 2C:44-1(b)(4)] applies in relation to the defendant's conduct" because "defendant . . . decided to consume alcohol and drive, and was under the influence at the time he was operating his vehicle. That's the conduct." Moreover, defendant admitted to driving under the influence of alcohol with a BAC of 0.08% or higher as part of the plea. The blood draw, which showed a BAC of 0.088%, was taken two hours after the accident. Therefore, in addition to the judge's findings, N.J.S.A. 2C:44-1(b)(4) was inapplicable because of defendant's admission at the plea, the reasonable time within which he was tested, and the inadmissibility of the extrapolation evidence.

IV.

Defendant argues aggravating factor N.J.S.A. 2C:44-1(a)(9), "[t]he need for deterring the defendant and others from violating the law," was inapplicable. He notes the judge did not find he was the kind of individual that needed to be specifically deterred from drinking and driving in the future. Further, he contends the judge improperly double-counted the drunk driving and should not have relied on it to find the need for general deterrence.

As a general proposition, "the absence of any personal [specific] deterrent effect greatly undermines the efficacy of a sentence as a general deterrent." State v. Jarbath, 114 N.J. 394, 405 (1989). However, general deterrence for a vehicular homicide offense is "absolutely meaningful" because

> [d]runken drivers include a broad cross-section of society. Individuals who would not otherwise come into contact with the criminal justice system do so because of driving while intoxicated. It is important for the public as a whole to see that a drunk driver will not be shielded from the sanction of lengthy imprisonment should that driver kill or injure another while intoxicated, even if she or he previously led a blameless life.
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> [State v. Locane, 454 N.J. Super. 98, 126-27 (App. Div. 2018).]

As we recounted, the sentencing judge's findings properly applied these principles. The judge did not abuse his discretion.

V.

Defendant argues the lack of sentencing guidelines in N.J.S.A. 2C:11-5.3(a) violates due process and creates disparate sentencing. He cites the Monmouth Vicinage case as an example.

Our Supreme Court has stated it has "never imposed on a trial court the obligation to demonstrate that a sentence comports with sentences imposed by other courts in similar cases." State v. Liepe, 239 N.J. 359, 379 (2019).

Therefore, the judge properly declined to consider the sentencing decision in the other case and this argument lacks merit.

Finally, we reject defendant's due process claim. The Criminal Code was designed to eliminate arbitrary or idiosyncratic sentencing by "establish[ing] a framework of structured discretion within which judges exercise their sentencing authority. . . . Crimes are classified as first, second, third, or fourth degree crimes in descending order of seriousness, and each degree contains a range within which a defendant may be sentenced. N.J.S.A. 2C:43-6(a)." State v. Case, 220 N.J. 49, 63 (2014) (citation omitted).

Defendant acknowledged during the plea that the judge had discretion to sentence him to no jail time or up to 364 days. N.J.S.A. 2C:45-1(e). Defendant's conviction on a third-degree strict liability offense pursuant to N.J.S.A. 2C:11-5.3(a) meant the presumption of non-imprisonment did not apply. N.J.S.A. 2C:11-5.3(b). This is the "framework of structured discretion" the Legislature established, and the trial judge properly exercised his sentencing authority in imposing a custodial term that was less than half of the maximum period permissible. We discern no reversible error or due process violation.

Affirmed.