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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1044-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN M. RODRIGUEZ,

Defendant-Appellant.

Submitted February 14, 2022 – Decided May 18, 2022

Before Judges Fasciale and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 17-01-0030, 17-04-0469, 18-10-1433, and 18-10-1457.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Denny, Assistant Deputy Public Defender, of counsel and on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In seven indictments, Middlesex County grand juries charged defendant Kevin Rodriguez with over 100 criminal offenses ranging from first degree to fourth degree. Following plea negotiations, defendant pled guilty to the following: an amended count of third-degree conspiracy to commit theft, N.J.S.A. 2C:5-2(a)(1), 2C:20-3(a), and 2C:20-2(b)(2)(c), Indictment No. 17-01-0030; violation of probation on an underlying conviction for third-degree burglary, N.J.S.A. 2C:18-2(a)(1), and third-degree theft, N.J.S.A. 2C:20-3(a), Indictment No. 17-04-0469; second-degree conspiracy to commit burglary and second-degree possession of a controlled dangerous substance with the intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(4), Indictment No. 18-10-1433; and second-degree certain persons not to possess a weapon, N.J.S.A. 2C:39-7(b)(1), Indictment No. 18-10-1457.

In accordance with the plea agreement, the State dismissed all other charges against defendants, and the trial court imposed a five-year prison term subject to eighty-five percent parole disqualifier pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2, for conspiracy to commit burglary concurrent to respective five-year terms for possession with intent, conspiracy to commit theft, and violation of probation; and consecutive to a five-year prison term with

a five-year period of parole disqualification for certain persons not to possess a weapon.

Defendant's amended notice of appeal was scheduled to be heard on our excessive sentence oral argument calendar. We, however, granted his request to transfer his appeal to our plenary calendar.

In a single-point argument, he contends:

THE COURT FAILED TO CONDUCT A
YARBOUGH^[1] ANALYSIS BEFORE
IMPOSING CONSECUTIVE SENTENCES,
AND HAD IT PROPERLY DONE SO, IT
WOULD HAVE FOUND THAT THE
YARBOUGH FACTORS DO NOT SUPPORT
IMPOSITION OF CONSECUTIVE
SENTENCES. (Not Raised Below).

We agree, reversing and remanding for the trial court to conduct a Yarbough analysis and assess the overall fairness of imposing consecutive sentences. In addition, the court shall consider any arguments defendant may raise regarding the applicability of the recently enacted sentencing mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14).

To evaluate defendant's appeal, we are guided by some well-settled principles. "[Our] review of sentencing decisions is relatively narrow and is

¹ State v. Yarbough, 100 N.J. 627, 643-644 (1985).

governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). We consider whether the trial court has made findings of fact grounded in "reasonably credible evidence," whether the factfinder applied "correct legal principles in exercising . . . discretion," and whether "application of the facts to the law [has resulted in] such a clear error of judgment that it shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363, 364 (1984) (citations omitted). "To facilitate meaningful appellate review, trial judges must explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Fuentes, 217 N.J. 57, 74 (2014); R. 3:21-4(g) [subsequently amended and now R. 3:21-4(h)] (requiring the judge to state reasons for imposing the sentence, including the factual basis for finding aggravating or mitigating factors affecting the sentence)).

Pursuant to N.J.S.A. 2C:44-5(a), when a defendant receives multiple sentences of imprisonment "for more than one offense, . . . such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." A trial court must apply the following guidelines when determining whether to impose concurrent or consecutive sentences:

- (1) there can be no free crimes in a system for which the punishment shall fit the crime;

(2) the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision;

(3) some reasons to be considered by the sentencing court should include facts relating to the crimes, including whether or not:

(a) the crimes and their objectives were predominantly independent of each other;

(b) the crimes involved separate acts of violence or threats of violence;

(c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;

(d) any of the crimes involved multiple victims;

(e) the convictions for which the sentences are to be imposed are numerous;

(4) there should be no double counting of aggravating factors;

(5) successive terms for the same offense should not ordinarily be equal to the punishment for the first offense.^[2]

[Yarbough, 100 N.J. at 643-44 (footnote omitted).]

² Guideline six was superseded by a 1993 amendment to N.J.S.A. 2C:44-5(a), which provides "[t]here shall be no overall outer limit on the cumulation of consecutive sentences for multiple offenses." L. 1993, c. 223, § 1.

The Yarbough guidelines leave "a fair degree of discretion in the sentencing courts." State v. Carey, 168 N.J. 413, 427 (2001). "[A] sentencing court may impose consecutive sentences even though a majority of the Yarbough factors support concurrent sentences," id. at 427-28, but "the reasons for imposing either a consecutive or concurrent sentence should be separately stated in the sentencing decision," State v. Miller, 205 N.J. 109, 129 (2011) (quoting Yarbough, 100 N.J. at 643). As our Supreme Court noted, "[a]n explicit statement, explaining the overall fairness of a sentence imposed on a defendant for multiple offenses in a single proceeding or in multiple sentencing proceedings, is essential to a proper Yarbough sentencing assessment." State v. Torres, 246 N.J. 246, 268 (2021).

Defendant contends "[t]he trial court ran the sentence for second-degree certain persons not to possess a weapon consecutive to the sentence for second-degree conspiracy to commit burglary without ever analyzing the applicable" Yarbough guidelines. To support the fairness of being given concurrent sentences, he stresses that his "crimes occurred during a single period of aberrant behavior and during a single uninterrupted episode in time[,] . . . occur[ing] on the same day and . . . relat[ing] to the [same] burglary." Without passing judgment on whether the court abused its discretion on imposing

consecutive sentences, the court was remiss in not conducting a Yarbough analysis.

At sentencing, the court assessed aggravating factors against defendant, reciting his juvenile and adult criminal record; found no mitigating factors; and imposed consecutive sentences in accordance with the State's recommendation as set forth in the plea agreement. The court did not mention Yarbough nor weigh its factors in sentencing defendant. In fact, when defendant asked why he was given consecutive sentences, the court merely replied, "[b]ecause that's what the plea called for. . . . [I]t's a consecutive plea. All right." The fact that the plea agreement called for consecutive sentences did not excuse the court from addressing the Yarbough factors. In accordance with N.J.S.A. 2C:44-5(a), "multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence." Accordingly, we remand for the court to consider and weigh the Yarbough factors in determining whether to impose consecutive sentences.

In addition, defendant argues the "overall fairness" considerations described in Miller favor no consecutive sentences. He maintains that when the crimes were committed, he was in his early twenties. Thus, with consecutive sentences, "[he] will serve nearly ten years in prison, equivalent to almost half

of his life at the time he committed the crimes." He asserts that his youth at the time of his crimes must be considered in light of the "[j]udicial, [l]egislative, and [e]xecutive [b]ranches in New Jersey . . . uniformly declar[ing] that younger offenders are less culpable and less blameworthy, and have greater prospects for rehabilitation; accordingly, they do not deserve the harshest sentences under our [c]riminal [c]ode, reserved for adults." He cites the new mitigating factor – N.J.S.A. 2C:44-1(b)(14) (requiring consideration of the fact the defendant was under twenty-six years of age when the offense was committed) – enacted by the Legislature while his appeal was pending.

We agree with the State that the court "considered defendant's age at the time of sentencing" when the court acknowledged he was "a young man . . . who is starting life with some serious deficits." Yet, the court did not weigh defendant's youth as a mitigating factor against the aggravating factors that it considered. Therefore, because we are remanding for resentencing on the appropriateness of consecutive sentences, the court must consider defendant's argument that N.J.S.A. 2C:44-1(b)(14) applies. State v. Bellamy, 468 N.J. Super. 29, 48 (App. Div. 2021) (holding "where, for a reason unrelated to the adoption of [N.J.S.A. 2C:44-1(b)(14)], a youthful defendant is resentenced, he or she is entitled to argue the new statute applies").

Reversed and remanded for resentencing. 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