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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1687-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAWN JACKSON a/k/a
RA'ZULU S. UKAWABUTU,

Defendant-Appellant.

Submitted October 25, 2022 – Decided December 23, 2022

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey,
Law Division, Atlantic County, Indictment Nos. 89-
12-3501 and 90-11-3310.

Joseph E. Krakora, Public Defender, attorney for
appellant (Ruth E. Hunter, Designated Counsel, on the
brief).

William Reynolds, Atlantic County Prosecutor,
attorney for respondent (John J. Santoliquido,
Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

In 1991, defendant Shawn Jackson, a/k/a Ra'Zulu S. Ukawabutu, was convicted of numerous crimes, including first-degree murder, N.J.S.A. 2C:11-3(a)(1) & (2); first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1); and first-degree robbery, N.J.S.A. 2C:15-1(a)(3). He was sentenced to an aggregate term of life imprisonment plus fifteen years, with thirty-five years of parole ineligibility.

He has previously filed several motions for a new trial, petitions for post-conviction relief (PCR), and appeals. This matter returns to us following a remand to consider the imposition of the consecutive sentence. Specifically, defendant appeals from an October 22, 2020 order that reimposed the consecutive sentence and denied his motion to modify, reduce, or reconsider his sentence.

Defendant primarily argues that his life sentence constitutes cruel and unusual punishment because it was imposed without considering his young age. We reject that argument. We are, however, constrained to remand for a new resentencing because on the last remand, the sentencing judge did not consider the overall fairness of the sentence as subsequently required by the New Jersey Supreme Court. See State v. Torres, 246 N.J. 246 (2021).

I.

In 1988, when defendant was nineteen years old, he and two codefendants kidnapped, robbed, and murdered a victim. The victim was seventeen years old at the time of the murder and defendant shot him seven times in the head. Defendant was indicted for eleven crimes, including a superseding indictment that charged him with capital murder. Defendant waived his right to a jury trial, and a judge found defendant guilty of all the charges. At the ensuing penalty phase proceedings, the judge did not find the aggravating factors for imposing the death penalty.

Defendant was sentenced in 1991. On the murder conviction, defendant was sentenced to life imprisonment with thirty years of parole ineligibility.¹ On the kidnapping conviction, defendant was sentenced to a consecutive term of fifteen years in prison with five years of parole ineligibility. All other convictions were either merged or the sentences were run concurrently.

Following a remand to address the admissibility of statements defendant gave to the police, see State v. Jackson, 272 N.J. Super. 543 (App. Div. 1994), we affirmed defendant's convictions. State v. Jackson, No. A-0047-91 (App.

¹ At the time of that sentence, the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, had not been enacted. NERA became effective in June 1997. L. 1997, c. 117.

Div. Apr. 7, 1995). The Supreme Court denied certification. 142 N.J. 450 (1995). We also affirmed the denial of two petitions for PCR, the denial of two motions for a new trial, and the denial of a motion to modify, reduce, or reconsider defendant's sentence. See State v. Jackson, No. A-1725-00 (App. Div. Oct. 3, 2002), certif. denied, 176 N.J. 429 (2003); State v. Jackson, No. A-4364-03 (App. Div. Dec. 9, 2005), certif. denied, 186 N.J. 365 (2006); State v. Jackson, No. A-4986-12 (App. Div. Dec. 1, 2015), certif. denied, 225 N.J. 221 (2016); State v. Jackson, No. A-5146-12 (App. Div. Dec. 1, 2015), certif. denied, 225 N.J. 221 (2016); State v. Jackson, No. A-3974-17 (App. Div. Sept. 25, 2018) (which was an order entered after the appeal was considered on an excessive sentencing calendar).

In 2017, defendant filed a motion contending that his 1991 sentence was illegal. He made numerous arguments, including that the sentencing court had not provided reasons for the consecutive sentence. On June 6, 2018, the trial court entered an order denying defendant's motion. On appeal of that order, we rejected all of defendant's arguments, except the consecutive sentence argument. We remanded for the limited purpose of resentencing the kidnapping conviction because the original sentencing judge had failed to

articulate reasons for imposing a consecutive sentence. State v. Jackson, No. A-0227-18 (App. Div. Dec. 9, 2019).

Shortly after our remand, on December 31, 2019, defendant, representing himself, filed a motion to change or reduce his sentence under Rule 3:21-10(b). On October 22, 2020, the trial judge conducted a hearing on the remand. The judge evaluated the factors identified in State v. Yarbough, 100 N.J. 627, 643-44 (1985), and found that the kidnapping was an independent crime from the murder and was committed at a different time and in a separate place from the murder. The judge then reimposed the same concurrent sentence of fifteen years in prison with five years of parole ineligibility for the kidnapping conviction. The judge apparently did not enter a new judgment of conviction.² Instead, the judge issued an order denying the motion to "modify, reduce, or reconsider [d]efendant's sentence[.]"

Defendant now appeals from the October 22, 2020 order.

II.

On this appeal, defendant principally argues that his life sentence constitutes cruel and unusual punishment because it was imposed without

² We say apparently, because the record does not include a new or modified judgment of conviction entered on October 22, 2020.

considering his young age. Defendant's counsel articulates those arguments as follows:

POINT I – DEFENDANT'S LIFE SENTENCE THAT WAS IMPOSED WITHOUT THE CONSIDERATION OF HIS YOUTH IS CRUEL AND UNUSUAL PUNISHMENT BECAUSE HE WAS A YOUNG ADULT UNDER THE AGE OF 26, AND YOUNG ADULTS AS A CLASS, LIKE JUVENILES, SHARE THE MITIGATING QUALITIES OF YOUTH; THEREFORE, THERE MUST BE A RESENTENCING PURSUANT TO MILLER v. ALABAMA, 567 U.S. 460, 471 (2012). SEE ALSO STATE v. COMER, 249 N.J. 359 (2022). THE RESENTENCING COURT SHOULD ALSO CONSIDER DEFENDANT'S REHABILITATIVE EFFORTS PURSUANT TO STATE v. RANDOLPH, 210 N.J. 330 (2012), APPLY THE YOUTH MITIGATING FACTOR, N.J.S.A. 2C:44-1(b)(14), AND RECONSIDER THE CONSECUTIVE SENTENCE IN ACCORDANCE WITH STATE v. TORRES, 246 N.J. 246 (2021).

A. A Life Sentence For Juveniles Is Unconstitutional Without Consideration of the "Distinctive Attributes of Youth," And It is Only the Rarest of Juvenile Offenders For Which Such a Sentence Would Not Be Unconstitutionally Disproportionate. Additionally, Our Court Has Now Provided a Right To a Miller Resentencing For Juveniles Sentenced For Murder and Who Have Served 20 Years. See State v. Comer, 249 N.J. 359 (2022).

B. As a Class, Young Adults, Like Juveniles, Share the "Distinctive Attributes of Youth."

C. A Life Sentence Without the Consideration of Youth For Young Adults Like Defendant Is Also Cruel and Unusual Punishment.

D. The Length of Defendant's Sentence Qualifies Him For a Resentencing Pursuant to Miller and Zuber, [227 N.J. 422, 437 (2017)] and Defendant's Possibility of Parole in 2024 Does Not Render Defendant's Sentence Constitutionally Valid.

E. Defendant Is Not a "Rare" Young Adult Offender Whose Crimes Reflect Permanent Incurability, and He Must At Least Be Afforded The Opportunity To Present To a Sentencing Court the Mitigating Qualities of Youth. At a Minimum, Resentencing is Required Because No Court Appropriately Considered Defendant's Youth Prior to Sentencing Him.

F. Defendant's Conviction And Sentence For Felony Murder Is An Additional Reason Why Defendant's Sentence Is Unconstitutionally Cruel and Unusual.

G. A Proper Miller Resentencing Includes a Consideration of Defendant's Rehabilitative Efforts, Which the Motion Judge Refused to Consider.

H. Because a Miller Resentencing is Required, the Court Should Also Apply the Youth Mitigating Factor, "The Defendant Was Under 26 Years of Age At the Time of the Commission of the Offense," N.J.S.A. 2C:44-1(b)(14). See State v. Bellamy, 468 N.J. Super. 29, 38-39 (App. Div. 2021).

I. This Court Should Remand For Resentencing Because The Trial Court Did Not Explicitly Find That The Aggregate Sentence Was Fair, Nor Did it

Consider Defendant's Age In Imposing a Consecutive Sentence, As Required By State v. Torres, 246 N.J. 246 (2021).

In a brief he filed pro se, defendant makes three additional arguments:

POINT ONE – THE RESENTENCING JUDGE ERRED BY IMPOSING THE SAME CONSECUTIVE SENTENCE BASED ON WHAT SHE PRESUMED THE INITIAL SENTENCING JUDGE INTENDED WITHOUT MAKING HER OWN INDEPENDENT FINDINGS; ALSO, BY FAILING TO MAKE AN EXPLICIT STATEMENT EXPLAINING THE "OVERALL FAIRNESS" OF THE AGGREGATE SENTENCE, THEREFORE, THE MATTER SHOULD BE REMANDED FOR RESENTENCING

POINT TWO – THE RESENTENCING COURT'S FAILURE TO ADDRESS THE DEFENDANT'S DISPARITY ARGUMENT THAT HIS CONSECUTIVE SENTENCE FOR THE KIDNAPPING COUNT IS DISPARATE TO HIS CO-DEFENDANT'S CONCURRENT SENTENCE FOR THE SAME COUNT AND THE FAILURE TO PROVIDE A REASON FOR THE DISPARITY OR AN OVERALL FAIRNESS ASSESSMENT REQUIRES THE MATTER TO BE REMANDED FOR RESENTENCING

POINT THREE – THE JUDGE ERRED BY DENYING THE DEFENDANT'S MOTION FOR A CHANGE OR REDUCTION OF SENTENCE PURSUANT TO R. 3:21-10(b)(3) WITHOUT ANY FINDINGS OF FACTS OR CONCLUSIONS OF LAW, THEREFORE THE MATTER SHOULD BE REMANDED FOR A HEARING.

In an attempt to provide support for those arguments, defendant filed a motion for release of one of his codefendant's presentence reports. We, however, denied that motion. Defendant also moved to expand the record with data and studies concerning the impulsive nature of young adults. We also denied that motion.

A. The Limited Issues On This Appeal.

Initially, we identify the limited issues on this appeal. This matter comes back to us following our limited remand to resentence defendant on the kidnapping conviction. Specifically, we had remanded and instructed the resentencing judge to determine "whether a consecutive sentence for kidnapping is warranted under the facts of this case." Jackson, No. A-0227-18 (App. Div. Dec. 9, 2019) (slip op. at 4).

All other aspects of defendant's sentence were affirmed in prior appeals or are now procedurally barred because they were not raised in prior appeals. See R. 3:22-4. To raise a new challenge to his sentence, defendant needs to show that his sentence was illegal or there is a new rule of constitutional law. See R. 3:22-4(a); Zuber, 227 N.J. at 437. Moreover, defendant would need to demonstrate that the new rule of constitutional law was not available to be raised when he made his prior motions, petitions, and appeals.

B. Whether Defendant's Sentence Is Illegal For Failure To Consider That He Was Nineteen Years Old When He Committed the Crimes.

Defendant argues that because he was a young adult when he committed his crimes, he should be resentenced. In making that argument, defendant relies on a line of cases from the United States Supreme Court and the New Jersey Supreme Court, which addressed lengthy prison sentences imposed on juveniles. See Miller, 567 U.S. at 465; Zuber, 227 N.J. at 428.

We reject defendant's arguments for three reasons. First, the constitutional rule announced in Miller was issued in 2012. The argument about the need to consider defendant's young age was available when he filed previous motions and appeals, but he did not raise the argument. He is therefore procedurally barred from belatedly raising the argument now. R. 3:22-4; State v. Flores, 228 N.J. Super. 586, 594-96 (App. Div. 1988) (explaining that excessive sentence claims cannot be raised for the first time in a second PCR petition).

Second, defendant did not make this argument before the judge on the remand in 2020. Instead, defendant is making this argument for the first time on this appeal. "Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J.

364, 383 (2012); see also State v. Robinson, 200 N.J. 1, 19 (2009) (explaining that appellate courts refrain from addressing issues not developed in the trial court); State v. Andujar, 462 N.J. Super. 537, 550 (App. Div. 2020), aff'd as modified, 247 N.J. 275 (2021) (pointing out that appellate courts should not address issues that were not considered by the trial court).

Third, the argument lacks substantive merit. In Miller, the United States Supreme Court held that it was a violation of the Eighth Amendment to impose mandatory life imprisonment, without parole, on a juvenile who was under the age of eighteen at the time that he committed the crime. 567 U.S. at 465. In Zuber, our Supreme Court held that "sentencing judges should evaluate the Miller [juvenile] factors at [the time of sentencing] to 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" 227 N.J. at 451 (quoting Miller, 567 U.S. at 480). Miller, Zuber, and the line of cases that have followed them, have only been applied to juveniles. Accordingly, those cases are not applicable to defendant because he was not a juvenile when he committed the murder and kidnapping.

C. The Need For Another Remand.

Having reviewed the record on the remand, we are constrained to remand for a new proceeding. We do this for one limited reason. In October 2020, the judge did not consider the overall fairness of the consecutive sentence being imposed. In 2021, the Supreme Court clarified that sentencing courts must consider the overall fairness in imposing a lengthy consecutive sentence. See Torres, 246 N.J. at 272. In Torres, the Court held that "an explanation for the overall fairness of a sentence by the sentencing court is required" when imposing consecutive sentences. Ibid. Indeed, here the State concedes that there needs to be another remand and resentencing to consider the overall fairness of the sentence.

We clarify that on this remand, the judge is to conduct a new resentencing and do a new and independent analysis of whether defendant's conviction for kidnapping should be sentenced consecutive to or concurrently with his sentence for murder. The judge is not to try to figure out what the sentencing judge in 1991 did or did not intend. Instead, the court is to conduct its own analysis and apply the first five Yarbough factors. Yarbough, 100 N.J. at 643-44; N.J.A.C. 2C:44-5.³

³ Although Yarbough identified six factors, the sixth factor was statutorily eliminated by the Legislature, see L. 1993, c. 233, § 1, and that rejection "may

We also clarify that in resentencing defendant on this remand, the court must consider mitigating factor fourteen. N.J.S.A. 2C:44-1(b)(14). Mitigating factor fourteen became effective on October 19, 2020, and provides that a sentencing court must consider defendant's age as a mitigating factor if the defendant was under twenty-six-years old at the time of the commission of the offenses. N.J.S.A. 2C:44-1(b)(14). Our Supreme Court has explained that mitigating factor fourteen does not apply retroactively. State v. Lane, 251 N.J. 84, 97 (2022). The Court has also explained, however, that mitigating factor fourteen is to be applied to a defendant who is resentenced on or after October 19, 2020, if a matter is remanded for resentencing for other reasons. Id. at n.3.

Finally, we also clarify that on this remand, it will be appropriate for the judge resentencing defendant to consider his rehabilitation during the time of his imprisonment. At resentencing, a defendant is "entitled to the same full review and explanation of the finding and weighing of aggravating and mitigating factors" as if it were an original sentencing. Randolph, 210 N.J. at 349. "This review must include evidence relating to a defendant's post-offense conduct." State v. Jaffe, 220 N.J. 114, 124 (2014). As such, the judge "should

(continued)

reasonably [be] interpreted as tacit approval of the remaining five factors." Torres, 246 N.J. at 265-66.

resentence defendant as he appears on the day of resentencing," considering evidence of defendant's rehabilitation. Randolph, 210 N.J. at 354.

C. Defendant's Other Arguments.

We hold that defendant's other arguments are without merit. That includes defendant's argument for a reduction or change of sentence under Rule 3:21-10. Defendant made no showing that he is entitled to relief under the limited exceptions in Rule 3:21-10(b). Indeed, we find that all of defendant's other arguments lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Remanded for resentencing 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