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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-3145-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOEL J. NUNEZ,
a/k/a CHUBBS NUNEZ,
and CARLOS RAMOS,

Defendant-Appellant.

Submitted April 5, 2022 – Decided April 14, 2022

Before Judges Fisher and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment Nos. 18-10-0829 and 19-04-0347.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Marc A. Festa, Chief Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

On February 6, 2020, defendant pleaded guilty in one indictment to second-degree conspiracy to commit a carjacking on June 23, 2018, N.J.S.A. 2C:5-2; N.J.S.A. 2C:15-2, and in another indictment to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4, and two counts of first-degree robbery, N.J.S.A. 2C:15-1, all of which occurred on July 15, 2018. The carjacking occurred when defendant was seventeen, and the manslaughter and robberies occurred a few weeks after he turned eighteen. At sentencing, the judge imposed concurrent prison terms of: twenty-three years on the manslaughter conviction subject to an eighty-five percent period of parole ineligibility; ten years on the robbery convictions; and seven years on the carjacking conviction.

Defendant appeals, arguing:

I. BECAUSE DEFENDANT WAS A JUVENILE AT THE TIME OF THE [CARJACKING] OFFENSE[], THIS MATTER MUST BE REMANDED FOR A RESENTENCING FOR THE COURT TO "TAKE INTO ACCOUNT HOW CHILDREN ARE DIFFERENT." MILLER v. ALABAMA, 567 U.S. 460, 471 (2012). THE TRIAL COURT MUST ALSO RESENTENCE DEFENDANT FOR THE [OTHER] OFFENSES . . . AND SIMILARLY CONSIDER "THE MITIGATING QUALITIES OF YOUTH" BECAUSE DEFENDANT HAD JUST TURNED 18 AT THE TIME OF THESE OFFENSES.

A. A Resentencing Is Required Because Although Defendant Was a Juvenile And 18 At the Time of the Offenses, the Trial Court Did Not Consider Defendant's Youth.

B. A Resentencing is Also Required Because the Court Used Defendant's Youth As an Aggravating Factor.

II. THIS COURT SHOULD ADDITIONALLY REMAND FOR RESENTENCING FOR THE TRIAL COURT TO RECONSIDER DEFENDANT'S SENTENCE BASED ON THE NEW 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), AND BECAUSE THE TRIAL COURT: (1) IMPOSED AN EXCESSIVELY DISPARATE SENTENCE WITH RESPECT TO THE CO-DEFENDANTS; (2) ERRED IN ITS FINDINGS OF AGGRAVATING AND MITIGATING FACTORS; AND (3) FAILED TO CONDUCT AN ABILITY TO PAY HEARING CONCERNING THE SIGNIFICANT RESTITUTION IT IMPOSED.^[1]

During the pendency of this appeal, the Supreme Court decided State v. Rivera, 249 N.J. 285, 290 (2021), holding that a defendant's youth cannot be considered as an aggravating factor, only a mitigating factor.² Because of

¹ We have not included the subparts to either defendant's Point IA or Point II for brevity's sake.

² Defendant brought Rivera to our attention as permitted by Rule 2:6-11(d). The State did not respond to defendant's letter explaining how Rivera applies here.

Rivera's intervention, we agree with defendant that he is entitled to be resentenced. And, because defendant must be resentenced, the judge must consider the new mitigating factor that defendant was under the age of twenty-six at the time he committed the offenses.³ Ibid.

In Rivera, the Court considered that at sentencing the trial judge "gave great weight" to aggravating factor three, N.J.S.A. 2C:44-1(a)(3), because of the defendant's youth. 249 N.J. at 295. As the Court explained, the trial judge engaged "in impermissible speculation that defendant would have engaged in other criminal conduct but did not have the opportunity to do so because of her youth." Id. at 302. The sentencing judge here similarly applied aggravating factor three, as well as aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), in imposing sentence on the manslaughter and robbery convictions and added aggravating factor six, N.J.S.A. 2C:44-1(a)(6), when fixing the sentence on the carjacking conviction.

Although the judge did not as clearly correlate defendant's youth at the time of the offenses to any of these aggravating factors as did the trial judge in

³ We express no view as to whether our courts are obligated to apply retroactively this new mitigating factor, N.J.S.A. 2C:44-1(b)(14), an issue pending before our Supreme Court. State v. Lane, A-17-21 (argued Feb. 1, 2022).

Rivera, the judge did suggest defendant's youth was an aggravating rather than a mitigating circumstance. For example, in arguing in favor of mitigation, defense counsel asked that the judge consider defendant's youth and trouble fitting in, while acknowledging his family taught him "right from wrong." The judge interjected that "this is the problem I have with it," adding: "I understand that you're not matured enough at that point in your life. However, you still know right from wrong." Soon after making these comments, the judge offered as an example how, when he was a youth, he was faced with a choice between trying to fit in and doing what was right and that he was able to do the latter.

In considering the entirety of the sentencing transcript, we are satisfied that defendant's age played a role in the sentence imposed but as an aggravating and not a mitigating factor. For that reason, we are satisfied Rivera requires that defendant be resentenced. And, since defendant must be resentenced, the judge should also consider and apply – to the extent the judge deems appropriate – mitigating factor fourteen. Id. at 290.

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