SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3462-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HUDY MULDROW,

Defendant-Appellant.

Argued April 7, 2022 – Decided April 22, 2022

Before Judges Haas and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 19-03-0253 and Accusation No. 19-12-1039.

Matthew W. Reisig argued the cause for appellant (Reisig Criminal Defense & DWI Law, LLC, attorneys; Matthew W. Reisig, of counsel and on the briefs; Jeffrey Zajac, on the briefs).

Christopher F. Schellhorn, Supervising Assistant Prosecutor, argued the cause for respondent (Robert J. Carroll, Morris County Prosecutor, attorney; Christopher F. Schellhorn, on the brief).

PER CURIAM

On the morning of May 17, 2018, defendant Hudy Muldrow crossed three westbound lanes on Route 80 towards an "official use only" point to make an illegal U-turn so he could join eastbound traffic while driving a bus carrying thirty-eight children and six adults on a school trip. The bus collided with a dump truck traveling westbound; one student and a teacher were killed. Many others, including the truck driver, were seriously injured.

On December 23, 2019, defendant entered a guilty plea to two counts of second-degree vehicular homicide, N.J.S.A. 2C:11-5(a), five counts of fourth-degree assault by auto resulting in bodily injury, N.J.S.A. 2C:12-1(c)(1), one count of third-degree endangerment of the thirty-eight children on the bus, N.J.S.A. 2C:24-4(a)(2), and one count of disorderly persons assault by auto, N.J.S.A. 2C:12-1(c)(1).[1] The State agreed to recommend an aggregate sentence of ten years' imprisonment as follows: on the vehicular homicide, two concurrent five-year terms subject to eighty-five-percent parole-ineligibility, in accordance with the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2(a); five concurrent one-year terms for each assault by auto conviction to be served

[1] The plea agreement required the State to dismiss twenty-one indictment counts of fourth-degree assault by auto. Defendant waived his right of indictment as to third-degree child endangerment; thus he pled guilty to an accusation.

consecutive to the vehicular homicide sentences; and one consecutive four-year term of imprisonment for the child endangerment.[2]

The judge sentenced defendant accordingly on February 26, 2020, after a cogent discussion of the statutory aggravating and mitigating factors, and the reasons the aggravating factors slightly outweighed the mitigating. The judge also found that consecutive sentences were appropriate in light of defendant's significant recklessness in causing the accident and the numerous victims. Defendant now appeals, claiming the sentence is excessive. We affirm.

On appeal, defendant raises the following point:

> THERE ARE MULTIPLE EXAMPLES OF THE TRIAL COURT'S ABUSE OF DISCRETION WHICH RESULTED IN AN EXCESSIVE SENTENCE THAT SHOCKS THE JUDICIAL CONSCIENCE.

Before imposing sentence, the judge reviewed defendant's history and personal circumstances. Defendant was seventy-seven years old when the accident occurred, had no criminal history, and was not under the influence at the time of the crash. His driving record included eight speeding citations, many of which dated back a number of years, two prior motor vehicle violations for

[2] The amended judgment of conviction should be further amended to clarify that the concurrent assault by auto terms overall added only a year to the aggregate sentence. The total aggregate sentence was ten years' imprisonment.

improper turns, a very old driving while suspended conviction, and a careless driving charge. The judge also noted prior suspensions of defendant's commercial driver's license resulting from his failure to meet certain medical qualifications.

The court found aggravating factor two, the gravity of the harm, N.J.S.A. 2C:44-1(a)(2), applied with regard to the child endangerment conviction. The harm done to the victims, both physical and mental, certainly exceeded the statutory elements of the offense; thus the finding was not double-counting. See State v. A.T.C., 454 N.J. Super. 235, 254-55 (App. Div. 2018) ("A court . . . does not engage in double-counting when it considers facts showing defendant did more than the minimum the State is required to prove to establish the elements of an offense."). The court also found aggravating factor three, the risk of reoffense, N.J.S.A. 2C:44-1(a)(3), based on defendant's driving record, which included a reckless driving offense on March 28, 2018, immediately before this incident. Defendant's "extremely reckless" conduct in this case, which far exceeded simply failing to maintain a lane and causing an accident by an improper turn, supported aggravating factor three. The judge opined that it was "difficult to imagine the operation of a vehicle with [a] greater degree of

recklessness." Regardless, the court afforded aggravating factor three only slight weight.

The court found aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), for essentially the same reasons as supported aggravating factor three, in addition to the very strong need for general deterrence. Defendant's position as a school bus driver made this consideration particularly important.

Finally, the judge found mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), because this was, after a blameless life, defendant's first encounter with the criminal justice system. He gave mitigating factor seven "fairly significant weight."

The judge explained in detail the reasons he rejected other aggravating and mitigating factors. Overall, his focus was on the fact that, despite defendant's innocent intent in attempting an illegal U-turn across three lanes of traffic on a busy highway while driving a busload of eleven- and twelve-year-old children, doing so ignored the likelihood of harm. Furthermore, the judge was not entirely satisfied that defendant understood and accepted the horrific consequences of his driving on that day.

The judge considered other mitigating factors defendant proposed to conflict with his findings as to aggravating factors three and nine. In any event,

because of the weight he accorded each factor, he concluded that the aggravating factors slightly outweighed the mitigating. Although the negotiated term was "severe," it was "appropriate" in light of the two deaths and the injuries inflicted upon a great number of victims. With regard to the child endangerment, since aggravating factor two applied, the aggravating factors preponderated.

Before the judge, and again on appeal, defendant asserts that it was error to find a risk of reoffense because defendant will never drive again. Furthermore, he claims that aggravating factor three was without foundation, and mitigating factors eight (that defendant's conduct is the result of circumstances unlikely to recur), N.J.S.A. 2C:44-1(b)(8), and nine (that the character and attitude of defendant indicates he is unlikely to reoffend), N.J.S.A. 2C:44-1(b)(9), should have been applied. Defendant argues that the judge would have reduced his sentence had he found mitigating factors eight and nine and refused to find aggravating factor three.

Defendant posits that given his age, consecutive sentences should not have been imposed. He also advances the theory that the vehicular homicide statute itself limits driving while intoxicated (DWI), and only DWI, as the most reckless driving conduct included within the offense, because the statute creates a rebuttable presumption with regard to DWI. He draws from that rebuttable

presumption the notion that anything less than DWI does not constitute the most severe form of recklessness, and that therefore the judge's findings with regard to the aggravating and mitigating factors were erroneous, as were the consecutive sentences.

The court's findings with regard to aggravating and mitigating factors, however, were supported by the evidence as well as the law. Additionally, the negotiated term is presumptively reasonable. State v. Fuentes, 217 N.J. 57, 71 (2014) (explaining that a negotiated sentence is presumptively reasonable and should be affirmed unless it does not comply with the sentencing code). The plea agreement here struck a difficult balance between the unusual nature of the event and the character of defendant: a horrific vehicular homicide caused by, as the judge said, "extreme recklessness" on the one hand, and defendant's previously blameless life on the other.

The court's finding of aggravating factor three is not improper because the factor can include an evaluation of more than just a defendant's criminal history. State v. Locane, 454 N.J. Super. 98, 125 (App. Div. 2018). The risk of reoffense was appropriately assessed in light of defendant's prior driving record, which included a reckless driving citation weeks before this incident. Once the judge

found aggravating factor three in this case, mitigating factors eight and nine were not appropriate.

Furthermore, the court did not abuse its discretion with regard to the three consecutive terms. The judge imposed them in light of the seriousness of defendant's conduct and the extreme harm inflicted on numerous victims. Although he recognized that defendant's age made the negotiated term severe, he also recognized that the conduct required such punishment. As our Supreme Court has recently stated, "age alone cannot drive the outcome [of an aggregate term]. An older defendant who commits a serious crime, for example, cannot rely on age to avoid an otherwise appropriate sentence." State v. Torres, 246 N.J. 246, 273 (2021). In light of the two deaths and the many injuries inflicted on the occupants of the school bus, this ten-year aggregate term was reasonable. It was not manifestly excessive.

Affirmed.