SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4024-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HUSSEIN R. DIGGS, a/k/a
HUSSEIN RAHIOM DIGGS, and
RAKEEM DIGGS

Defendant-Appellant.

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Submitted January 3, 2022 – Decided January 19, 2022

Before Judges Accurso and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 98-05-2570.

Hussein R. Diggs, appellant pro se.

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Barbara A. Rosenkrans, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Hussein R. Diggs appeals from an April 23, 2020 order denying his pro se motion for a reduction or change of sentence under Rule 3:21-10. We affirm.

Over twenty years ago, a jury convicted defendant of attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3; first-degree robbery, N.J.S.A. 2C:15-1; second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(a); and second-degree possession of a firearm for an unlawful purpose, N.J.S.A. 2C:39-4(a). Defendant initially received an aggregate sentence of fifty years, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. We affirmed his convictions but remanded the case for resentencing, State v. Diggs, No. A-1225-99 (App. Div. May 8, 2001). We found the trial court improperly imposed NERA's eighty-five percent parole ineligibility period on the extended term for attempted murder rather than on the ordinary term. Id. (slip op. at 11-12). We also noted that N.J.S.A. 2C:43-6(c) "requires imposition of a parole disqualifier between one-third and one-half of the base term."[1]

[1] The statute was amended thereafter and increased the minimum period of parole ineligibility. L. 2013, c. 113.

On July 3, 2003, the trial court resentenced defendant to an aggregate term of fifty years. The resentence included, on the attempted murder count, a fifty-year prison term with twenty-five years of parole ineligibility under the Graves Act, N.J.S.A. 2C:43-6(c). Defendant did not appeal from his resentence.

Subsequently, defendant unsuccessfully filed petitions for post-conviction relief and for a writ of habeas corpus, in 2006 and 2012, respectively. Also, in 2015, defendant filed a motion to correct an illegal sentence, which motion, too, was denied. In 2017, we affirmed the denial of defendant's 2015 application, finding his appeal to be without merit under Rule 2:11-3(e)(2). State v. Diggs, No. A-3088-15 (App. Div. July 24, 2017).

In the latter part of 2019, defendant filed a motion for a reduction or change of sentence pursuant to Rule 3:21-10(b). In denying the motion, the judge correctly noted that "[g]enerally, R[ule] 3:21-10(a) limits the time to file a motion for reduction or change of sentence to be not later than [sixty] days after the date of the judgment of conviction," but there are several exceptions to this time limit provided in R[ule] 3:21-10(b). Further, the judge found that defendant invoked Rule 3:21-10(b) without "specif[ying] or fit[ting] any of the exceptions provided under [the] Rule," i.e., his application did "not offer any ground contemplated under exceptions [one] through [seven] of R[ule] 3:21-

10(b)." Accordingly, the judge concluded "substantially more ti[m]e than [sixty] days has elapsed since the date of judgment of conviction," and that defendant's application was time barred.[2]

On appeal, defendant advances the following lone argument:

POINT I

> THE LOWER COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A REDUCTION OR CHANGE OF SENTENCE, AND THEREBY ABUSED [ITS] DISCRETION.

This argument is unavailing.

We employ a discretionary standard of review to a trial court's decision to grant or deny a motion made under Rule 3:21-10(b), which permits a court to change a sentence at any time based on various exceptions. See, e.g., State v. Davis, 68 N.J. 69, 85 (1975) (applying abuse of discretion standard to trial

[2] The judge also indicated he had no jurisdiction to consider defendant's application for a sentence change under Rule 3:21-10(b) because of a mistaken belief defendant had not completed his mandatory period of parole ineligibility by the time defendant's Rule 3:21-10(b) application was decided. The State concedes, however, that the judge "had jurisdiction over this application if a Rule 3:21-10(b) exception applied, because defendant had completed his mandatory minimum sentence by April 2020, when this motion was decided." Because we are satisfied defendant's application was time barred, given that it was not filed until 2019 and defendant failed to qualify for an exception under Rule 3:21-10(b), we need not address this jurisdictional issue further.

judge's decision on the defendant's request for transfer to a substance abuse program pursuant to subsection (b)(1)); State v. Chavies, 247 N.J. 245, 260 (2021) (considering modification under subsection (b)(2) based on the defendant's medical condition, stating, "As with sentencing, the scope of appellate review of a trial court's decision to grant or deny a Rule 3:21-10(b)(2) motion is whether the trial court abused its discretion." (quoting State v. Priester, 99 N.J. 123, 137 (1985))). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Chavies, 247 N.J. at 257 (quoting State v. R.Y., 242 N.J. 48, 65 (2020)).

Here, defendant contends he "filed a motion for a reduction or change of sentence pursuant to R[ule] 3:21-10(b)[(3)]," yet the judge abused his discretion in denying his application and "failed to articulate any findings of fact or conclusions of law that reflects an analysis of the claims raised." This argument lacks merit. R. 2:11-3(e)(2).

Rule 3:21-10(b)(3) is one of seven exceptions listed under Rule 3:21-10(b), and it permits a court to enter an order "at any time . . . changing a sentence for good cause shown upon the joint application of the defendant and the prosecuting attorney[.]" No such joint application was made in this matter.

Moreover, because defendant failed to demonstrate he qualified for a reduction or change of sentence under any of the remaining six exceptions outlined under Rule 3:21-10(b), we are convinced his untimely application was properly denied.

To the extent we have not addressed defendant's remaining arguments, we are satisfied they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION