

# RECORD IMPOUNDED

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### SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-4201-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CASEY TERRY,

Defendant-Appellant.

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Submitted on September 28, 2022 – Decided November 16, 2022

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Indictment No. 87-04-0326.

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

Bradley D. Billhimer, Ocean County Prosecutor, attorney for respondent (Samuel Marzarella, Chief Appellate Attorney, of counsel; Dina R. Khajezadeh, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Casey Terry appeals from the May 4, 2020 Law Division order denying his motion to correct an illegal sentence. We vacate the order denying defendant's motion to correct an illegal sentence and remand to the trial court for a sentencing rehearing in light of the Supreme Court's decision in State v. Comer, 249 N.J. 359 (2022), which had not been decided at the time the judge denied defendant's motion.

We summarize the pertinent facts and procedural history of the case.<sup>1</sup> At sixteen years old, defendant was arrested and charged with offenses stemming from the rape and murder of eighty-six-year-old E.S.<sup>2</sup> Jurisdiction was waived to the Law Division where defendant was prosecuted as an adult and charged in Indictment No. 87-04-00236 with two counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1) and N.J.S.A. 2C:11-3(a)(2); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); four counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(3), N.J.S.A. 2C:14-2(a)(4), and N.J.S.A. 2C:14-2(a)(5); armed

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<sup>1</sup> There was a co-defendant in this matter, Maurice Romero, who was tried separately and convicted. On appeal, we affirmed Romero's conviction and sentence. State v. Romero, No. A-315-88 (App. Div. Oct. 4, 1990). Because the facts relevant to defendant's crimes in this appeal are detailed in our unpublished opinion in State v. Romero, we need not repeat them here.

<sup>2</sup> We identify the victim by her initials to protect her privacy. See R. 1:38-3(c)(12).

robbery, N.J.S.A. 2C:15-1; second-degree burglary, N.J.S.A. 2C:18-2(a)(1); third-degree theft by unlawful taking or disposition, N.J.S.A. 2C:20-3(a); and two counts of second-degree aggravated arson, N.J.S.A. 2C:17-1(a)(1) and N.J.S.A. 2C:17-1(a)(2).

On January 15, 1988, defendant entered a negotiated guilty plea to murder and aggravated sexual assault and the State agreed to dismiss the remaining counts. At sentencing, the trial court considered defendant's commission numerous juvenile offenses and his probation status at the time he committed the murder. In a written statement of reasons annexed to the judgment of conviction (JOC), the sentencing judge found five aggravating factors, no mitigating factors, and explained his reasons for imposing consecutive sentences as follows:

[T]his defendant, who is 18 years old today, stands before this court for sentencing, having pled guilty to purposely and knowingly causing the death of [E.S.], and having pled guilty to aggravated sexual assault upon [E.S]. This case involves the senseless and brutal rape and murder of an 86[-]year[-] old woman, in the sanctity of her own home. The aggravating factors found by this court [are]:

1. The nature and circumstances of the offense, and the role of the actor therein, including the fact that the crimes were committed in an especially heinous, cruel, and depraved manner. []This involved both physical and sexual assault, within the earshot of

the victim's paralyzed 94[-]year[-]old husband, who was totally helpless to come to the aid of his wife. The victim was raped by Mr. Terry and by Mr. Romero, the codefendant, as well.

2. The gravity and seriousness of harm inflicted upon the victim, with the defendant knowing that the victim of his crimes [was] particularly vulnerable and incapable of resistance. She was 86 years old, and was targeted because of her age and because she received Social Security checks and was easy prey for the defendant. The victim received severe multiple injuries. The victim herself was using a walker.

3. The risk of the defendant committing another crime. The defendant's own examining physician shows him to have a sociopathic personality. He shows little or no remorse for these crimes.

4. The extent of the defendant's prior criminal record. He has an extensive juvenile record, and was on probation when these crimes were committed.

5. The need to deter this defendant and others from violating the law.

The court finds no mitigating factors.

The sentences in this case must be consecutive because punishment for either one of these crimes is not sufficient to encompass the evil mind of the defendant and the harm done to the victim. Also, not to impose consecutive sentences in this case would, in the opinion of the court, be tantamount to giving the defendant a "free" crime.

At eighteen years old, defendant was sentenced to life in prison with a thirty-year parole bar on the murder charge to run consecutive to a term of imprisonment of twenty years with a ten-year parole bar on the aggravated sexual assault charge. Defendant did not file a direct appeal.

On July 1, 2019, defendant, then pro se, moved to correct an illegal sentence under Rule 3:21-10(b)(5). Defendant claimed the sentence of life imprisonment with the thirty-year parole bar contravened the rulings in Miller v. Alabama, 567 U.S. 460 (2012), and State v. Zuber, 227 N.J. 422 (2017), and sought resentencing. The State cross-moved to dismiss defendant's motion. Shortly thereafter, counsel was appointed to represent defendant.

On October 18, 2019, the judge ordered supplemental briefing since defendant's five-page brief was unsupported by exhibits necessary to consider defendant's motion.<sup>3</sup> Defendant was directed to: (1) file a supplemental brief

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<sup>3</sup> The motion judge had limited information about defendant before the December 1986 crimes and thereafter. Absent from the record was information concerning defendant's childhood, family history, and education prior to 1986. The only information available to the court about defendant's youth came from the JOC and the sentencing judge's statement of reasons which noted "[defendant] had an extensive juvenile record and was on probation when these crimes were committed." The motion judge reviewed a Department of Corrections (DOC) Inmate "Offender Details" which indicated defendant was convicted, under Mercer Co. Indictment No. 15-04-00428, on May 27, 2016, of

with any appropriate exhibits from his prior proceedings; (2) specify the nature of any hearing sought and a proffer of any evidence to be introduced at such a hearing; and (3) submit any order, opinion, or decision on a similar motion filed by co-defendant Romero.

On November 15, 2019, defendant partially complied with the court's order.<sup>4</sup> However, defendant did not proffer any evidence he sought to introduce at the hearing. The State filed opposition to defendant's motion.

The motion judge heard additional arguments on February 7, 2020. In a twenty-two-page written decision dated May 4, 2020, the judge denied defendant's motion and granted the State's cross-motion. The judge held defendant was not entitled to a review of his sentence under Miller and Zuber. The judge concluded defendant was not sentenced to "life without the possibility" of parole or a mandatory life sentence since he was sentenced to life with "forty-years of parole ineligibility." Based on the DOC Inmate Records,

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the additional crime of aggravated assault on a law enforcement officer on July 23, 2015.

<sup>4</sup> Defendant filed the following exhibits: a DOC offender search, a copy of the grand jury indictment returned April 29, 1987, defendant's plea agreement, the JOC, Romero's resentencing decision dated September 5, 2018, and a May 22, 2018 letter from the Ocean County Superior Court Criminal Record Unit to the Office of the Public Defender. Defendant's presentence investigation report was no longer available.

the judge determined defendant would be eligible for parole "in the relatively near future" at the age of fifty-six on December 2, 2026. The judge also determined at that time defendant would have a life expectancy of 26.3 years based on the Life Expectancies for all Races and Both Sexes, citing Appendix I-A of the New Jersey Court Rules. Lastly, the judge noted defendant failed to comply with the court's order to produce any proffered evidence which he sought to introduce at the resentencing hearing. Instead, defendant argued he would address "additional merits and arguments" in the event the judge granted a resentencing hearing. This appeal followed.

On appeal, defendant raises the following points for our consideration:

POINT I

THIS MATTER MUST BE REMANDED FOR A MILLER RESENTENCING. SEE MILLER v. ALABAMA, 567 U.S. 460, 471 (2012).

- A. Because "Children Are Different," Defendant Is Entitled to a Sentencing Hearing That Meaningfully Takes into Account That He Was a Child at the Time of the Crimes.
- B. Defendant Is Also Entitled to a [Miller] Resentencing Because He Was Sentenced to the Mandatory Minimum Sentencing Provision for Murder, and He Has Served More than 20 Years. See State v. Comer, [249] N.J. [359] (2022). Like the Trial Court in Comer, The Motion Court

Failed to Appreciate "How Children Are Different." (Not Raised Below)

- C. Defendant's Dubious Possibility of Parole in 2026 Does Not Satisfy Miller.
- D. Defendant Is Not a "Rare" Juvenile 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. (Not Raised Below)
- E. Defendant's Conviction and Sentence for Felony Murder Is an Additional Reason Why Defendant's Sentence Is Unconstitutionally Cruel and Unusual. (Not Raised Below)
- F. A Proper Miller Resentencing Includes a Consideration of Defendant's Rehabilitative Efforts and Application of 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). (Not Raised Below)
- G. 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, Required by State v. Torres, 246 N.J. 246 (2021).

Defendant argues that he is entitled to a resentencing hearing based on Miller and Zuber. Defendant further argues the aggregate life sentence with a forty-year parole disqualifier imposed for the offenses committed as a juvenile



and without consideration of his youth as a mitigating factor "violates the federal and state constitutions' prohibitions against cruel and unusual punishment." Relying on State v. Comer, defendant further contends that he is entitled to a Miller resentencing hearing because he was sentenced to the mandatory minimum sentence for murder and has served more than thirty years of that sentence.

In opposition, the State argues that defendant was not entitled to resentencing under Zuber and Miller because (1) he was sentenced to the mandatory minimum sentence for murder, and served more than twenty years; (2) he failed to present any evidence of rehabilitation; and (3) the possibility of parole satisfies Miller. The State also presents two arguments not raised below: (1) defendant should not be afforded the opportunity to present to a sentencing court the mitigating qualities of youth since the juvenile crimes reflect permanent incorrigibility; and (2) the murder conviction and sentence do not render the sentence unconstitutionally cruel and unusual.

"A defendant may challenge an illegal sentence at any time." Zuber, 227 N.J. at 437 (citing R. 3:21-10(b)(5); State v. Acevedo, 205 N.J. 40, 47 n.4 (2011)). "[A]n illegal sentence is one that 'exceeds the maximum penalty . . . for a particular offense' or a sentence 'not imposed in accordance with law.'" Id.

at 45. Acevedo, 205 N.J. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). Whether a sentence is constitutional is an issue of law, which we review de novo. State v. Patel, 239 N.J. 424, 435 (2019) (citing State v. Quaker Valley Farms, LLC, 235 N.J. 37, 55 (2018)).

Since the judge's denial of defendant's motion, our Supreme Court in Comer provided another avenue for relief to a defendant who was convicted of murder and was a juvenile at the time of the offense. Under Comer, a defendant who is convicted of knowing and purposeful murder as a juvenile, and who receives a lengthy sentence and period of parole ineligibility under N.J.S.A. 2C:11-3, is entitled to "petition for a review of their sentence after having spent [twenty] years in jail." Comer, 249 N.J. at 401.

When a petition under Comer is filed, the trial court shall conduct an evidentiary hearing to review the defendant's sentence and consider the Miller factors—including factors that could not be fully considered decades earlier, like whether the defendant still fails to appreciate risks and consequences, and whether he [or she] has matured or been rehabilitated. Ibid. In the absence of the availability of such a hearing to review a defendant's sentence after serving twenty years, the thirty-plus-year period of parole ineligibility and thirty-plus-year sentence authorized under N.J.S.A. 2C:11-3 for a juvenile tried as an adult

and convicted of murder constitutes unconstitutional cruel and unusual punishment under our State Constitution. See id. at 401 (explaining the constitutional "problem" presented by imposing the mandatory sentences for murder under N.J.S.A. 2C:11-3 on a juvenile is addressed by "[a]llowing minors a later opportunity to show they have matured, to present evidence of their rehabilitation, and to try to prove they are fit to reenter society").

Defendant has been in custody since 1987 and has served almost thirty-five years. Regardless of whether his sentence constitutes the practical equivalent of a life sentence without parole under Zuber, his sentence does not withstand scrutiny under our state constitution unless he is afforded a review of his sentence in accordance with the procedural and substantive requirements established in Comer. Ibid.; see also State v. Thomas, 470 N.J. Super. 167, 171-72 (App. Div. 2022) (finding the "defendant, who was sentenced to life in prison without a specified period of parole ineligibility and has been incarcerated for forty years for crimes committed when a juvenile . . . is entitled to the same type of hearing adopted in Comer").

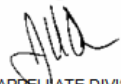
We therefore vacate the court's order and remand for an evidentiary hearing and a review of defendant's sentence in accordance with the requirements under Comer. Defendant shall be given an "opportunity to show

he has matured, to present evidence of his rehabilitation, and to try to prove he is fit to reenter society . . . ." Thomas, 470 N.J. Super. at 171 (internal quotations omitted).

On remand, defendant shall be permitted to amend his motion for a review of his sentence, and the court shall conduct such proceedings as it deems appropriate. We do not offer an opinion on the merits of defendant's motion, and nothing in this opinion shall be construed as limiting the arguments and evidence the parties may submit in support of their respective positions on remand.

Vacated and remanded for further proceedings in accordance 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