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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-4405-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONELL COOK, a/k/a
JUSTIN WALKER,

Defendant-Appellant.

Submitted September 28, 2022 – Decided November 21, 2022

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Indictment No.
14-11-1265.

Joseph E. Krakora, Public Defender, attorney for
appellant (Michele E. Friedman, Assistant Deputy
Public Defender, of counsel and on the brief).

Yolanda Ciccone, Middlesex County Prosecutor,
attorney for respondent (Nancy A. Hulett, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from his sentence imposed after a plea agreement. He contends the court increased his sentence by using his failure to appear at a prior sentencing as a non-statutory aggravating factor and in double counting it regarding the bail jumping offense. We disagree and affirm.

In 2014, defendant was driving in New Brunswick when he was stopped by a police officer. As the officer approached defendant's car, defendant proceeded to drive off while the officer held onto the car. The police officer was dragged by the car until it crashed into a parked school bus. After the crash, the officer attempted to arrest defendant and a struggle ensued. During the scuffle, defendant reached for the officer's gun but was unsuccessful in removing the gun from its holster.

Defendant was charged in an indictment with three counts of third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(5); second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); second-degree assault by auto, N.J.S.A. 2C:12-1(c)(3); fourth-degree assault by auto, N.J.S.A. 2C:12-1(c)(1); second-degree disarming of a law enforcement officer, N.J.S.A. 2C:12-11(a); third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3); third-degree hindering one's own apprehension, N.J.S.A. 2C:29-3(b)(4); and fourth-degree obstructing administration of law, N.J.S.A. 2C:29(1)b.

In May 2017, defendant pleaded guilty to one count of second-degree aggravated assault and one count of second-degree disarming a law enforcement officer. The State recommended a seven-year period of incarceration subject to an eighty-five percent period of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. During the plea hearing, the court scheduled sentencing for September 29, 2017. The judge informed defendant:

[Y]ou must be here on that date. Otherwise, a bench warrant will be issued for your arrest. The State may charge you with bail jumping. Your bail may be forfeited. So make sure you are here. I'm going to have you sign something that I advised you of that. . . . [M]ake sure you come . . . back on the sentencing date, okay? Yes?

Defendant responded: "Yes, ma'am."

The court provided defendant with an order that stated "[i]f you fail to appear for sentencing a [b]ench [w]arrant may issue for your arrest, your bail may be forfeited, and the State may bring [b]ail [j]umping [c]harges against you. The State may also petition the [c]ourt for additional relief, if appropriate."

Defendant did not appear on the scheduled sentencing date. Therefore, the court issued a bench warrant and told defense attorney to instruct defendant to turn himself in. Defendant was subsequently apprehended in Georgia in November 2017 and was extradited to New Jersey in April 2018.

During the May 4, 2018 sentencing hearing, the judge stated that she "[was] going to consider the fact that [defendant] did[] [not] show up for [his] sentencing." Defendant explained he did not appear on the sentencing date because he did not have a way of getting to the courthouse, he did not have a job, and he did not have any income.

In sentencing defendant, the court found defendant pleaded guilty to aggravated assault and disarming a police officer, he failed to appear for his sentencing, and he fled to Georgia and did not communicate with the court until he was arrested and extradited to New Jersey. The court noted defendant's prior criminal history including shoplifting, resisting arrest, possession of marijuana under fifty grams, a conditional discharge in New York for possession of marijuana, convictions in New York for several crimes, a conviction in Maine for aggravated assault and aggravated forgery, and prior terms of incarceration. The judge found aggravating factors three, 2C:44-1(a)(3)—risk of committing another offense; six, 2C:44-1(a)(6)—extent of prior record and seriousness of offense; and nine, 2C:44-1(a)(9)—need to deter the defendant from violating the law. There were no mitigating factors.

The court further noted the State was seeking additional jail time as a result of defendant's failure to appear for sentencing.¹ The judge stated there must be consequences for failing to appear. The court sentenced defendant to an eight-year term of incarceration subject to an eighty-five percent period of parole ineligibility under NERA.

However, shortly thereafter, the judge reentered the courtroom, advising she had listened to the May 2017 plea hearing and determined that she had not told defendant there would be additional consequences if he failed to appear for sentencing, including that the court could impose a higher sentence. As a result, the court believed it was prohibited from increasing the sentence without having advised defendant of that risk. Therefore, the judge imposed the original sentence recommended in the 2017 plea agreement of seven years' incarceration with the NERA parole ineligibility.

In November 2018, a grand jury indicted defendant on third-degree bail jumping, N.J.S.A. 2C:29-7. Defendant pleaded guilty to the charge in January 2020. Thereafter, defendant and the State agreed to a plea deal: defendant would be resentenced on the 2014 indictment to nine years' incarceration, with an

¹ The State asked the court to impose at least ten years' prison time.

eighty-five percent NERA parole disqualifier and to a five-year flat sentence on the bail jumping charge to run concurrent with the first sentence.

At the sentencing hearing on June 3, 2020, the court again discussed defendant's lengthy prior criminal history and the specific facts of the present crimes—the assault on a police officer during which the officer sustained serious injuries and the subsequent attempt to grab the officer's gun. The court remarked it was fortunate those actions did not lead to further injuries to the officer or others in the area. The judge then said: "[T]his court sends a message to this defendant and others that there are consequences to such behavior. There are consequences for . . . choosing not to show up for your sentence."

Defendant requested the court apply mitigating factor eleven, 2C:44-1(b)(11)—hardship to dependents—because he has a young daughter. The judge again found aggravating factors three, six, and nine and concluded no mitigating factors were applicable. Defendant was then sentenced on the 2014 indictment to nine years in prison subject to the eighty-five percent NERA parole ineligibility and to a concurrent sentence of five years flat on the bail jumping charge.

On appeal, defendant raises a sole argument for our consideration:

THE LAW DIVISION IMPERMISSIBLY
INCREASED MR. COOK'S SEVEN-YEAR, MID-

RANGE SENTENCE FOR FAILING TO APPEAR AT THE SEPTEMBER 29, 2017 SENTENCING DATE, SINCE FAILURE TO APPEAR IS NOT A STATUTORY AGGRAVATING FACTOR, THE INCREASE IN THE SENTENCE DID NOT COMPORT WITH THE COURT'S FACTUAL FINDINGS, AND THE COURT ENGAGED IN DOUBLE-COUNTING.

A. The Sentencing Court Improperly Penalized Mr. Cook for Failing to Appear at the September 29, 2017 Sentencing Hearing, Thus Impermissibly Utilizing a Non-Statutory Aggravating Factor to Increase His Original Sentence.

B. The Court Double-Counted Mr. Cook's Failure to Appear, As Applied to the Bail Jumping Offense.

We review a trial court's sentence for an abuse of discretion. State v. Torres, 246 N.J. 246, 272 (2021). We affirm the sentence "unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shocks the judicial conscience.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (citing State v. Roth, 95 N.J. 334, 364-65 (1984)).

We do not substitute our judgment for that of the trial court. State v. Miller, 237 N.J. 15, 28 (2019). But, if the issue on appeal regards "whether the

sentence imposed violates sentencing guidelines," we review the sentence de novo. State v. Robinson, 217 N.J. 594, 603-04 (2014).

Defendant contends the court penalized him for failing to appear at his September 2017 sentencing hearing by finding the failure to appear was a non-statutory aggravating factor and increasing his sentence. We discern no merit in this argument.

When the judge sentenced defendant in 2020, she gave reasons for finding three aggravating factors and rejecting defendant's request for mitigating factor eleven. The judge then imposed the sentence recommended in the plea agreement. The court's reference to the bail jumping offense was appropriate since the court was imposing sentence on the guilty plea to that crime. In addition, the failure to appear was relevant to the court's findings of the three aggravating factors.

The sentence complies with this court's ruling in State v. Subin, 222 N.J. Super. 227, 239-40 (App. Div. 1988). In noting that the trial court in Subin mentioned the defendant's non-appearance at a prior scheduled sentencing hearing, we stated "it [was] perfectly clear from the sentencing transcript that the trial court did not sentence defendant solely because of his non-appearance."

Id. at 239. We found the non-appearance may validly be analyzed within one of the permissible sentencing factors, stating:

A defendant who has been convicted of a crime has an obligation to appear before the sentencing court. A defendant's disregard of that obligation by failing to appear in the absence of a valid excuse demonstrates the defendant's disrespect for the law and gives rise to a reasonable inference that he is likely to commit another offense.

[Id. at 240.]

Subin does not forbid a court from discussing a defendant's failure to appear at sentencing during a subsequent sentencing proceeding so long as it is applicable to a permissible aggravating or mitigating factor. Here, the court recounted defendant's extensive criminal history, and the specific facts of the offenses, and advised there were consequences to those actions, including the decision not to appear for sentencing.

There is no support for defendant's argument that the trial court considered his failure to appear as an aggravating factor. Rather, defendant pleaded guilty to bail jumping and the court explained its reasons for the imposition of the five year flat concurrent sentence.

Defendant further asserts the trial court imposed an illegal sentence because, in considering the failure to appear as an aggravating factor, it double

counted the failure to appear because it is an element of the bail jumping offense. Since we have found the failure to appear was not imposed by the court as an aggravating factor, we need not further address defendant's argument. As we have stated, the court imposed the recommended sentence in the plea agreement after considering the aggravating and mitigating factors. There is no support upon which to conclude the well-reasoned sentence was enhanced solely because of the failure to appear charge.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION