SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4476-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

URIEL BEN-DAVID, a/k/a PETER U. BEN, URIEL BEN, PETER U. BENDAVID, URIEL BENDAVID, URIEL P. BENDAVID, BEN DAVID, PETER U. DAVID, URIEL DAVID, and PETER D. KING,

Defendant-Appellant.

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Submitted April 4, 2022 – Decided May 23, 2022

Before Judges Sabatino and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 19-12-0898.

Joseph E. Krakora, Public Defender, attorney for appellant (Nakea J. Barksdale and Cody T. Mason, Assistant Deputy Public Defenders, of counsel and on the briefs).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Mark Niedziela, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Uriel Ben-David appeals from his July 21, 2020 judgment of conviction that was entered after he pled guilty, pursuant to a plea agreement, to one count of third-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(b)(iii). On appeal, defendant only challenges his sentence to five years in prison. Specifically, defendant argues the following point:

> POINT I
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> DEFENDANT'S SENTENCE OF FIVE YEARS, THE MAXIMUM FOR A THIRD-DEGREE OFFENSE, IS EXCESSIVE AND MUST BE REDUCED BECAUSE THE TRIAL [COURT] ERRED IN ITS FINDING AND WEIGHING OF AGGRAVATING AND MITIGATING FACTORS. U.S. COSNT. [SIC] AMENDS. VI AND XIV; N.J. CONST. ART. I, PARS. 9 AND 10.

After defendant filed his appeal, the matter was listed before an excessive sentencing panel of this court. On September 22, 2021, after considering the parties' oral arguments, the panel entered an order transferring this matter for plenary consideration by a merits panel.

We have now carefully considered defendant's contention on appeal in light of the record and the applicable principles of law. For the reasons stated

in this opinion, we remand this matter to the trial court for a more robust statement of reasons as to why defendant received a sentence at the highest end of the range within the third-degree considering the trial court's judgment of conviction stated the aggravating and mitigating factors were in equipoise.

The facts leading to defendant's arrest and conviction are summarized as follows. In July 2019, while already subject to community supervision for life (CSL)[1] under a prior conviction, defendant knowingly possessed approximately 600 images of child pornography on his computer. At the time defendant's parole officer discovered the files on defendant's electronic devices, defendant was seventy-one years old, suffered from various health conditions, and already

[1] N.J.S.A. 2C:43-6.4. "A 2003 amendment replaced all references to '[CSL]' with 'parole supervision for life [(PSL)].'" In re J.S., 444 N.J. Super. 303, 306 n.2 (App. Div. 2016) (quoting State v. Perez, 220 N.J. 423, 429 (2015)). "CSL is a component of the Violent Predator Incapacitation Act, which is also a component of a series of laws, enacted in 1994, commonly referred to as 'Megan's Law.'" Perez, 220 N.J. at 436-37. "CSL is designed to protect the public from recidivism by sexual offenders. To that end, defendants subject to CSL are supervised by the Parole Board and face a variety of conditions beyond those imposed on non-sex-offender parolees." Id. at 437. PSL's "restrictions . . . monitor every aspect of the daily life of an individual convicted of a qualifying sexual offense and expose that individual to parole revocation and incarceration on the violation of one, some, or all conditions." In the Matter of H.D., 241 N.J. 412, 421 (2020) (omission in original) (quoting Perez, 220 N.J. at 441). The term of CSL "follows immediately after the parolee's release from incarceration, if applicable." J.B. v. N.J. State Parole Bd., 433 N.J. Super. 327, 336-37 (App. Div. 2013).

had multiple convictions. In 1997, he was convicted of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(b)(5)(a), and second-degree attempted aggravated sexual assault upon a child of less than thirteen years, N.J.S.A. 2C:14-2(a)(1). He received a ten-year sentence in 1998 and placed on CSL. He was released from prison on August 20, 2003. Approximately one year later, defendant was convicted of third-degree violating the conditions of CSL, N.J.S.A. 2C:43-6.4(d), and received a two-year term of probation on January 7, 2005. He was discharged from probation on January 22, 2007, and approximately two years later, defendant was again convicted of third-degree violation of CSL, and received a one-year term of imprisonment on November 13, 2009. Thereafter, he was paroled on January 28, 2010, but violated parole approximately one year later. He completed his sentence on September 11, 2013. Prior to being released, while on parole, defendant was convicted of fourth-degree violation of CSL on September 22, 2011, and he received a period of 270 days in jail.

In December 2019, a grand jury indicted defendant, charging him with another fourth-degree violation of CSL and with second-degree endangering the welfare of a child. Thereafter, defendant entered into a plea agreement with the prosecutor under which defendant agreed to plead guilty to an amended

indictment, charging him with third-degree endangering the welfare of a child, in exchange for the prosecutor's recommendation that he receive a sentence of five years and continue on his previously ordered CSL.

At his ensuing plea hearing on February 18, 2020, defendant pled guilty to the one charge after providing a factual basis for his plea. The trial court imposed its sentence on June 12, 2020. Prior to his sentencing, defendant was subject to an evaluation at the Adult Diagnostic Treatment Center (ADTC) at Avenel.[2] The evaluation determined that defendant's behavior was the result of

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[2] In In re Civ. Commitment of W.X.C., 204 N.J. 179, 198-99 (2010), the New Jersey Supreme Court explained the ADTC's role in sentencing as follows:

> [A]s defined by statute, ADTC treatment . . . is directed only at specific offenders. Moreover, the treatment provided at the ADTC is particularized and is designed to meet the needs of the specific population of sex offenders that it intentionally targets. Utilizing a five-level program of treatment, it is geared only toward a particularized sex offender, one whose criminal sexual behavior was repetitive and compulsive, who is amenable to treatment, and who is willing to participate in treatment. Any offender who meets the repetitive and compulsive aspect of the statutory test, but who declines to accept treatment at the ADTC or is found to not be amenable to treatment, may request transfer later in a custodial term, but an offender who does not meet the essential "repetitive and compulsive" criteria is not eligible, because the statute itself is designed to address only that population of offenders.

his compulsive and repetitive conduct. In addition to considering the Avenel report, the trial court reviewed medical records describing defendant's physical health problems.

Early during his sentencing, despite the recommendation and the findings of the Avenel report, defense counsel made clear that defendant was not willing to be sentenced for treatment at Avenel. Counsel then confirmed defendant's age and explained that defendant had "some serious health issues," none of which were "life altering." Based on his medical records, however, counsel expressed defendant's desire "for some leniency due to his age and due to his health conditions."

The court then gave defendant an opportunity to speak on his own behalf. In response, defendant described his military career, education and his employment history. And, he reviewed in detail each of his health problems. He also admitted that the offenses he committed were "absolutely despicable" and assured the court that he would "never do this type of thing again." He concluded by apologizing for his behavior.

[(Citations omitted).]

The court began its consideration of defendant's sentence by turning to the Avenel report and confirming that defendant's "conduct was characterized by a pattern of repetition and compulsive behavior," but defendant did "not wish to be sentenced to Avenel." The court concluded, "it doesn't serve the interests of justice to force somebody into a treatment where the person is unwilling" even though "this would have tremendously helped, especially realizing that the defendant truly acknowledges how despicable the acts were and . . . how sorry he is for what he has done."

The court also found that defendant appeared to be "fully competent . . . very articulate, very educated." It then reviewed defendant's military history.

Turning to the statutory aggravating factors, the court initially noted that the plea agreement was the result of the "State extend[ing] a very, very generous offer to the defendant." The court then reviewed defendant's prior criminal history. It found applicable aggravating factor three, the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3). According to the court, there was a "real risk" that defendant would commit another offense as he "was previously convicted of [a] similar offense involving children" and was already subject to CSL, which he later violated on an earlier occasion. The court rejected defendant's attempt to minimize his offense by saying he just got carried away

and noted that despite defendant's age there continued to be a serious risk of re-offense. However, the court specifically "accept[ed] defendant's remorse." The court stated it gave aggravating factor three "medium weight."

The court then found, "based on [defendant's] record," that aggravating factor six, the extent of the defendant's prior criminal record and the seriousness of the offense of which he has been convicted, N.J.S.A. 2C:44-1(a)(6), applied. The court also found applicable aggravating factor nine, the need for deterring the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). As to "general deterrence," the court determined there was a need for individuals to be deterred and that "society has an interest in deterring defendant and individuals from committing or reoffending." Turning to "specific deterrence," the court found that there was a need for deterrence because, despite all of the positive attributes in defendant's background, including his education, military service and career, and despite his prior convictions, he still was reoffending. The court attributed "medium weight" to these two factors as well.

Turning to the mitigating factors, the court found applicable mitigating factor seven, the defendant has no history of prior delinquency or criminal activity or led a law-abiding life for a substantial period of time before the commission of the present offense, N.J.S.A. 2C:44-1(b)(7). According to the

court, it was applicable because defendant had "no juvenile offenses." The court attributed "low to medium weight" to this factor. The court found no other statutory mitigating factors, although it reiterated that it was also considering defendant's "genuine remorsefulness," age, and "significant health issues."

Based on its findings, the court concluded that a five-year sentence was appropriate based on a "qualitative" balancing of the aggravating and mitigating factors and because it was in "the interest of justice" to impose that sentence, "especially on [t]his plea, which was . . . very, very generous." This appeal followed.

On appeal, defendant contends his receipt of the maximum sentence for a third-degree offense was excessive because the trial court erred in failing to consider evidence in support of mitigating factor four, as there were "substantial grounds tending to excuse [defendant's] conduct," N.J.S.A. 2C:44-1(b)(4), and mitigating factor eleven, that "imprisonment would entail excessive hardship," N.J.S.A. 2C:44-1(b)(11). According to defendant, there was sufficient evidence in the record of defendant's health issues and his age-related issues that warranted the application of these two mitigating factors. Had the court properly considered them, it would not have concluded that the aggravating and

mitigating factors "are equipoised" as noted on his judgment of conviction. This appeal followed.

We begin our review by acknowledging that it is limited. We review a sentence imposed by the trial court under an abuse of discretion standard. State v. Jones, 232 N.J. 308, 318 (2018). In doing so, we consider: "(1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were . . . 'based upon competent evidence in the record'; [and] (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscious.'" State v. Bolvito, 217 N.J. 221, 228 (2014) (second alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

In weighing the aggravating and mitigating factors, a trial court must conduct a qualitative, not quantitative analysis. State v. Kruse, 105 N.J. 354, 363 (1987); State v. Boyer, 221 N.J. Super. 387, 404 (App. Div. 1987) (explaining that a sentencing court must go beyond enumerating factors). The court must also state the reason for the sentence, including its findings on the aggravating and mitigating factors. N.J.S.A. 2C:43-2(e); R. 3:21-4(h). A sentence should not be disturbed on appeal unless the facts and law show "such a clear error of judgment that it shocks the judicial conscience." Roth, 95 N.J. at 364.

Applying this deferential standard, we first note that defendant did not argue for either of the mitigating factors now being raised on appeal. Nevertheless, the trial court clearly took into consideration both defendant's age and his medical history. As to whether there were any grounds to excuse defendant's conduct, we discern no evidence in the record to support that finding.

However, what is not clear from the transcript of the proceedings before the trial court, was the court's weighing of the aggravating factors against the mitigating factors. Notably, there was no mention in the trial court's oral decision that the factors were in equipoise, as indicated on the judgment of conviction, or that the aggravating factors weighed more heavily, thereby justifying a five-year term.[3] See State v. Fuentes, 217 N.J. 57, 73 (2014) ("[I]f the aggravating and mitigating factors are in equipoise, the midpoint will be an appropriate sentence." (quoting State v. Natale, 184 N.J. 458, 488 (2005))).

Without that explanation, our ability to provide meaningful appellate review is hampered. "A clear and detailed statement of reasons is . . . a crucial

[3] Generally, "[i]n the event of a discrepancy between the court's oral pronouncement of sentence and the sentence described in the [JOC], the sentencing transcript controls, and a corrective judgment is to be entered." State v. Abril, 444 N.J. Super. 553, 564 (App. Div. 2016) (citing State v. Rivers, 252 N.J. Super. 142, 147 n.1 (App. Div. 1991)).

component of the process conducted by the sentencing court, and a prerequisite to effective appellate review." Fuentes, 217 N.J. at 74.

Therefore, we are constrained to vacate defendant's sentence and remand for resentencing so that the court can clarify how it concluded that the maximum term for a third-degree offense should be imposed as a result of the court's qualitative analysis of the aggravating and mitigating factors, as compared to a midrange sentence that is generally appropriate when a court finds the factors to be in equipoise. However, by our remand, "[w]e are not suggesting that this process will necessarily result in sentencing defendant to a lesser sentence within the third-degree range." State v. Sene, 443 N.J. Super. 134, 145 (App. Div. 2015). We only require the trial court to provide a clearer explanation for whatever sentence it reaches and afterward to issue an amended judgment of conviction that reflects its reasons. The remand shall be completed by June 30. 2022, unless the parties' consent to extend the time.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.