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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0435-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK SETTE,

Defendant-Appellant.

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Argued December 20, 2022 – Decided January 10, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 88-06-0840.

Daniel S. Rockoff, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Michele E. Friedman, Assistant Deputy Public Defender, of counsel and on briefs).

Milton S. Leibowitz, Assistant Prosecutor, argued the cause for respondent (James O. Tansey, First Assistant Prosecutor of Union County, attorney; Milton S. Leibowitz, of counsel and on the brief).

Appellant filed pro se supplemental briefs.

PER CURIAM

More than three decades ago, a death-qualified jury convicted defendant Mark Sette of mortally stabbing one of his four roommates, wounding another, and attempting to stab two neighbors in their condominium complex in Plainfield. Defendant was twenty-three years old with no criminal history at the time of the March 21, 1988, early morning rampage. The jury spared defendant's life; the trial judge sentenced defendant to an aggregate prison term of life plus thirty-eight years, with forty years of parole ineligibility.

On direct appeal, we affirmed all but one of defendant's convictions. State v. Sette, 259 N.J. Super. 156, 192 (App. Div. 1992). We remanded the reversed count for further proceedings and "for overall resentencing because of the consecutive sentence imposed on" the reversed count, and did not reach defendant's excessive sentencing argument. Ibid. Apparently, however, the matter slipped through the proverbial cracks for nearly thirty years. Following dismissal of the remanded count in 2019, another judge resentenced defendant to the same sentences on the remaining counts that had been imposed by the trial judge.

Defendant now appeals from the July 9, 2020 judgment of conviction (JOC), raising the following points in his counseled brief:

POINT I

THE MATTER MUST BE REMANDED FOR A NEW RESENTENCING BECAUSE, DESPITE OVER [THIRTY] YEARS OF REHABILITATIVE EFFORTS, THE COURT IMPOSED THE EXACT SAME SENTENCE BASED ON THE EXACT SAME AGGRAVATING FACTORS, THEREBY FAILING TO RESENTENCE [DEFENDANT] AS HE STOOD BEFORE THE COURT.

A. The Court Paid Mere Lip Service to the Rule that It Must Sentence [Defendant] Anew, Based Upon Who He Was on the Day of the Resentencing.

B. In Finding Aggravating Factor Three and Refusing to Find Mitigating Factors Eight and Nine, the Court Violated the Establishment Clause and Otherwise Made a Factually-Incorrect Finding. Aside From These Impermissible Rulings, the Court's Findings that [Defendant] is Likely to Recidivate Was Unsupported By the Record. [(Partially raised below).]

(i) The Court's Basis for Finding Aggravating Factor Three and Refusing to Find Mitigating Factors Eight and Nine Violated the Establishment Clause of our Federal and State Constitution and Was Otherwise Premised on an Erroneous Factual Finding that [Defendant] Had Never Undergone Mental Health Treatment. [(Not raised below).]

(ii) The Court's Finding of Aggravating Factor Three and Refusal to Find Mitigating Factors Eight and Nine Was Otherwise Unsupported.

C. The Resentencing Court Erred in Finding and According Heavy Weight to Aggravating Factor Two Because It Constituted Double-Counting, and Retreating to One's Bedroom Does Not Make a Victim Particularly Vulnerable or Incapable of Resistance.

D. The Resentencing Court Failed to Articulate Its Rationale for Finding Aggravating Factor Nine.

E. The Resentencing Court's Refusal to Find Mitigating Factor Four Was Rooted in a Misunderstanding of the Mitigator.

F. The Court Neglected to Explain How It Considered [Defendant]'s Age of [Twenty-Three] at the Time of the Offenses.

G. The Court Imposed Consecutive Sentences Without Considering the Overall Fairness of the Aggregate Sentence, Pursuant to State v. Torres[, 246 N.J. 246 (2021)].

## POINT II

THE [JOC] ALSO MUST BE CORRECTED TO REFLECT 11,756 DAYS OF PRIOR SERVICE CREDIT. [(Not raised below).]

In his pro se brief, defendant raises the following points, which we renumber for the reader's convenience:

POINT III

AT RESENTENCING, [THE JUDGE] DEFERRED TO [THE TRIAL JUDGE'S] ORIGINAL SENTENCE AND DEPRIVED DEFENDANT OF HIS RIGHT TO BE VIEWED CONTEMPORANEOUSLY.

POINT IV

DEFENDANT WAS DENIED A FUNDAMENTALLY FAIR HEARING WHEN THE JUDGE ALLOWED HIS ATTORNEY TO BE UNFAIRLY SURPRISED BY THE PROSECUTION. [(Not raised below).]

POINT V

DEFENDANT WAS DENIED DUE PROCESS WHEN THE SENTENCING COURT FAILED TO PROVIDE A NEW PRE-SENTENCE REPORT [(PSR)], AND RELIED ON THE ORIGINAL [PSR] GENERATED IN 1989. [(Not raised below).]

POINT VI

[THE RESENTENCING JUDGE] REIMPOSED AN ILLEGAL SENTENCE UPON DEFENDANT [BY FAILING TO MERGE COUNT TEN WITH COUNT ONE. (Not raised below).]

POINT VII

DEFENDANT WAS DENIED DUE PROCESS WHEN THE JUDGE (A) CONTRARY TO THE JURY'S FINDING DURING HIS INITIAL PENALTY PHASE HEARING FOUND THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATING, AND (B) IMPROPERLY ASSIGNED AGGRAVATING FACTORS [ONE], [TWO], [THREE], AND [NINE],

AND FAILED TO ASSIGN APPLICABLE  
MITIGATING FACTORS.

POINT VIII

DEFENDANT SHOULD HAVE RECEIVED A  
SEVENTY-FIVE[-]YEAR SENTENCE INSTEAD OF  
LIFE.

Having considered these points in view of the record and applicable legal standards, we are constrained to remand once again for resentencing.

I.

The facts of the brutal attacks are set forth at length in our prior decision, Sette, 295 N.J. Super. at 161-67, and need not be reiterated here. To lend context to the issues raised on appeal, we instead summarize the three-decade procedural posture.

In 1989, the jury found defendant guilty of the following offenses charged in a twelve-count Union County indictment: first-degree capital murder of Rosemary Devaney, N.J.S.A. 2C:11-3(a)(1) and (2) (count one); first-degree attempted murder of Peter Johnson, N.J.S.A. 2C:5-1(a)(1) and (2), and N.J.S.A. 2C:11-3(a)(1) and (2) (count three); second-degree aggravated assault against Michael Triano, and Gina Columbus, N.J.S.A. 2C:12-1(b)(1) (counts six and eight); fourth-degree unlawful possession of a hunting knife, N.J.S.A. 2C:39-5(d) (count nine); second-degree possession of a weapon for an unlawful

purpose, N.J.S.A. 2C:39-4(d) (count ten); third-degree aggravated assault against a police officer, N.J.S.A. 2C:12-1(b)(5) (count eleven); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2 (count twelve).<sup>1</sup>

The trial judge sentenced defendant to life imprisonment with a thirty-year term of parole ineligibility on count one; a consecutive twenty-year term of imprisonment, with a ten-year period of parole ineligibility on count three; a consecutive seven-year prison term on count six; a consecutive seven-year prison term on count eight; a consecutive four-year prison term on count eleven; following merger of count nine with count ten, a concurrent four-year prison term on count ten; and a concurrent nine-month prison term on count twelve.

As to counts one and three, the trial judge found aggravating factors one (the nature and circumstances of the offense); two (the gravity of harm to the victim, including the victim's particular vulnerability); three (the risk defendant will commit another offense); and nine (general and specific deterrence), N.J.S.A. 2C:44-1(a)(1), (2), (3), and (9),<sup>2</sup> substantially outweighed mitigating

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<sup>1</sup> The jury acquitted defendant of attempted murder of Triano and Columbus (counts five and seven); the court dismissed the lesser-included offenses of aggravated manslaughter of Devaney (count two) and aggravated assault against Johnson (count four).

<sup>2</sup> The judge found aggravating factors three and nine, only, on the remaining counts.

factor seven (defendant's lack of prior criminal activity), N.J.S.A. 2C:44-1(b)(7). In essence, the trial judge determined consecutive sentences were warranted in view of the "independent acts of violence and different victims." The aggregate sentence reflected the judge's "intention and desire and recommendation to the Parole Board that [defendant] spend the rest of [his] natural life away from society."

In September 2018 – twenty-six years after our 1992 decision reversing defendant's attempted murder conviction and remanding for further proceedings and resentencing – defendant filed a pro se application, styled as a motion to correct an illegal sentence pursuant to Rule 3:21-10(b)(5). Defendant claimed in March 1993, he was assigned counsel to represent him on the remanded charge, but "never heard back from the public defender or the Union County [P]rosecutor's Office." Defendant sought dismissal of count three and resentencing on the remaining counts. Among other arguments, defendant contended the trial judge improperly imposed consecutive sentences, erroneously found aggravating factors, and failed to find certain mitigating factors. Citing our decision in State v. Mance, 300 N.J. Super. 37 (App. Div. 1997), defendant requested an updated PSR prior to resentencing. Thereafter, defendant was assigned counsel. Because the trial judge had retired, the matter



was reassigned to another judge who, with the assistance of counsel, "attempted to reconstruct the record" following our remand.

One year later, during the September 3, 2019 motion hearing, the resentencing judge memorialized his recent conversation with the trial judge, who had recalled dismissing count three on the State's motion following our remand. However, the disposition neither was memorialized in an amended judgment of conviction (JOC), nor the computerized criminal case information and management system known as PROMIS/Gavel. The resentencing judge thus dismissed count three on the State's renewed application and scheduled the matter for resentencing.

Defense counsel thereafter filed a sentencing memorandum, arguing: the court must consider defendant's rehabilitation as of the date of resentencing; aggravating factors one, two, three, and nine found by the trial judge were not applicable; mitigating factors four, seven, eight, and nine, and defendant's youth at the time of the offense<sup>3</sup> and his age at the time of resentencing were applicable; and all counts should have been imposed concurrently to one

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<sup>3</sup> Mitigating factor fourteen (the offense was committed when the defendant was under the age of twenty-six), N.J.S.A. 2C:44-1(b)(14), became effective on October 19, 2020, after defendant submitted his sentencing memorandum to the trial court.

another. Defense counsel annexed various documents in mitigation of sentencing, including defendant's letter to the court; multiple letters of support; defendant's certificates of achievement; and the prison's "Progress Notes Report."

Prior to oral argument on December 6, 2019, the judge noted, according to the Criminal Division, an updated PSR "is not provided" on resentencing. However, the judge stated he "certainly" would "consider everything" defendant had presented in mitigation of his resentence. The judge afforded Devaney's family members to speak on the decedent's behalf, and defendant and his family members to speak on his behalf. At the conclusion of argument, the judge reserved decision.

On May 28, 2020, the resentencing judge issued an oral decision, spanning more than fifty transcript pages.<sup>4</sup> Citing the governing law, the judge recognized his obligation to resentence defendant anew, viewing defendant "as he st[ood] before the court on the day of sentencing." See State v. Randolph, 210 N.J. 330, 354 (2012) (requiring the court on resentencing to "view [the] defendant as he

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<sup>4</sup> Before the judge rendered his decision, defense counsel raised mitigating factor eleven, contending defendant was incarcerated at South Woods State Prison, which was experiencing "the most positive COVID-19 tests among inmates of any prison in New Jersey." See N.J.S.A. 2C:44-1(b)(11) (defendant's imprisonment constitutes hardship).

stands before the court on that day"); see also State v. Jaffee, 220 N.J. 114, 124 (2014) (holding the court's "review must include the defendant's post-offense conduct"); State v. Case, 220 N.J. 49, 70 (2014) (the judge "should give full consideration to all relevant evidence and all relevant sentencing factors as of the day [the] defendant stands before the court").

The judge acknowledged defendant's voluminous mitigation documents. Because he did not preside over the trial, the judge recited nearly verbatim all the facts set forth in our prior decision. The judge also considered the information contained in the 1989 PSR, including defendant's statements to the probation officer who had prepared the report. Defendant claimed prior to the incident he had "scored a very large quantity of cocaine, was drinking alcohol, and swallowed Co-Tylenol capsules in an effort to commit suicide." Defendant also "acknowledged a history of alcohol and drug usage"; "denied any alcohol or drug dependency"; and "admitted . . . the need for future psychological treatment."

According to the PSR, defendant was admitted to Trenton Forensic Psychiatric Hospital on March 22, 1988 "because he was confused, delusional, and suicidal." Discharged on April 4, 1988, defendant "was diagnosed [with] atypical psychosis, secondary to substance abuse, cocaine." Defendant told the

probation officer "he now realized he should have sought treatment for his depression prior to the instant offenses and acknowledged his need for future treatment." The hospital records were not included in the record.

The resentencing judge found the same aggravating and mitigating factors as the trial judge. Considering aggravating factor one, the judge found defendant's "repeated actions" of stabbing Devaney in her bedroom, while pursuing her down the stairs, and ultimately slashing her throat while she lay at the bottom of the stairs, demonstrated the murder was committed in an "especially heinous, cruel . . . or depraved manner." As to aggravating factor two, the judge similarly found defendant "ambushed" Devaney, "repeatedly stabb[ed] her," then "stood over her" and "slashed her throat," when she was "incapable of exercising normal physical resistance." The judge weighed both factors "very heavily."

Turning to aggravating factor three, the judge acknowledged defendant's progress during his thirty-two-year imprisonment, but the record was devoid of any indication defendant participated in mental health or substance abuse programs, or "counseling of any sort whatsoever," to address the issues that precipitated the incident. While the judge was issuing his decision, and for the first time before the trial court, defense counsel interjected, "the only substance

abuse courses offered in the State prison are those that conflict with [defendant's] religious beliefs." Counsel further stated defendant had not been cited for possession or use of intoxicating substances. The judge acknowledged that in 2012, defendant changed his religious designation from Catholicism to Buddhism. The judge also found aggravating factor nine based on the need for specific and general deterrence.

With the exception of mitigating factor seven, the judge rejected all other mitigating factors sought by defendant. As to mitigating factor four, the judge was not persuaded defendant's conduct was excusable based on the jury's determination that his "conduct was knowing [and] purposeful." Noting mitigating factors eight and nine are related to aggravating factor three, the judge reiterated "the record is barren of . . . any treatment for [defendant's] diagnoses at the time of his sentencing; no substance abuse treatment of any sort whatsoever." The judge also rejected mitigating factor eleven, finding the presence of the COVID-19 virus in prison, without any evidence in the record of defendant's comorbidities, did not constitute excessive hardship to defendant or his dependents.

As for the remaining counts – six, eight, ten, eleven, and twelve – the judge determined aggravating factors three and nine, and mitigating factor seven

applied for the same reasons stated for count one. Addressing the factors articulated by the Court in State v. Yarbough, 100 N.J. 627 (1985), the judge found the crimes charged in counts six, eight, and eleven constituted independent acts, with different objectives and different victims. The sentences on each of these counts were imposed consecutively to count one.

Overall, the judge imposed the same sentence on each count of conviction as the trial judge, except for the dismissed count three. Thus, defendant was resentenced to an aggregate term of life imprisonment, plus eighteen years, with a thirty-year parole disqualifier. This appeal followed.

## II.

### A. Aggravating and Mitigating Factors

We first address the overlapping arguments raised in points I (A through E), III, V, and VII, some of which were raised for the first time on appeal. The thrust of defendant's contentions is that the resentencing judge "merely rubber-stamped" the trial judge's sentencing decision, "failing to meaningfully resentence" him anew. Defendant challenges the judge's: assessment of the statutory aggravating and mitigating factors; failure to find his youth mitigated his conduct; and imposed consecutive sentences without considering "the overall fairness of the aggregate sentence." To support his contentions,

defendant now claims the judge erroneously relied on an outdated PSR and failed to order a new PSR "that accurately reflected defendant at his resentencing."

As a preliminary matter, we recognize neither the Rules of Court nor the Code of Criminal Justice mandates a new PSR on resentencing. See R. 3:21-2; N.J.S.A. 2C:44-6. Pursuant to N.J.S.A. 2C:44-6(a), however, "[t]he court may order a presentence investigation" even when an investigation is not "required by the Rules of Court." In our view, the three-decade gap between defendant's original sentence and resentencing warranted an updated PSR. Although the judge considered defendant's arguments and documentary evidence in mitigation of his resentence, the judge noted the record was devoid of any indication defendant had addressed his substance abuse and mental health issues while incarcerated. An updated PSR would have provided information regarding whether defendant had availed himself of any treatment programs while incarcerated, and whether those programs could have accommodated defendant's Buddhist beliefs.<sup>5</sup>

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<sup>5</sup> While defendant's appeal was pending, we denied his motion to supplement the record with information that was not provided to the resentencing court, i.e., that the prison's substance abuse programs "are at odds with his religious beliefs."

We conclude the resentencing judge erroneously sentenced defendant without ordering an updated presentence investigation addressing defendant's current mental health and any rehabilitative efforts made while incarcerated. See Mance, 300 N.J. Super. at 65. In Mance, we vacated the defendant's sentence where the trial court failed to order an updated PSR for crimes he committed while incarcerated in 1990, and relied instead on the PSR prepared in 1977 for a different crime. Ibid. We found the 1977 PSR "was either irrelevant or set forth material which was outdated, to say the least." Ibid. We therefore remand the matter for resentencing with an updated PSR.

In view of our disposition, we need not address defendant's specific challenges to the judge's assessment of aggravating factors one, two, three, and nine, and mitigating factors four, eight, and nine. Although we do not expect revisions to the circumstances of the offense in an updated PSR, the court on remand shall reassess all applicable factors, and make findings on the applicability or non-applicability of those factors and the weight ascribed to each factor.

#### B. Defendant's Youth

Because we are remanding for resentencing, we address defendant's contention, raised in point I (F), that the judge failed to consider he was twenty-



three-years old when he committed the murder and related offenses. When defendant was resentenced in December 2019, mitigating factor fourteen (defendant was under the age of twenty-six when the offense was committed) was not yet enacted. N.J.S.A. 2C:44-1(b)(14). However, after the briefs in this matter were filed, our Supreme Court decided State v. Lane, 251 N.J. 84 (2022).

In Lane, the Court held the Legislature intended this new sentencing factor "apply . . . prospectively to defendants sentenced on or after its effective date of October 19, 2020." Id. at 97. The Court further stated: "We view N.J.S.A. 2C:44-1(b)(14) to apply not only to defendants sentenced for the first time on or after October 19, 2020, but also to defendants resentenced on or after that date for reasons unrelated to mitigating factor fourteen." Id. at 97 n.3. Accordingly, on remand, the court shall find mitigating factor fourteen applies and assess its weight.

### C. Consecutive Sentences

In point I (G), defendant argues that in imposing consecutive sentences on counts six, eight, and eleven, the resentencing judge failed to comply with the Court's directive in Torres, 246 N.J. at 246, decided after defendant's resentencing. In Torres, the Court required a sentencing judge to provide "[a]n explicit statement, explaining the overall fairness of a sentence imposed on a

defendant for multiple offenses in a single proceeding or in multiple sentencing proceedings." Id. at 268.

In the present matter, the judge explained his reasons for imposing consecutive sentences in accordance with the Yarbough factors. However, in recognizing the critical consequence of the Legislature's elimination of Yarbough's sixth factor – an overall outer limit on consecutive sentences – the Torres Court reasoned:

Acknowledging and explaining the fairness of the overall sentence imposed on the defendant advances critical sentencing policies of the Code, as amplified by Yarbough. It remains, in fact, the critical remnant of accountability imposed by Yarbough, since the legislative elimination of the outer limit imposed by factor six.

[246 N.J. at 268.]

Because we are remanding for other reasons, if the court again chooses to impose consecutive sentences, it shall provide "[a]n explicit statement, explaining the overall fairness of [the] sentence imposed." Ibid.

#### D. Merger

We next consider defendant's pro se contention, raised in point VI, that the resentencing judge failed to merge his conviction for possession of a weapon

for an unlawful purpose (count ten) with his murder conviction (count one). The State does not challenge defendant's belated argument.

"At its core, merger's substantial purpose 'is to avoid double punishment for a single wrongdoing.'" State v. Romero, 191 N.J. 59, 80 (2007) (quoting State v. Diaz, 144 N.J. 628, 637 (1996)); see also N.J.S.A. 2C:1-8(a)(1) (providing a defendant may not be convicted of multiple offenses if "[o]ne offense is included in the other"); N.J.S.A. 2C:1-8(d)(1) (stating an offense is included in the other when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the [other] offense"). A conviction for possession of a weapon for an unlawful purpose must merge with the substantive offense where the defendant's only unlawful purpose in using the weapon was commission of the substantive offense. Romero, 191 N.J. at 79-80. Applying these principles here, we are satisfied count ten should merge with count one for sentencing purposes.

#### E. Jail Credits

For the first time on appeal, defendant asserts, in point II, the resentencing judge should have awarded 11,756 days of prior service credits, instead of jail credits from his date of arrest, March 22, 1988, through May 27, 2020, the day before his resentencing. Recognizing the "atypical" delay between our order

vacating defendant's sentence on count three and defendant's resentencing, the State counters "defendant is entitled to 10,597 days of jail credits and 1,159 days of prior service credits," but defers to this court to determine defendant's prior service credits.

"Service credits are awarded to a defendant for time served on a custodial sentence following the entry of a [JOC]. Jail credits are awarded to a defendant for time served in custody prior to the entry of a judgment of conviction." State v. Njango, 247 N.J. 533, 540, n.1 (2021); see also R. 3:21-8(a); State v. Rippy, 431 N.J. Super. 338, 350-55 (App. Div. 2013) (discussing the allocation of jail and service credits).

Because we are remanding for resentencing, we likewise remand for the court to calculate defendant's jail credit through the time of resentencing. The court shall also consider whether defendant is entitled to prior service credits in view of the "atypical" procedural posture of this matter. See Njango, 247 N.J. at 537 (awarding service credits under the fundamental fairness doctrine).

#### F. Remaining Contentions

To the extent not addressed, defendant's pro se contentions raised in point IV lack sufficient merit to warrant discussion in a written opinion, and our

disposition makes it unnecessary to discuss the assertions raised in point VIII.  
R. 2:11-3(e)(2).

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In sum, we vacate the sentences imposed and remand for the court to: (1) merge count ten with count one; (2) order an updated PSR; and (3) resentence defendant again. In doing so, and without expressing any opinion about specific findings the court may otherwise make on remand or the appropriate sentence it may impose: (a) the court shall reassess the applicable aggravating and mitigating factors, including mitigating factor fourteen; (b) if the court again chooses to impose consecutive sentences, it shall provide an explicit statement on the overall fairness of the sentence as required by Torres; and (c) the court shall reassess defendant's jail credits and determine whether any service credits are warranted.

Reversed and remanded. 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