SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0892-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLOS CEVALLOS-BERMEO,

Defendant-Appellant.

Submitted December 12, 2022 – Decided February 15, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 96-02-0323.

Carlos Cevallos-Bermeo, appellant pro se.

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Colleen Kristan Signorelli, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from an October 8, 2021 Law Division decision dismissing his pro se motion to correct an illegal sentence pursuant to Rule 3:21-10(b)(5). We affirm.

We glean these facts from the record. Following a 1997 jury trial, defendant was convicted of capital murder, first-degree kidnapping, first-degree aggravated sexual assault, second-degree attempted aggravated sexual assault, and related offenses. The convictions stemmed from defendant abducting a woman from the street in West New York in 1994 and dragging her into a parking lot where he sexually assaulted and brutally murdered her. In the sentencing phase, the jury could not reach a unanimous verdict regarding the imposition of the death penalty. As a result, in 1998, the judge sentenced defendant to consecutive terms for an aggregate sentence of life in prison plus sixty years, with a sixty-year parole disqualifier.[1]

We affirmed defendant's convictions but modified the sentences to run concurrently instead of consecutively, thereby reducing the aggregate sentence to life imprisonment with a thirty-year parole disqualifier. State v. Cevallos-

[1] The death penalty was abolished in New Jersey in 2007 and replaced with life imprisonment without the possibility of parole. See L. 2007, c. 204.

Bermeo, 333 N.J. Super. 181, 183 (App. Div. 2000).[2] We otherwise rejected defendant's arguments regarding his sentence, which challenged the judge's identification of the applicable aggravating and mitigating factors as well as his assessment and balancing of the aggravating and mitigating factors. Id. at 188. We determined the "contentions [were] without merit and d[id] not warrant discussion in a written opinion." Ibid. (citing R. 2:11-3(e)(2)). Thereafter, our Supreme Court denied certification. State v. Cevallos-Bermeo, 165 N.J. 607 (2000). Defendant's subsequent petition for post-conviction relief was denied by the trial court without an evidentiary hearing, and that decision was affirmed on appeal. State v. Cevallos-Bermeo, A-382-01 (App. Div.), certif. denied, 177 N.J. 221 (2003). Defendant then filed a petition for habeas corpus relief, which was denied by the District Court in an unpublished opinion. Cevallos-Bermeo v. Hendricks, No. 04-1469, 2006 U.S. Dist. LEXIS 769, at *76 (D.N.J. Jan. 6, 2006).

On August 12, 2019, defendant filed a pro se motion pursuant to Rule 3:21-10(b)(5) to correct an illegal sentence, arguing the sentencing court failed to conduct a presentence investigation and issue a presentence report

[2] The sentence imposed was to run consecutively to a sentence defendant was already serving on an unrelated murder conviction.

(PSR). In an October 8, 2021 written decision, the judge denied the motion, reasoning "a presentence investigation and report were not required" under N.J.S.A. 2C:44-6(a) because the "jury . . . imposed [the] sentence, rather than the judge." See N.J.S.A. 2C:44-6(a) ("The court shall not impose [a] sentence without first ordering a presentence investigation of the defendant and according due consideration to a written report of such investigation when required by the Rules of Court."). The judge also explained that the sentence was not illegal, but was authorized by law "as the sentence fell within the parameters set forth in N.J.S.A. 2C:11-3 at the time of the offense." This appeal followed.

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

> POINT I
>
> DEFENDANT CAN FILE A MOTION TO CORRECT AN ILLEGAL SENTENCE AT ANY TIME WITHOUT BEING TIME BARRED OR PROCEDURALLY BARRED.
>
> POINT II
>
> THE TRIAL COURT ERRED WHEN DENYING DEFENDANT BY MISTAKENLY CONCLUDING A JURY SENTENCED DEFENDANT THUS NEGATING THE NEED FOR A PRESENTENCE REPORT.[3]

[3] Defendant concedes a PSR was prepared and abandons his contrary argument. A review of the sentencing transcript confirms that a PSR was in fact prepared and reviewed prior to defendant's April 4, 1998 sentencing hearing.

POINT III

DEFENDANT WAS SENTENCED ILLEGALLY WHEN:

A. The Judge Did Not Weigh The Aggravating Factors. (Not Raised Below).

B. The Judge Sentenced Defendant To Pay The Maximum Amount Of Restitution Without A Statement Of Reasons Or Regard To His Ability To Pay. (Not Raised Below).

C. The Judge Failed To Find Mitigating Factors Unique To The Defendant. (Not Raised Below).

Rule 3:21-10(b)(5) provides, in relevant part, that "[a] motion may be filed . . . at any time" to correct "a sentence not authorized by law." In State v. Acevedo, 205 N.J. 40 (2011), our Supreme Court made clear that allegations of excessive sentencing based on improper consideration of the aggravating and mitigating factors are not cognizable under Rule 3:21-10(b)(5). Acevedo, 205 N.J. at 47. The Court explained that an illegal sentence cognizable under Rule 3:21-10(b)(5) "is one that 'exceeds the maximum penalty provided in the Code [of Criminal Justice] for a particular offense' or a sentence 'not imposed in accordance with law.'" Id. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). We have likewise recognized that, provided a sentence falls within the prescribed statutory range for the crime involved, "issues relating to the

determination of aggravating and mitigating factors, the balancing thereof and the conclusions resulting from that balancing generally deal with claims of 'excessiveness', as opposed to 'illegality.'" State v. Ervin, 241 N.J. Super. 458, 472 (App. Div. 1989).

Critically, a claim of an "excessive" sentence, as distinct from a claim of an "illegal" sentence, is cognizable "'only by way of direct appeal.'" Ibid. (quoting State v. Flores, 228 N.J. Super. 586, 595 (App. Div. 1988)); State v. Clark, 65 N.J. 426, 437 (1974) ("[M]ere excessiveness of [a] sentence otherwise within authorized limits, as distinct from illegality by reason of being beyond or not in accordance with legal authorization, is not an appropriate ground of post-conviction relief and can only be raised on direct appeal from the conviction."); State v. Tormasi, 466 N.J. Super. 51, 67 (App. Div. 2021) ("Claims that a sentence 'within the range permitted by a verdict' is excessive must be raised on direct appeal and 'are not cognizable . . . under the present Rule 3:21-10(b)(5).'" (alteration in original) (citations omitted) (first quoting State v. Hess, 207 N.J. 123, 145 (2011); and then quoting Acevedo, 205 N.J. at 47), remanded on other grounds, 250 N.J. 6 (2022)). Thus, to make a cognizable claim under Rule 3:21-10(b)(5), a defendant must challenge the legality of the sentence, rather than its excessiveness. Acevedo, 205 N.J. at 47.

Here, defendant's claims are not cognizable under Rule 3:21-10(b)(5) because by challenging "the determination of aggravating and mitigating factors, the balancing thereof and the conclusions resulting from that balancing," defendant's arguments go to the excessiveness of his sentence, not its illegality. Ervin, 241 N.J. Super. at 472. Moreover, as the judge concluded, defendant's sentence is not illegal because the sentence imposed "falls within the range authorized by the Legislature for the degree of crime involved." Ibid.; see also N.J.S.A. 2C:11-3(b)(1) (authorizing a sentence "to a specific term of years . . . between [thirty] years and life imprisonment of which the person shall serve [thirty] years before being eligible for parole" for first-degree murder).

Additionally, because defendant has already raised an excessive sentence argument on direct appeal, he is barred from doing so now under the law-of-the-case doctrine. "The law-of-the-case doctrine is a non-binding rule intended to prevent relitigation of a previously resolved issue in the same case." State v. Njango, 247 N.J. 533, 544 (2021) (quoting State v. K.P.S., 221 N.J. 266, 276 (2015)). Under this doctrine, "'once an issue has been fully and fairly litigated, it ordinarily is not subject to relitigation between the same parties either in the same or in subsequent litigation.'" Ibid. (quoting K.P.S., 221 N.J. at 277).

On direct appeal, defendant argued that "the sentence imposed was unjust, inappropriate and manifestly excessive." Cevallos-Bermeo, 333 N.J. Super. at 188 (emphasis omitted). Specifically, defendant argued that the sentencing judge "erred in [his] assessment of and weighing and balancing of aggravating and mitigating factors," and that he "[wrongly] found that there were no mitigating factors" because he failed to consider defendant's "longstanding problem with and addiction to alcohol" as well as "the reports of psychiatrists elucidating defendant's severe mental problems." We expressly rejected these arguments as devoid of merit. Ibid. Because the record clearly indicates that defendant had a full and fair opportunity to litigate the alleged excessiveness of his sentence, he is barred from relitigating the issue in this appeal.

Likewise, we reject defendant's contention that the sentencing judge's imposition of financial penalties totaling $14,000 was unlawful because the sentencing judge failed to articulate his reasons for imposing a maximum penalty and failed to consider defendant's ability to pay. The penalties imposed were within the applicable statutory range and failure to provide a statement of reasons does not make a sentence illegal. See State v. Hyland, 238 N.J. 135, 145 (2019) (explaining that a sentence "is not illegal if the sentencing judge fails

to state the reasons for imposition of a sentence on the record . . . , but otherwise imposes an authorized sentence." (citing Acevedo, 205 N.J. at 47)).

At the time of the crime, N.J.S.A. 2C:43-3.1(a)(1) authorized the assessment of a penalty of "at least $100.00, but not to exceed $10,000.00 for each . . . crime [of violence] for which [the defendant] was convicted which resulted in the injury or death of another person." The judge assessed $10,000 for the murder charge, and $1,000 each for the kidnapping, aggravated sexual assault, and attempted aggravated sexual assault charges.

Affirmed.