SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0901-21

STATE OF NEW JERSEY,

Plaintiff-Appellant/
Cross Respondent,

v.

ELLIOTT WRIGHT TAYLOR[1]
a/k/a ELLIOTT W. TAYLOR,
ELLIOT TAYLOR, ELLIOTT
WRIGHT, and ELLIOT WRIGHT,

Defendant-Respondent/
Cross-Appellant.

Argued May 31, 2023 – Decided June 28, 2023

Before Judges Messano, Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 20-12-0940.

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[1] Defendant is identified as Elliott W. Wrighttaylor in the judgment of conviction. However, defendant identified himself as Elliot Wright Taylor during the plea hearing.

William P. Miller, Assistant Prosecutor, argued the cause for appellant/cross-respondent (Mark Musella, Bergen County Prosecutor, attorney; William P. Miller, of counsel and on the briefs; John J. Scaliti, Legal Assistant, on the briefs).

Scott M. Welfel, Assistant Deputy Public Defender, argued the cause for respondent/cross-appellant (Joseph E. Krakora, Public Defender, attorney; Melanie K. Dellplain, Assistant Deputy Public Defender, and Scott M. Welfel, of counsel and on the briefs).

PER CURIAM

This appeal and cross-appeal implicate the propriety of defendant Elliott Wright Taylor's sentence and purported open guilty plea to offenses charged in a four-count Bergen County indictment: second-degree eluding, N.J.S.A. 2C:29-2(b) (count one); third-degree receiving stolen property, N.J.S.A. 2C:20-7 (count two); fourth-degree eluding, N.J.S.A. 2C:29-2(a)(2) (count three); and fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count four). Over the State's objection, the trial court entered the guilty pleas and thereafter sentenced defendant in the third-degree range to an aggregate prison term of four years.

The State appeals defendant's sentence as of right pursuant to Rule 2:3-1(b)(6) and N.J.S.A. 2C:44-1(f)(2), raising a single point for our consideration:

DEFENDANT'S DOWNGRADED SENTENCE SHOULD BE VACATED AND THE MATTER REMANDED FOR FURTHER PROCEEDINGS.

Subsumed within this point, however, the State also attacks the validity of defendant's guilty pleas. Citing "process" and "substantive" issues, the State argues the court failed to "turn square corners" by, among other things, undercutting the State's power to escalate its plea offers, and improperly negotiating the plea agreement with defense counsel under the guise of an open plea. The State also challenges the adequacy of defendant's factual basis for the second-degree eluding charge. The State seeks vacatur of the judgment of conviction and a remand permitting defendant either to: (1) plead guilty to second-degree eluding in exchange for the State's recommendation of a five-year prison term; or (2) allege ineffective assistance of plea counsel in exchange for the State's reinstatement of its pre-indictment offer, 180 days in the county jail as a condition of probation.

In response, defendant, through his first assigned appellate counsel, opposed the State's arguments, contending the State is procedurally barred from challenging the validity of defendant's guilty pleas, and the sentence was a proper exercise of the court's discretion. Defendant did not address the

effectiveness of his plea counsel. Claiming he had signed the pre-indictment plea forms, he filed a cross-appeal, raising one point:

> THE STATE VIOLATED DEFENDANT'S DUE PROCESS RIGHTS BY WITHDRAWING A [PRE-INDICTMENT] PLEA OFFER AFTER DEFENDANT HAD ALREADY ACCEPTED THE OFFER.

Thereafter, defendant's appeal was reassigned to another attorney. During oral argument before us, this attorney advanced a different approach from that of his predecessor.[2] In essence, defendant now claims he is entitled to the State's pre-indictment offer either because he signed the plea forms, or his plea counsel was ineffective for failing to convey to the prosecutor defendant's acceptance of the State's offer. Defendant acknowledges he did not file a cross-appeal on his ineffective-assistance-of-counsel claim and a hearing would be necessary to explore the communications between plea counsel and the prosecutor.

Although defendant maintains the court did not abuse its discretion at sentencing, he now asserts that if we vacate his sentence, his guilty pleas also must be vacated. To support his argument, defendant claims he relied to his detriment on the court's representation that he could move to vacate his plea if he were sentenced to greater than a four-year prison term. Should we vacate the

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[2] We granted defendant's ensuing motion to file a supplemental brief, memorializing appellate counsel's arguments before us.

sentence but not the guilty pleas, defendant alternatively argues "only in that case" he "would withdraw his double jeopardy objection to the State's [insufficient-factual-basis] argument." Defendant does not, however, explain how the factual basis was inadequate. Nor did he withdraw his cross-appeal.

Having considered the parties' contentions in view of the governing legal principles, we vacate defendant's sentence and remand for resentencing before a different judge. We decline to vacate defendant's guilty pleas. We agree with defendant's initial position that the State is procedurally barred from challenging his guilty pleas. Further, unless and until defendant is resentenced to a term of imprisonment that exceeds four years we reject, as premature, defendant's revised contention that he relied to his detriment on the court's sentencing representations. Nor are we persuaded by defendant's new contingent argument that his factual basis was inadequate.

I.

The facts supporting defendant's guilty pleas are straightforward. On September 13, 2020, defendant was driving a stolen Hyundai Elantra at a high rate of speed in Lyndhurst, when he failed to stop at two red traffic lights and disobeyed a police signal to stop. Eventually, the vehicle was disabled. Defendant "jumped out" of the car and ran from police. Defendant was arrested

after police found him "partially submerged in marshland." Defendant acknowledged he had no legitimate reasons to possess the knives police recovered from a bag inside the car.

The procedural history of this matter can only be described as tortured and, to quote the State, is set forth "in excruciating detail" in its merits brief. We need not reiterate the trial court events or the contentious nature of the proceedings in the same level of detail. Suffice it to say, several status conferences were held by four judges over the course of one year, and the relationship among the parties and the present judge was not a model of respect.

Defendant initially was charged by complaint-warrant. On November 4, 2020, he appeared at a pre-indictment conference in Early Disposition Court (EDC) via Zoom. In exchange for his guilty plea to third-degree eluding, the State offered to recommend a 180-day jail term to be imposed concurrently to any disposition on defendant's pending charges in Union County. The court rescheduled the matter for November 10, 2020, to afford plea counsel the opportunity to confer with defendant.

Although the parties did not provide the transcript of the November 10, 2020 EDC conference, they agree that the State amended its "one-day" only offer on that date to fourth-degree resisting arrest by flight, with the same 180-

day jail term recommendation – provided defendant return the signed plea forms by the end of that day. Because the matter was not resolved pre-indictment, the charges were presented to the grand jury and an indictment was returned in January 2021.

On February 10, 2021, a status conference was held before a different judge. The State revised its plea offer to an aggregate four-year prison term in exchange for defendant's guilty pleas to third-degree eluding and third-degree theft of a motor vehicle, to be imposed consecutively to any open charges. Plea counsel protested, claiming the facts had not changed in the three months since the State's November 10 pre-indictment offer. Citing "some glitch" in the transmittal of the plea forms from the jail, plea counsel said the forms were signed before the deadline, indicating defendant was willing to plead guilty on that date. According to plea counsel, "but for the pandemic, [defendant] would have been brought over to court" and his guilty pleas would have been entered. In view of the pandemic, however, the plea forms had "to be scanned; sent over; someone [had] to bring [defendant] down somewhere to do it; and it got lost in the weeds."

The prosecutor – not the one who had extended the pre-indictment offer – explained that according to her colleagues, plea counsel failed to contact anyone

in the Bergen County Prosecutor's Office (BCPO) indicating defendant wished to plead guilty prior to indictment. Referencing defendant's prior incarcerations, including "a five-year sentence for the exact same [eluding] offense," and because the offer was "really, really low," the prosecutor was not inclined to extend the same lenient offer at this stage. The prosecutor nonetheless spoke with her supervisor after the hearing. The State refused to lower its offer.

During the ensuing status conferences, plea counsel was adamant that defendant had accepted the State's pre-indictment offer. The prosecutor maintained plea counsel had not contacted the BCPO before the charges were presented to the grand jury. At one point, plea counsel accepted some responsibility for allowing the plea offer to lapse, stating: "I'm manning up to accept that [lapse] so blame it on me. [Defendant] should not be punished. He signed [the plea forms]." Eventually, at the July 26, 2021 status conference, the State withdrew its post-indictment plea offer and the matter was scheduled for a pre-trial conference in September 2021.

On September 29, 2021, the present judge held a case management and pretrial conference. The parties summarized their divergent views of the plea-offer history. Plea counsel emphasized defendant never rejected the offer. The prosecutor confirmed the State would not "conference" the case. The judge,

however, inquired whether defendant would consider "pleading open to the indictment and then making your case before this court?" After conferring with his client in a breakout room, plea counsel reported defendant would accept "the last plea offer that was on the table, which was the four flat, and he would . . . plead to that, he would do it today and be done with this." The judge adjourned the matter to afford the prosecutor an opportunity to confer with her supervisor. Again, the State refused to lower the offer.

On the October 4, 2021 return date, the judge acknowledged the State's escalating plea policy and its right "to take a hard line in this matter." However, the judge also noted "defendant signed the plea papers" in EDC but failed to meet the 3:00 p.m. deadline imposed by the State. Accordingly, the judge was convinced the "rule of reason" and fairness dictated that this matter should be resolved. Suggesting defendant "plead open to the indictment" the judge promised to impose an aggregate sentence in the third-degree range, unless the presentence investigation revealed negative information. In that case, the judge indicated she would grant defendant's application to withdraw his guilty pleas. Similarly, the judge recognized the State's right to appeal the sentence and promised that if defendant's sentence were vacated on appeal, she would grant

defendant's ensuing motion to withdraw his guilty pleas. Over the State's objection, defendant pled guilty on October 6, 2021.

Clearly convinced the mitigating factors substantially outweighed the aggravating factors, and in the interest of justice, the judge imposed the promised sentence on November 19, 2021. Over the objection of the prosecutor, see R. 3:9-3(c),[3] the judge dismissed the underlying motor vehicle violations: failure to observe traffic control device, N.J.S.A. 39:4-81; reckless driving, N.J.S.A. 39:4-96; failure to obey direction of officer, N.J.S.A. 39:4-80; and driving without a license, N.J.S.A. 39:3-10. The State appealed, and the judge thereafter provided an amplification statement on December 2, 2021. R. 2:5-1(b).[4]

[3] Rule 3:9-3(c) provides in pertinent part: "Nothing in this Rule shall be construed to authorize the court to dismiss or downgrade any charge without the consent of the prosecutor."

[4] The matter was initially listed on the excessive sentencing calendar pursuant to Rule 2:9-11. We thereafter granted the State's motion to schedule the matter on a plenary calendar. After defendant commenced serving his sentence, he was released from custody on November 18, 2022, pending appeal on his present appellate counsel's unopposed application. See R. 2:9-4.

II.

The State's ability to appeal a sentence is limited by double jeopardy principles and is ordinarily permissible only when authorized by statute or the sentence is illegal. State v. Hyland, 452 N.J. Super. 372, 380 (App. Div. 2017), aff'd as modified, 238 N.J. 135 (2019); State v. Chambers, 377 N.J. Super. 365, 369-70 (App. Div. 2005). In this case, the State appeals pursuant to N.J.S.A. 2C:44-1(f)(2), which authorizes an appeal when the trial court downgrades a first- or second-degree conviction and imposes a sentence to a term one degree lower.

The Criminal Code's sentencing laws are premised on three principles: (1) sentences should be based on "structured discretion designed to foster less arbitrary and more equal sentences"; (2) punishment should fit the crime, not the criminal; and (3) sentences should be subject to meaningful appellate review to promote uniformity. State v. Roth, 95 N.J. 334, 345-46, 361 (1984); see also State v. Fuentes, 217 N.J. 57, 71 (2014). Criminal offenses are categorized by degree. Relevant here, the sentencing range for a second-degree offense is five to ten years; the range for a third-degree crime is three to five years. N.J.S.A. 2C:43-6(a)(2) and (3).

Within the applicable sentencing range, the court exercises discretion in fixing the term by qualitatively weighing the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b). See State v. Case, 220 N.J. 49, 65 (2014). These factors require the court to consider the personal characteristics of the defendant and the circumstances of the offense to ensure an individualized assessment, while maintaining uniformity and predictability in sentencing. See id. at 63. The process preserves "the Legislature's intention to focus on the degree of the crime itself as opposed to other factors personal to the defendant." State v. Hodge, 95 N.J. 369, 377 (1984).

In limited cases, a sentencing court may downgrade a crime of the first- or second-degree to one degree lower for sentencing purposes. State v. Trinidad, 241 N.J. 425, 454 (2020). "[T]he standard governing downgrading is high." State v. Megargel, 143 N.J. 484, 500 (1996). The court "must apply a two-step process." State v. Rice, 425 N.J. Super. 375, 384 (App. Div. 2012) (citing N.J.S.A. 2C:4-1(f)(2)). The court "'must be clearly convinced that the mitigating factors substantially outweigh the aggravating ones and that the interest of justice demands a downgraded sentence.'" Ibid. (quoting State v. L.V., 410 N.J. Super. 90, 109 (App. Div. 2009)); see also Megargel, 143 N.J. at 496. "The reasons justifying a downgrade must be 'compelling,' and something in addition

to and separate from, the mitigating factors that substantially outweigh the aggravating factors." Rice, 425 N.J. Super. at 384 (quoting Megargel, 143 N.J. at 505).

The court must "consider the sentence from the perspective of deterrence." Trinidad, 241 N.J. at 454; see also Megargel, 143 N.J. at 501. "The paramount reason we focus on the severity of the crime is to assure the protection of the public and the deterrence of others. The higher the degree of the crime, the greater the public need for protection and the more need for deterrence." Megargel, 143 N.J. at 500. The "court should also state why sentencing the defendant to the lowest range of sentencing for the particular offense for which he was convicted, is not a more appropriate sentence than a downgraded sentence." Id. at 502.

Because the downgrade statute "is an offense-oriented provision," a sentencing court should not consider "a defendant's overall character or contributions to the community" under N.J.S.A. 2C:44-1(f)(2). State v. Lake, 408 N.J. Super. 313, 328 (App. Div. 2009). "Characteristics or behavior of the offender are applicable only as they relate to the offense itself and give fuller context to the offense circumstances." Ibid.

Ordinarily, our review of the sentence imposed by the trial court is circumscribed. State v. Miller, 205 N.J. 109, 127 (2011). We review the sentence for a mistaken exercise of the judge's discretion; we do not substitute our judgment for that of the sentencing court. Fuentes, 217 N.J at 70. "However, 'the deferential standard of review applies only if the trial judge follows the [Criminal] Code and the basic precepts that channel sentencing discretion.'" Trinidad, 241 N.J. at 453 (quoting Case, 220 N.J.at 65). Thus, a sentence will be affirmed unless it violated the sentencing guidelines, relied on aggravating or mitigating factors that "were not based on competent and credible evidence in the record," Fuentes, 217 N.J. at 70, or applied the guidelines in such a manner as to "make[] the sentence clearly unreasonable so as to shock the judicial conscience." Roth, 95 N.J. at 364-65.

With those principles in view, we turn to the judge's sentencing decision in this case. The judge found four aggravating factors applied: three (the risk of reoffending); six (extent and gravity of defendant's prior criminal record); nine (general and specific deterrence); and thirteen (use of a stolen vehicle in commission of the crime). N.J.S.A. 2C:44-1(a)(3), (6), (9), and (13). The judge placed "a small amount of weight" on aggravating factor three; "some weight"

on aggravating factors six and nine; and "greater weight" on aggravating factor thirteen.

The judge found six statutory mitigating factors applied: one ("defendant's conduct neither caused nor threatened serious harm"); two (defendant did not contemplate his or her actions would threaten or cause serious harm); four (substantial grounds justified or excused defendant's conduct); nine (defendant's character and attitude indicate an unlikelihood of reoffending); eleven (imprisonment will entail excessive hardship on defendant or defendant's dependents); and fourteen (the offense was committed when defendant was under the age of twenty-six). N.J.S.A. 2C:44-1(b)(1), (2), (4), (9), (11), and (14). The judge placed unspecified "weight" on mitigating factors one, two, and nine; "some weight" on mitigating factors eleven and fourteen; and "significant weight" on mitigating factor four.

The judge also was persuaded that non-statutory mitigating factors applied, including defendant's "remorse and accountability for his conduct"; "the unusual procedural history in this case"; "[defendant]'s difficult time in his life up to this point" and the court's "overriding concern that justice be done in this case."

Weighing the aggravating and mitigating factors, the judge found:

> Based on the record, the court was clearly convinced that the mitigating factors, including the fact that defendant did not cause any harm, did not contemplate causing serious harm, and defendant's history of mental health issues, as well as his remorse and accountability for his conduct, substantially outweighed the aggravating factors in this case. The court placed significant weight on the fact that defendant's crime was not violent and caused no harm.

As to the second downgrade step, the judge also was convinced "the interest of justice demanded that the court sentence the defendant in the third-degree range due, not only to the mitigating factors articulated, but also to the unusual and problematic procedural history of this case."

Emphasizing defendant's extensive juvenile and criminal record, the State challenges the judge's assignment of weight for the aggravating factors, and contends the judge erroneously found mitigating factors one, two, four, eleven, and fourteen. The State further argues the judge erred in finding the interest of justice demanded a downgraded sentence in this case by: "ignor[ing] defendant's criminal conduct"; "emphasiz[ing] defendant's plight"; and "pointing to the State's conduct during plea negotiations." Defendant acknowledges mitigating factors eleven and fourteen are inapplicable in this case. We are persuaded the judge erroneously applied the interest-of-justice step. We therefore vacate defendant's sentence and remand for resentencing.

In considering the "interest of justice" standard, the judge did not focus on the offense. She failed to explain why, for example, sentencing defendant at the lowest end of the range for a second-degree offense was inappropriate. Instead, the judge explained her reasons for the downgrade by focusing on the "unusual and problematic procedural history," concluding she "simply could not turn a blind eye to the series of miscommunications, animosity and problems between the attorneys in this case[,] which prejudiced . . . defendant." The judge further noted defendant's steadfast willingness to plead guilty and avoid a trial, commencing with his execution of the plea forms for the pre-indictment offer. The judge's interest-of-justice analysis was misplaced. The judge was not free to disregard the legislative scheme simply because she believed defendant was prejudiced by the miscommunication and personal animosity between counsel and her assessment that defendant had led a difficult life and intended no harm.

On remand, the "court must engage in a de novo review of the aggravating and mitigating factors applicable to . . . defendant at the time of his resentencing." State v. Jaffe, 220 N.J. 114, 122 (2014) (citing State v. Randolph, 210 N.J. 330, 333 (2012)). Accordingly, we need not address the judge's assessment of aggravating and mitigating factors. We simply note, as did the parties, mitigating factor eleven finds no basis in the record, and because

defendant was over the age of twenty-six when he committed the offense, mitigating factor fourteen was based on a mistake of law. See Fuentes, 217 N.J. at 70.

Because the judge's comments throughout the proceedings evinced her personal views, we remand for resentencing before another judge. See R. 1:12-1(d); Pressler and Verniero, Current N.J. Court Rules, cmt. 4 on R. 1:12-1 (2023) (providing "the appellate court has the authority to direct that a different judge consider other matters on remand and in subsequent proceedings in order to preserve the appearance of a fair and unprejudiced hearing").

III.

We turn to the State's challenges to the validity of defendant's guilty pleas. Although we recognize the judge erroneously characterized defendant's guilty pleas as "open,"[5] and improperly indicated the sentence she likely would

[5] "An 'open plea' to an indictment neither 'include[s] a recommendation from the State, nor a prior indication from the court, regarding sentence.'" State v. Vanness, 474 N. J. Super. 609, 625 (App. Div. 2023) (quoting State v. Kates, 426 N.J. Super. 32, 42 n.4 (App. Div. 2012)). "When a court gives an inclination of a sentence in a plea agreement, it is not an open plea to the indictment." State v. Ashley, 443 N.J. Super. 10, 22 (App. Div. 2015).

impose,[6] we agree with defendant's initial position that the State is procedurally barred from challenging defendant's guilty pleas on this appeal.

"[T]he State's right to appeal in a criminal proceeding is limited." Hyland, 238 N.J. at 143 (citing R. 2:3-1(b)). Pursuant to Rule 2:3-1(b),

> the State may appeal, or where appropriate, seek leave to appeal pursuant to R[ule] 2:5-6(a) . . . to the appropriate appellate court from: (1) a judgment of the trial court dismissing an indictment, accusation or complaint, where not precluded by the constitution of the United States or of New Jersey; (2) an order of the trial court entered before trial in accordance with R. 3:5 (search warrants); (3) a judgment of acquittal entered in accordance with R. 3:18-2 (judgment n.o.v.) following a jury verdict of guilty; (4) a judgment in a post-conviction proceeding collaterally attacking a conviction or sentence; (5) an interlocutory order entered before, during or after trial, or, (6) as otherwise provided by law.

The State's right to appeal defendant's sentence was authorized by N.J.S.A. 2C:44-1(f)(2) and Rule 2:9-3(c), and its right therefore was limited to the judge's downgrading determination. Nor did the State move for leave to appeal to set aside the guilty pleas. We therefore conclude its appellate rights were limited to the sentence imposed.

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[6] Pursuant to Rule 3:9-3(a), the court may indicate its tentative sentencing inclination with the consent of the parties. See State v. Williams, 277 N.J. Super. 40, 47 (App. Div. 1994) (stating "the trial court clearly may not . . . participate in plea negotiations").

For the sake of completeness, we briefly address the State's contention that defendant's factual basis established only the statutory elements for third-degree, not second-degree, eluding. The State's argument that defendant failed to expressly "allocute to any conduct that risked death or serious bodily injury" ignores the eluding statute's "permissive inference that the flight or attempt to elude creates a risk of death or injury to any person if the person's conduct involves a violation of chapter 4 of Title 39." N.J.S.A. 2C:29-2(b); see also Model Jury Charges (Criminal), "Eluding an Officer (N.J.S.A. 2C:29-2(b))" (rev. Nov. 15, 2004). Here, defendant was charged with three such moving violations giving rise to the permissive inference of a risk of significant harm. See State v. Wallace, 158 N.J. 552, 560 (1999) (recognizing where the permissive inference applied in a jury trial on an eluding charge, the State need not "present circumstantial evidence to prove that [the] defendant's conduct produced a risk of death or injury to any person").

IV.

Little need be said regarding defendant's cross-appeal. Defendant argues his due process rights were violated because he signed the pre-indictment plea agreement and, as such, an enforceable contract was formed. We disagree.

"A plea agreement is . . . governed by contract-law concepts." State v. Pennington, 154 N.J. 344, 362 (1998). "It requires a meeting of the minds upon the negotiated pleas and is an executory agreement since it depends on the approval of the sentencing court." State v. Smith, 306 N.J. Super. 370, 383 (App. Div. 1997). Under basic contract law principles, "[w]hen two parties reach a meeting of the minds and consideration is present, the agreement should be enforced." State v. Means, 191 N.J. 610, 622 (2007).

Importantly, however, "the State is free to withdraw from a plea agreement before the agreement is accepted by the court." Williams, 277 N.J. Super. at 47. Because the plea agreement was not accepted by the EDC, an enforceable agreement was not formed here.

Any other contentions raised on either appeal lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Defendant's sentence is vacated, and the matter is remanded for resentencing. Jurisdiction is not retained.