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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1780-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NANCY CAVANAUGH,

Defendant-Appellant.

Submitted March 6, 2023 – Decided March 22, 2023

Before Judges Mitterhoff and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 21-05-0496.

Law Offices of John J. Zarych, attorneys for appellant (John J. Zarych and Brenden T. Shur, on the briefs).

William E. Reynolds, Atlantic County Prosecutor, attorney for respondent (Mario C. Formica, Deputy First Assistant Prosecutor, of counsel and on the brief; Linda A. Shashoua, on the brief).

PER CURIAM

Defendant Nancy Cavanaugh appeals from a January 10, 2022 judgment of conviction ("JOC"), which sentenced defendant to twenty-one years imprisonment, following an open plea of guilty to two counts of first-degree aggravated manslaughter. We affirm.

At approximately 12:14 p.m. on February 26, 2019, Alisha Williams was driving northbound on English Creek Avenue in Egg Harbor Township with her ten-month-old infant, A.C., in the rear seat. In a fifty-mile-per-hour zone, defendant's vehicle crossed the center line into Williams's lane from the opposite direction, colliding head on with the victim's vehicle at sixty-eight miles per hour—exceeding the speed limit by seventeen miles per hour.

As a result of the collision, the victim's vehicle overturned, trapping her and her infant son inside. Shortly after, a fire developed, and smoke immediately filled the overturned vehicle. Despite attempted intervention by passersby, neither victim could be rescued from the vehicle. Both Williams and her son died in the fire.

Defendant was apprehended at the scene; police smelled alcohol on her breath and noticed that her eyes were bloodshot. Defendant waived her Miranda¹ rights at the scene and made admissions relative to her culpability,

¹ See Miranda v. Arizona, 384 U.S. 436 (1966).

specifically involving her abuse of substances. Defendant admitted that she had been drinking alcohol, that she was the one who went into the other lane of travel, and that the accident was her fault. As she rode in the ambulance, defendant stated multiple times that she should not have been driving.

Toxicology reports conducted after the accident established that defendant consumed the equivalent of four to six strong alcoholic drinks "in a very short period just before the crash," yielding a blood alcohol concentration of between 0.8 and 0.12% at the moment of impact. It was established that defendant had also taken two or three times the prescribed dosage of alprazolam (Xanax) that morning, well in excess of a therapeutic dosage. While at the hospital, the sixty-six-year-old defendant claimed that she was mixing drugs and alcohol to cope with a diagnosis of lung cancer she had received two months earlier.

On May 5, 2021, Atlantic County Indictment No. 21-05-0496 charged defendant with two counts of first-degree aggravated manslaughter, in violation of N.J.S.A. 2C:11-4(a)(1). On September 30, 2021, defendant entered an open plea in the discretion of the court on both counts of first-degree aggravated manslaughter.² The parties preserved all rights with respect to arguments on

² On January 10, 2022, defendant entered a guilty plea to operating a motor vehicle under the influence of alcohol and drugs, in violation of N.J.S.A. 39:4-50.

sentencing and defendant acknowledged that her maximum sentencing exposure was sixty years in state prison, subject to the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2.

On January 10, 2022, defendant was sentenced; after hearing oral argument from both sides and listening to victim impact statements, the sentencing judge proceeded to identify the applicable aggravating and mitigating sentencing factors to determine the term of defendant's sentence, pursuant to N.J.S.A. 2C:44-1. As for the aggravating factors, the judge made the following findings and determinations:

Aggravating factor three [N.J.S.A. 2C:44-1(a)(3)] applies and has moderate weight. There is a risk that this defendant will commit another offense. Although the defendant indicates that she has no prior substance issues and her acts here are explained by her emotion[al] state at the time, in the court's view there's a real risk that when faced with adverse personal conditions that she will have recourse to substance abuse again. That substance abuse, coupled with the operation of a motor vehicle, increases the risk this defendant will commit another offense.

Aggravating factor nine [N.J.S.A. 2C:44-1(a)(9)] applies and has the greatest weight. There is a need to deter this defendant and others from violating the law. The defendant will need to appreciate that lethal consequences follow from extremely reckless behavior. She needs to be specifically deterred from putting individuals at risk of serious bodily injury and death by

her conduct. Only a substantial commitment to state prison will serve as an effective deterrent.

Further, the general public needs to be deterred from similar conduct. There is no shortage of community messaging regarding the deadly consequences of drinking, drugging[,] and driving. However, that messaging oftentimes falls on deaf ears. The public needs to be generally deterred by the visitation of the lengthy prison sentence on an offender who's taken the lives of others.

As for the mitigating factors, the judge made the following findings and determinations:

The court has carefully considered the numerous mitigating fact[or]s urged by the defendant. Specifically[,] mitigating factor two [N.J.S.A. 2C:44-1(b)(2)]. The defendant did not contemplate that her conduct would cause or threaten serious harm. Mitigating factor seven [N.J.S.A. 2C:44-1(b)(7)]; defendant's lack of record. Mitigating factor eight [N.J.S.A. 2C:44-1(b)(8)]; the defendant is unlikely to repeat the offensive conduct. Mitigating factor nine [N.J.S.A. 2C:44-1(b)(9)], the defendant's good character and attitude.

Given the defendant's age and maturity at the date of the offense, the defendant could not have overlooked that her conduct was the quintessential threat to public and individual safety. As such, mitigating factor two does not apply here. For the reasons in finding aggravating factor three, the court declines to find mitigating factor eight. However, the court notes that the defendant's prior good repute and attitude of remorse. As such, the court will afford this factor moderate weight in finding mitigating factor nine.

The court cannot find sufficient evidence to credit mitigating factors two or eight. And as stated, the court finds mitigating factors seven and eight and gives them moderate weight.

After identifying the applicable factors, the judge then proceeded to balance the competing factors against each other:

Having due regard for the character and condition of this defendant, and having carefully[] weighed, balanced[,] and considered the two aggravating factors with the two mitigating factors, the court finds and concludes that the aggravating factors substantially preponderate over the moderate weight of the mitigating factors warranting a sentence at or above the midrange.

The defendant has argued that she should be treated as a second[-]degree offender. For the reasons and finding the applicable sentencing factors [sic], the court is of the opinion that the defendant has not established a legal or factual basis for sentencing to a lesser degree. Not only do the aggravating factors outweigh the mitigating factors, the interests of justice do not demand a lesser sentence than the one provided for an enhanced first[-]degree offense such as aggravated manslaughter for which the law urges special caution upon sentencing courts when considering a downgrade.

The court is mindful of the defendant's age, her significant adverse health conditions, the prior good repute in her community, and her extensive family support. Nevertheless, none of these factors militate in favor of a downward departure.

Ultimately, defendant was sentenced to two concurrent, twenty-one-year prison terms, subject to the provisions of NERA, reflecting a substantial reduction from the exposure she was facing.³ This appeal followed.

On appeal, defendant presents the following arguments:

POINT I

THE SENTENCING COURT ERRED IN FINDING AGGRAVATING FACTOR THREE IN A CASE IN WHICH A [SIXTY-SIX]-YEAR-OLD WOMAN WITH NO PRIOR CRIMINAL HISTORY WAS AT RISK TO COMMIT ANOTHER OFFENSE.

POINT II

THE COURT ERRED IN FAILING TO FIND MITIGATING FACTOR EIGHT.

POINT III

THE LOWER COURT FAILED TO PROPERLY CLARIFY IF IT FOUND MITIGATING FACTOR EIGHT.

POINT IV

THE COURT FAILED TO PROPERLY CONSIDER THE AGE OF THE DEFENDANT WHEN IMPOSING

³ Under N.J.S.A. 2C:11-4(c), defendant's sentencing exposure for first-degree aggravated manslaughter was a term of imprisonment between ten and thirty years. In light of State v. Carey, 168 N.J. 413, 429-30(2001), and State v. Liepe, 239 N.J. 359, 377 (2019), there was a great likelihood of consecutive terms since defendant's conduct resulted in the death of two individuals.

A SENTENCE OF [TWENTY-ONE] YEARS ON A [SIXTY-SIX]-YEAR-OLD DEFENDANT.

POINT V

THE COURT ERRED IN GIVING THE GREATEST WEIGHT TO AGGRAVATING FACTOR NINE.

POINT VI

THIS COURT [SHOULD] ORDER A RESENTENCING OF THIS MATTER BECAUSE THE SENTENCE IS IN EXCESS OF SIMILARLY SITUATED DEFENDANTS AND CREATES A SENTENCING DISPARITY (Not Raised Below).

POINT VII

THE COURT ERRED IN NOT FINDING THAT THE MITIGATING FACTORS OUTWEIGHED THE AGGRAVATING FACTORS TO SUCH AN EXTENT AS TO SENTENCE THE DEFENDANT TO A TERM OF IMPRISONMENT ONE DEGREE LOWER PURSUANT TO N.J.S.[A.] 2C:44-1(f)(2).

POINT VIII

THE LOWER COURT'S SENTENCE SHOCKS THE JUDICIAL CONSCIENCE (Not Raised Below).

We employ a deferential standard when reviewing a trial court's sentencing decision. State v. Grate, 220 N.J. 317, 337 (2015). "Appellate review of a criminal sentence is limited; a reviewing court decides whether there is a 'clear showing of abuse of discretion.'" State v. Bolvito, 217 N.J. 221, 228

(2014) (quoting State v. Whitaker, 79 N.J. 503, 512 (1979)). The appellate court should defer to the sentencing court's factual findings and should not "second-guess" them. State v. Case, 220 N.J. 49, 65 (2014).

The deferential standard of review applies, however, "'only if the trial judge follows the Code and the basic precepts that channel sentencing discretion.'" State v. Trinidad, 241 N.J. 425, 453 (2020) (quoting Case, 220 N.J. at 65). Therefore, "[a]ppellate courts must affirm the sentence of a trial court 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 'shock[s] the judicial conscience.'" Bolvito, 217 N.J. at 228 (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). The test also applies to "sentences that result from guilty pleas, including those guilty pleas that are entered as part of a plea agreement." State v. Fuentes, 217 N.J. 57, 71 (2014) (quoting State v. Sainz, 107 N.J. 283, 292 (1987)).

"The Criminal Code allows a sentencing judge to downgrade a first- or second-degree offense where 'the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands.'" Trinidad, 241 N.J. at 453 (quoting N.J.S.A. 2C:44-1(f)(2)) (emphasis in original); State v.

Megargel, 143 N.J. 484, 495 (1996) ("The sentencing judge must be (1) clearly convinced that the mitigating factors substantially outweigh the aggravating factors and (2) the interest of justice must demand the downgrade."). "Accordingly, downgrading, while not required, is appropriate where both prongs of the statutory test are satisfied." Trinidad, 241 N.J. at 453.

Fifteen aggravating factors are set forth in N.J.S.A. 2C:44-1(a), and fourteen mitigating factors are set forth in N.J.S.A. 2C:44-1(b). "[A] trial court should identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." State v. O'Donnell, 117 N.J. 210, 215 (1989). The court "must qualitatively assess" the factors it finds applicable and assign each "its appropriate weight." Case, 220 N.J. at 65.

With these guiding principles in mind, we discern no abuse of discretion in the judge's application and qualitative weighing of the statutory factors. As for aggravating factor three, "[t]he risk that the defendant will commit another offense," N.J.S.A. 2C:44-1(a)(2), we find the judge's reasoning that, should defendant be faced with adverse personal conditions again, there is a risk that she will have recourse to substance abuse again, which increases the risk that

she will commit another offense, was sound and supported by the record. Further, defendant's claim that the existence of a license suspension law—pointing specifically to N.J.S.A. 39:5-30(a) and (b)—somehow obviates the need to recognize a recidivism concern in this matter has no basis in law or fact.

Turning to aggravating factor nine, "[t]he need for deterring the defendant and others from violating the law," N.J.S.A. 2C:44-1(a)(9), the judge gave this factor "the greatest weight" and went into significant detail when explaining his reasoning for determining that both specific and general deterrence were necessary in this matter. As for specific deterrence, the sentencing judge stated that "defendant will need to appreciate that lethal consequences follow from extremely reckless behavior. She needs to be specifically deterred from putting individuals at risk of serious bodily injury and death by her conduct. Only a substantial commitment to state prison will serve as an effective deterrent."

As for general deterrence, the judge likewise found that the general public needs to be deterred from similar conduct. Despite the breadth of community messaging regarding the deadly consequences of drinking, taking drugs, and driving, the judge found that such "messaging oftentimes falls on deaf ears."

We find that the judge did not abuse his discretion in applying aggravating factor nine. While the need for specific deterrence is apparent, regardless of

defendant's age, the demand for general deterrence here is strengthened by "the gravity and harmfulness of the offense." Fuentes, 217 N.J. at 78-79 (quoting State in the Interest of C.A.H. and B.A.R., 89 N.J. 326, 334 (1982)).

Finally, it is well-established, and logically follows, that mitigating factor eight, "[t]he defendant's conduct was the result of circumstances unlikely to recur," N.J.S.A. 2C:44-1(b)(8), is to be weighed against aggravating factor three. See State v. Towey, 244 N.J. Super. 582, 593 (App. Div. 1990). Here, the judge opined, "[f]or the reasons in finding aggravating factor three, the court declines to find mitigating factor eight." Having already found the judge's application of aggravating factor three to be reasonable, we find no reason to disturb his application of mitigating factor eight here.

We further find that defendant's argument that the judge failed to properly clarify whether or not he found mitigating factor eight applicable lacks merit. The context of the transcript from the sentencing hearing and the JOC leads this court to the conclusion that the judge made a singular misstatement as to his findings. The judge's detailed reasoning behind his finding of mitigating factors seven and nine, and express dismissal of mitigating factor eight, defeats defendant's argument. In addition, the sentencing judge clearly stated that he balanced the "two mitigating factors" against the aggravating factors, which

clearly indicates that mitigating factor eight was not considered in the sentencing judge's analysis.

Any arguments not specifically addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION