SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2151-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

SAHIL KULGOD,

Defendant-Respondent.

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Submitted March 28, 2023 – Decided April 4, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment No. 15-04-0231.

John P. McDonald, Somerset County Prosecutor, attorney for appellant (Matthew Murphy and John Ascione, Assistant Prosecutors, on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (John P. Flynn, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

A jury convicted defendant Sahil Kulgod of second-degree vehicular homicide, N.J.S.A. 2C:11-5. The trial judge sentenced him to a five-year prison term subject to the mandatory parole ineligibility and parole supervision imposed by the No Early Release Act, N.J.S.A. 2C:43-7.2. We affirmed the conviction but remanded for resentencing. State v. Kulgod, No. A-1672-19 (App. Div. Sept. 10, 2021) (slip op. at 1). On remand, the trial court denied the State's motion to consider and weigh the impact of defendant's social media postings regarding his driving exploits, downgraded the conviction for sentencing purposes to the third-degree range, and imposed a four-year NERA term. The State appeals from the denial of its motion and the downgraded, reduced sentence. We vacate the sentence and remand for a second resentencing.

I.

The underlying facts were set forth in our opinion in the prior appeal.

> At approximately 10:00 a.m. on January 4, 2015, defendant, a college student home on his winter break, went for a drive in his black 2012 Ford Focus. He traveled southbound on a roadway in Hillsborough Township. The posted speed limit was 45 miles per hour, and as he approached a curve, a warning sign recommended a speed of 35 miles per hour. The road surface was wet from an earlier rainfall.

Beginning 1023 feet from the area of impact, a series of nine chevrons indicate the curve travels first from the left to the right, then from the right to the left. The configuration of the curve limits the sight line, as does some vegetative growth before the second half of the curve. Homes and driveways line the approach on the right side of the southbound lane, a sign announces "School Bus Stop Ahead" after the first chevron, another reads "Hidden Driveway"; and between the chevrons in the first curve and the second, a very large yellow arrow is posted. A yellow diamond-shape sign placed beyond that indicates a T-intersection after the curve. Also along that second curve is a sign depicting a man on horseback.

The State's accident reconstruction and Event Data Recorder (EDR) expert, Richard R. Ruth, testified regarding his examination of the EDR removed from defendant's car after the accident. He opined that five seconds before impact, defendant's vehicle was traveling at a speed of 86.5 miles per hour, plus or minus 4% (between 83 miles per hour and 90 miles per hour). In the next half-second, the Focus slowed slightly to 86.1 miles per hour, and the acceleration pedal position was at zero, meaning the driver's foot was off the pedal but the brake had not yet been activated. At four seconds before impact, the speed was reduced to 85 miles per hour, plus or minus 4%, and the brakes were touched lightly, although not slowing the vehicle down "very much." From three-and-a-half to two-and-a-half seconds before the crash, the driver depressed the brake pedal enough to reduce the speed to 74 miles per hour at three seconds. Given the road surface and physical forces involved, even extreme braking at that point could only result in a speed reduction of 12 to 3 miles per hour per second.

From two-and-a-half to one-and-a-half seconds, the speed dropped 5 miles per hour in one half-second and 4 miles per hour in the next half-second, so braking was occurring, but not at maximum. At two seconds before the impact, the anti-lock braking system was activated, but the car's speed was still 62.2 miles per hour. From two seconds to one-and-a-half seconds, the car slowed only another 4 miles per hour.

Somerset County Prosecutor's Office Lieutenant William Pauli also testified as an expert in accident reconstruction. After examining the road surface shortly after the accident, he concluded that as the victim's vehicle was traveling north in the northbound lane, defendant's Ford crossed the double yellow line, encroaching into the northbound lane of the second curve. The left front of the Ford struck the right front of the victim's tan 1991 BMW with such force that the BMW was pushed off the road. The right rear of the vehicle struck a tree after the car rotated 270 degrees.

Pauli opined the maximum speed a car traveling southbound could reach when entering the second curve to the left, without leaving its lane, was 49.26 miles per hour. Defendant was traveling at 86.5 miles per hour, plus or minus 4%, at five seconds out. At two seconds from impact, defendant's car was traveling at 62.2 miles per hour, at one-and-a-half seconds 58.6 miles per hour, and at one second 58.6 miles per hour. At half-a-second, the speed of travel was 52.4 miles per hour—all exceeding speeds at which the car could maintain the roadway. Although the maximum speeds were not calculated for a Ford Focus specifically, they were calculated for "[a] vehicle that's in normal turning condition."

. . . .

> Defendant, while maneuvering into the second portion of the S-curve, struck and killed Nancy Louie, who was driving her college-age daughter Melissa Louie's 1991 BMW. The two were traveling to New York City to spend the day with family. Melissa, seated in the passenger's seat, was only slightly injured. As she left the vehicle, she immediately realized that her mother had died. The medical examiner testified that Nancy's lethal injuries centered on the left side of the head, the chest, and the pelvis, including skull fractures.
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> [Id. at 1-2 (footnote omitted).]

After the jury found defendant guilty of vehicular homicide, the judge found defendant guilty of reckless driving, N.J.S.A. 39:4-96. Id. at 3. In sentencing defendant, the judge found aggravating factor nine (the need to deter defendant and others), N.J.S.A. 2C:44-1(a)(9), and mitigating factors seven (defendant's lack of criminal history), and nine (defendant's character and attitude indicate he is unlikely to commit another offense), N.J.S.A. 2C:44-1(b)(7) and (9). The judge found that aggravating factor nine was slightly outweighed by mitigating factors seven and nine.

The judge rejected mitigating factors two, four, and eight, N.J.S.A. 2C:44-1(b)(2), (4) and (8). As to mitigating factors two and four, we noted:

> The judge reasoned mitigating factor two was inapplicable because defendant could have readily contemplated that his conduct would cause or threaten serious harm, and the jury's verdict necessitated a

> finding of recklessness. The court rejected mitigating factor four—that substantial grounds existed tending to excuse or justify the conduct—because there simply was not enough evidence to establish, to his satisfaction or the jury's, that defendant's speed was necessary to avoid being tailgated by the metallic or blue BMW.
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> [Id. at 8.]

The judge imposed the minimum five-year NERA term for the second-degree vehicular homicide. See N.J.S.A. 2C:43-6.2(a)(2) (the ordinary term for a second-degree crime is between five and ten years).

We found "[t]he judge made inconsistent findings on the sentencing factors without providing a reasoned explanation for doing so, wrote the requirement of 'certainty' into mitigating factor eight, and omitted any mention of defendant's individual circumstances." Id. at 9. We vacated the sentence and remanded for resentencing. Ibid. We directed that upon resentencing, mitigating factor fourteen (defendant was under twenty-six years of age at the time of commission of the offense), N.J.S.A. 2C:44-1(b)(14), must be applied since defendant was twenty-one years old when the offense was committed on January 4, 2015. Ibid.

The State's Motion to Consider Defendant's Social Media Posts

Pursuant to a communications data warrant, the State recovered eleven posts on Twitter dated between October 4, 2014, and January 4, 2015, and a post

on defendant's Facebook page dated December 5, 2014. Most relevant here, a December 23, 2014 Twitter post read: "The number of times I've seen triple digit speeds is probably wayyy more than what my engineers had in mind . . . #shhh." Two December 27, 2014 Twitter posts read: "I still have speedstreaks from . . . all those times I was going over 110 mph teehee ;) #vroom" and "how Epic!!! In 2nd gear at 4000 rpm in a 4-wheel-drift going around the curve opposite Princeton Junction station." The court denied admission of all but one of the posts at trial.

On remand, the State filed a motion to have the trial court consider and weigh the impact of defendant's social media postings regarding his driving exploits on Twitter and his Facebook page on the aggravating and mitigating factors. The State argued the court was required to consider defendant's own voluntary statements that memorialized his purposeful misuse of public roadways to act out his racecar-driver fantasies in the weeks and days leading up to the January 4, 2015 offense.

The judge denied the motion without oral argument, reasoning that: (1) the social media posts were previously ruled inadmissible at trial; (2) they were excluded from consideration during the initial sentencing hearing; and (3) the prior exclusion was the "law of the case." The judge considered the State's

motion as "essentially a motion for reconsideration, post-appeal," which the court determined that procedurally, could not be heard.

The Judge's Sentencing Findings and Analysis

The judge noted he was resentencing defendant "based upon the defendant as he appears before me today." After recounting the underlying facts, he noted defendant expressed more remorse during his allocution than he did at the first sentencing.

The judge explained that aggravating factor nine applied since it was not limited to deterring defendant and is different than the risk of committing another offense. The judge stated he believed defendant needed to be deterred from future similar conduct, but did not give aggravating factor nine significant weight. The judge once again did not apply aggravating factor three.

The judge found mitigating factor seven, noting defendant had no prior criminal or motor vehicle charges. He applied mitigating factor fourteen as defendant was under twenty-six years old when the offense was committed. The judge explained that "[y]ounger individuals like [defendant] have the opportunity to change. There's the rehabilitation process. It's certainly easier with a younger formative brain than it is with the -- if he was [forty-six] as

opposed to [twenty-one]." The judge considered this a "weighty mitigating factor."

The judge once again applied mitigating factor nine, finding that "he's unlikely to commit another offense," which he differentiated from mitigating factor eight that applies when the "conduct was the result of circumstances unlikely to recur." Noting that unlike defendant's allocution during the first sentencing hearing, during which the judge "was not impressed that defendant really understood the gravity of the offense and was going to do something about it to change his behavior," the judge did not "see that now." The judge "believed that faced with these circumstances again, which are rare, but certainly could occur, that the conduct would not be the same." On that basis, the judge also found mitigating factor eight.

The judge found mitigating factors seven, eight, and nine to be "fairly weighty" and mitigating factor fourteen to have "significant weight." He rejected mitigating factor twelve, finding defendant did not cooperate with law enforcement. The judge found that clear and convincing evidence showed the mitigating factors substantially outweighed aggravating factor nine.

The judge then briefly considered whether the "interest of justice" demanded a downgrade. He noted that defendant's conduct involved reckless

driving, not drunk driving, but it still resulted in a death. Without making any other findings or providing any additional analysis, the judge found that it would be in the interest of justice to downgrade the second-degree offense one degree lower for sentencing purposes pursuant to N.J.S.A. 2C:44-1(f)(2). Defendant received a four-year NERA term, one year less than the original sentence.[1] This appeal by the State followed.[2]

II.

The State raises the following points for our consideration:

> I. THE TRIAL COURT'S SENTENCE MUST BE VACATED AND REMANDED FOR ANOTHER SENTENCING HEARING. FOR THE SECOND TIME IN THE SAME CASE, THE TRIAL JUDGE FAILED TO PROPERLY IMPOSE A SENTENCE IN ACCORDANCE WITH OUR [CRIMINAL] CODE AND CONTROLLING CASE LAW.
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> II. ON REMAND, THE APPELLATE DIVISION MUST ISSUE AN ORDER DIRECTING THE LAW DIVISION TO CONSIDER AND WEIGH THE IMPACT OF DEFENDANT'S TWITTER AND FACEBOOK STATEMENTS ON THE

[1] The judge clarified that the reckless driving and failure to keep right, N.J.S.A. 39:4-82, charges were merged into the vehicular homicide.

[2] On April 1, 2023, defendant was released from prison after serving 85% of his sentence and began serving the three-year period of mandatory parole supervision under N.J.S.A. 2C:43-7.2(c).

AGGRAVATING AND MITIGATING SENTENCING FACTORS.

III. ON REMAND, THE APPELLATE DIVISION SHOULD ORDER THAT THE RE-SENTENCING HEARING BE CONDUCTED BY ANOTHER JUDGE.

A.

We first address the denial of the State's motion to consider defendant's social media posts. We review that decision for abuse of discretion.

When fashioning a sentence, judges should consider "the fullest information possible concerning the defendant's life and characteristics . . . unconstrained by evidential considerations." State v. Fuentes, 217 N.J. 57, 71 (2014). Where resentencing is ordered, "the State [] is not limited in its presentation. The only restriction placed on both parties is that the evidence presented be competent and relevant." State v. Case, 220 N.J. 49, 70 (2014); see also State v. Smith, 262 N.J. Super. 487, 530 (App. Div. 1993) ("[S]entencing judges may consider material that otherwise would not be admissible at trial, as long as it is relevant and trustworthy."). When imposing sentence, the court must make an individualized assessment of the defendant based on the facts of the case and the aggravating and mitigating sentencing factors. State v. Jaffe, 220 N.J. 114, 122 (2014).

Defendant's social media posts discussing driving at speeds over 100 m.p.h. and performing four-wheel drifts were competent and clearly relevant to whether mitigating factors eight and nine applied, and if so, the weight to be given to each of those factors. The posts were not stale. They were made during the three months leading up to the date of the offense.

The court abused its discretion in excluding consideration of those posts. Their inadmissibility at trial is not controlling, nor is the fact that they were not considered during the prior sentencing hearing. On this basis, a remand for a second resentencing is required. On remand, the judge shall consider defendant's relevant social media posts.

B.

The Code's sentencing provisions are based on the principles that sentences should be the product of "structured discretion designed to foster less arbitrary and more equal sentences"; punishment should fit the crime, not the criminal; and sentences should be subject to meaningful appellate review to promote uniformity. State v. Roth, 95 N.J. 334, 345-49, 361 (1984). To that end, the Code grades offenses based on severity and provides corresponding sentencing ranges for each degree of crime. State v. Hodge, 95 N.J. 369, 375

(1984). However, the Code permits a sentencing downgrade in certain limited circumstances. To that end, N.J.S.A. 2C:44-1(f)(2) provides:

> In cases of convictions for crimes of the first or second degree where the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands, the court may sentence the defendant to a term appropriate to a crime of one degree lower than that of the crime for which he was convicted. If the court does impose sentence pursuant to this paragraph, or if the court imposes a noncustodial or probationary sentence upon conviction for a crime of the first or second degree, such sentence shall not become final for 10 days in order to permit the appeal of such sentence by the prosecution.

The required findings and appropriate analysis for a sentencing downgrade were explained in the concurring opinion on the first appeal:

> A sentencing downgrade under N.J.S.A. 2C:44-1(f)(2) is appropriate only if "the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors and where the interest of justice demands" the downgrade. See also [State v. Megargel, 143 N.J. 484, 496 (1996)]; State v. L.V., 410 N.J. Super. 90, 112-13 (App. Div. 2009). "[T]he court must find that there are 'compelling' reasons 'in addition to, and separate from,' the mitigating factors, which require the downgrade in the interest of justice." [State v. Locane, 454 N.J. Super. 98, 121 (App. Div. 2018)] (quoting State v. Jones, 197 N.J. Super. 604, 607 (App. Div. 1984)). See also Megargel, 143 N.J. at 505; L.V., 410 N.J. Super. at 112-13. "The interest of justice analysis does not include consideration of defendant's overall character or contributions to the community."

Locane, 454 N.J. Super. at 122 (citing State v. Lake, 408 N.J. Super. 313, 328-29 (App. Div. 2009)).

"The focus remains on the crime, as the downgrade statute 'is an offense-oriented provision.'" Id. at 121 (quoting Lake, 408 N.J. Super. at 328). "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." Id. at 122 (quoting Megargel, 143 N.J. at 500). In deciding whether to downgrade an offense, the court should consider the degree of the crime, whether the surrounding circumstances make the offense similar to one of a lesser degree, and the defendant's characteristics as they relate to the offense. Megargel, 143 N.J. at 500-01; [State v. Rice, 425 N.J. Super. 375, 384 (App. Div. 2012)]. The severity of the crime is the most important factor. Megargel, 143 N.J. at 500. "Where the crime includes an enhanced penalty, . . . 'trial courts must exercise extreme caution[ ]' before ordering a downgrade." Locane, 454 N.J. Super. at 122 (second alteration in original) (quoting Megargel, 143 N.J. at 502). See also Cannel, N.J. Criminal Code Annotated, cmt. 10 on N.J.S.A. 2C:44-1 (2021) ("A court should sentence to one degree lower only where the 'interest of justice' so requires, and it should be reluctant for crimes so serious that they carry sentences higher than those normal for the degree of crime." (citing State v. Mirakaj, 268 N.J. Super. 48 (App. Div. 1993))). Those factors all militated strongly against downgrading the second-degree vehicular homicide. The "interests of justice" did not require sentencing defendant one degree lower.

Moreover, where the Legislature has provided an enhanced penalty for an offense, "the downgrade of that

> offense requires more compelling reasons than the downgrade of an offense for which the Legislature has not attached an enhanced penalty." Rice, 425 N.J. Super. at 385 (quoting Megargel, 143 N.J. at 502). A sentencing court should not use its discretion to circumvent the legislative design. State v. Lopez, 395 N.J. Super. 98, 108-09 (App. Div. 2007). The Legislature subjected second-degree vehicular homicide to the parole ineligibility and mandatory parole supervision under NERA.
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> [Kulgod, (slip op. at 13-14) (Geiger, J., concurring).]

A trial court must state on the record its reasons for downgrading and should particularly state why a sentence at the lowest end of the sentencing range is not a more appropriate sentence. Megargel, 143 N.J. at 502. The decisions to downgrade and to set a term of imprisonment are distinct and independent decisions within the court's discretion. State v. Balfour, 135 N.J. 30, 38 (1994). Thus, a court may grant a request to downgrade an offense and yet impose the maximum term on the downgraded offense. Ibid.; State v. Nemeth, 214 N.J. Super. 324, 326-27 (App. Div. 1986).

We afford appropriate deference to the sentencing judge's findings of fact and discretionary decisions in reviewing a sentence, regardless of which party files the appeal. State v. Gerstofer, 191 N.J. Super. 542, 545 (App. Div. 1983). "However, 'the deferential standard of review applies 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). We do not overlook a trial court's failure to apply the correct statutory test, as interpreted by binding case law precedent, in determining whether to impose a downgraded sentence.

Downgrading a sentence is error if "the trial judge did not correctly apply the interest of justice prong of the downgrade provision as interpreted in Megargel." Lake, 408 N.J. Super. at 328. The basis for the interest of justice prong "must be separate and distinct from the mitigating factors." Id. at 329.

A conclusory statement that it would be in the interest of justice to downgrade the offense for sentencing purposes does not suffice. See State v. Moore, 377 N.J. Super. 445, 451 (App. Div. 2005) ("[T]he trial court must set forth its reasons why the interest of justice demands a downgrade." (citing Megargel, 143 N.J. at 498-502)); State v. Lebra, 357 N.J. Super. 500, 514 (App. Div. 2003) ("It is not enough to say that the 'interest of justice' demanded that defendant be sentenced within a third-degree range; the trial court was obligated to explain how it reached that conclusion."); see also R. 3:21-4(h) ("At the time the sentence is imposed the judge shall state reasons for such sentence . . . .").

Here, the judge provided no explanation for finding the interest of justice prong was satisfied. Noticeably absent from the judge's decision is any

consideration of whether there were "'compelling' reasons 'in addition to, and separate from,' the mitigating factors, which require the downgrade in the interest of justice." Locane, 454 N.J. Super. at 121 (quoting Jones, 197 N.J. Super. at 607). The judge also did not consider whether the surrounding circumstances make the offense similar to one of a lesser degree. See Megargel, 143 N.J. at 500-01; Rice, 425 N.J. Super. at 384. Nor did the judge consider the severity of the crime, see Megargel, 143 N.J. at 500, or the enhanced penalty for vehicular homicide, see Locane, 454 N.J. Super. at 122 (quoting Megargel, 143 N.J. at 502).

"A trial 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 under [N.J.S.A. 2C:]44-1f(2)." Megargel, 143 N.J. at 502. The judge provided no such explanation.

For this additional, independent reason, we vacate the sentence and remand for a second resentencing. On remand, the judge shall consider defendant's social media posts and engage in a fulsome consideration of the sentencing downgrade factors.

C.

The State contends that on remand, resentencing be conducted by a different judge assigned to Vicinage 13. Reassignment to a different judge is warranted when necessary "to preserve public trust in the sentencing framework established by our Code." State v. McFarlane, 224 N.J. 458, 469 (2019).

Here, the judge once again did not consider or apply the well-established factors applicable to a sentencing downgrade or engage in a meaningful analysis in granting the sentencing downgrade. We find this clear departure from the required decision-making process "undermines public confidence in our system of criminal sentencing." McFarlane, 224 N.J. at 469. On remand, the second resentencing shall be assigned to a different judge. We offer no comment on the appropriate sentence to be imposed on remand.

Vacated and remanded for resentencing in accord with this opinion. We do not retain jurisdiction.