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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2641-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDY J. DEJESUS,

Defendant-Appellant.

Submitted May 8, 2023 – Decided June 12, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment Nos. 18-10-0829 and 18-10-0842.

Joseph E. Krakora, Public Defender, attorney for appellant (Peter T. Blum, Assistant Deputy Public Defender, of counsel and on the brief).

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Leandra L. Cilindrello, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Andy J. DeJesus appeals from the fifteen-year sentence he received after pleading guilty to three robberies and aggravated manslaughter. We vacate the sentence and remand for resentencing.

I.

Defendant admitted that when he was eighteen he participated in three robberies, one of which resulted in the shooting death of a victim. On July 15, 2018, defendant and two accomplices approached a man sitting in his car. One accomplice tapped a gun on the window to put the occupant in fear. Although the trio attempted to steal property from the victim, they were unsuccessful.

About twenty minutes later, the three approached another man sitting in a car with the intent to commit a robbery. An accomplice again wielded a gun, which discharged, killing the victim. The trio fled without obtaining any property from the victim.

On July 30, 2018, defendant and an accomplice, who was wielding a gun, approached a third victim with the intent to commit a robbery. The pair was unsuccessful at obtaining property from the victim.

After being the subject of two indictments charging a total of twenty-one counts, defendant agreed to plead guilty to one count of first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), and three counts first-degree robbery,

N.J.S.A. 2C:15-1. In exchange, the State agreed to recommend a fifteen-year sentence, with an eighty-five-percent period of parole ineligibility.

Defendant's sentencing hearing was brief. The only substantive statement made by defendant's counsel was:

Your Honor, I have a young man who stands next to me that has no prior felonies. But I could tell you many things about him. I could tell you he's remorseful, as you know from his letter. But there's nothing I can tell you that can allow you to lessen the sentence. The sentence is what it is. He agreed to this sentence. So, basically, I have no recourse but to simply submit.

The assistant prosecutor urged the court to impose the recommended sentence.

The court's entire analysis of the aggravating and mitigating factors established in N.J.S.A. 2C:44-1(a) and (b) was as follows:

I find the following aggravating factors: number three, the risk that the defendant will commit another offense; number nine, the need to deter the defendant and others from violating the law.

Mitigating factors, I find none.

The aggravating outweigh the mitigating; however, I will sentence the defendant in accordance with the plea agreement.

The court then sentenced defendant to four concurrent terms of fifteen years of imprisonment, with an eighty-five percent period of parole ineligibility

pursuant to the No Early Release Act, N.J.S.A. 2C:43-7.2. Two February 13, 2020 judgments of conviction memorialize the sentence.

This appeal follows. Defendant raises the following arguments.

POINT I

DEJESUS SHOULD BE RESENTENCED BECAUSE THE SENTENCING COURT FAILED TO EXPLAIN WHY IT FOUND AGGRAVATING FACTORS THREE AND NINE.

POINT II

DEJESUS SHOULD BE RESENTENCED BECAUSE, GIVEN AN EIGHTEEN-YEAR-OLD OFFENDER'S LESSER CULPABILITY AND LIKELIHOOD OF REFORM, THE RECORD DID NOT SUPPORT A FINDING OF AGGRAVATING FACTORS THREE AND NINE, AND THE COURT IMPROPERLY FAILED TO CONSIDER SEVERAL MITIGATING FACTORS.

POINT III

DEJESUS SHOULD BE RESENTENCED BECAUSE DEFENSE COUNSEL WAS INEFFECTIVE IN WRONGLY CONCEDED THAT HE COULD NOT ARGUE FOR, AND THE COURT COULD NOT IMPOSE, A LESSER SENTENCE THAN THE PROSECUTOR'S RECOMMENDATION.

POINT IV

DEJESUS SHOULD BE RESENTENCED BECAUSE THE CURRENT MITIGATING FACTOR FOURTEEN PROVIDING THAT YOUTH IS

MITIGATING SHOULD BE GIVEN PIPELINE
RETROACTIVITY.

II.

We review defendant's sentence for abuse of discretion. State v. Pierce, 188 N.J. 155, 166 (2006). We must affirm a sentence "unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) 'the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience.'" State v. Fuentes, 217 N.J. 57, 70 (2014) (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

The sentencing court must examine the aggravating and mitigating factors enumerated in N.J.S.A. 2C:44-1(a) and (b). Id. at 72. Each factor found by the court must be relevant and supported by "competent, reasonably credible evidence." Ibid. (quoting Roth, 95 N.J. at 363). The court then must conduct a qualitative balancing of the factors to determine the appropriate sentence. Id. at 72-73. One "reasonable" approach is for the court to begin its analysis in the middle range for the offense at issue and determine whether the factors justify departure above or below the middle range. Id. at 73 (quoting State v. Natale, 184 N.J. 458, 488 (2005)).

"To facilitate meaningful appellate review, trial judges must explain how they arrived at a particular sentence." State v. Case, 220 N.J. 49, 65 (2014). "[T]he judge shall state reasons for imposing [a] sentence including . . . the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence." R. 3:21-4(h). Mere enumeration of aggravating factors is insufficient to survive appellate review of a sentence. Case, 220 N.J. at 65, 68.

The trial court provided no explanation for its conclusion that aggravating factors three, N.J.S.A. 2C:44-1(a)(3), and nine, N.J.S.A. 2C:44-1(a)(9), applied. Nor did the court explain its finding that no mitigating factors, N.J.S.A. 2C:44-1(b), applied. The absence of meaningful analysis in the trial court's sentencing decision warrants resentencing. At the resentencing hearing, defendant may offer evidence in support of the application of any mitigating factor or against the application of any aggravating factor including, but not limited to, the evidence and arguments he raised before this court.

We note as well that the trial court may have been under the mistaken impression that it was bound to impose the fifteen-year sentence recommended by the State. "Our jurisprudence makes clear that the State cannot insist on a term in a plea agreement that would vitiate the court's ability to exercise discretion in sentencing." State v. Hess, 207 N.J. 123, 151 (2011). "[A] criminal

sentence is always and solely committed to the discretion of the trial court to be exercised within the standards prescribed by the Code of Criminal Justice." State v. Warren, 115 N.J. 433, 447 (1989). "That discretion cannot 'be encumbered' by giving the prosecutor a stranglehold over the sentencing determination." Hess, 207 N.J. at 151 (quoting Warren, 115 N.J. at 447-48).

Defendant's counsel mistakenly stated that there was nothing he could say that would "allow" the court "to lessen the sentence" to which defendant agreed and that he had "no recourse but to simply submit." It is not clear from the court's terse opinion whether it believed it was bound by counsel's mistaken assertion that the court could not depart from the recommended sentence. Other than characterizing the charges as "serious," the assistant prosecutor offered no argument in support of the recommended sentence, which he urged the court to impose. This ambiguity in the record, coupled with defense counsel's failure to argue for application of any mitigating factors or against application of any aggravating factors, further justifies a resentencing hearing.

Finally, during the pendency of this appeal, the Legislature amended N.J.S.A. 2C:44-1(b) to add new mitigating factor fourteen. L. 2020, c. 110. The statute now provides as a mitigating factor "[t]he defendant was under 26 years

of age at the time of the commission of the offense." N.J.S.A. 2C:44-1(b)(14). According to the L. 2020, c. 110, § 2, "[t]his act shall take effect immediately."

Also during the pendency of this appeal, the Supreme Court issued its opinion in State v. Lane, 251 N.J. 84 (2020). There, the Court rejected the argument that the new mitigating factor should be given pipeline retroactivity, i.e. that the new factor should apply to defendants who were under twenty-six years old at the time of their offenses if their direct appeals were pending when the statute was amended. Id. at 87-88. Instead, the Court concluded that the amendment's legislative history "confirm[s] the Legislature's intent to authorize sentencing courts to consider the new mitigating factor in imposing a sentence on or after the date of the amendment." Ibid. The new factor applies to "defendants sentenced on or after . . . October 19, 2020[,]" id. at 97, including those who are resentenced after that date. Id. at 97 n.3. Because defendant will be resentenced after October 19, 2020, he is entitled to the benefit of mitigating factor fourteen at resentencing.

The sentence imposed in the February 13, 2020 judgments of conviction is vacated and the matter is remanded for a new sentencing hearing in accordance with this opinion. 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