SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: *A-2211-22T4*

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEMONT LOVE,

Defendant-Appellant.

CIVIL ACTION

ON APPEAL FROM FINAL ORDER OF
THE SUPERIOR COURT
MIDDLESEX COUNTY, LAW DIVISION -
CRIMINAL PART

SAT BELOW: Hon. Joseph Paone, J.S.C.

BRIEF AND APPENDIX IN SUPPORT OF APPEAL ON BEHALF OF DEFENDANT-APPELLANT

Lemont Love
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Defendant -Appellant
On the brief, *Pro-Se*

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PRELIMINARY STATEMENT

The defendant in this matter had two convictions vacated and he then filed a motion with the trial court to be resentenced based on the fact that the sentencing court considered to two vacated convictions when it imposed the sentence on defendant.

This case is straight forward and should be reversed and remanded for resentencing because the trial court denied the motion for resentencing based on the sentence not being illegal when the defendant properly motioned the court pursuant to ***Ct. R.*** **3:21-10(b)(7).**

The defendant is currently out of prison and on parole which expires in July of 2024, for this reason this case should be accelerated based on the fact that defendant will be irreparably harmed as he should have been resenteneed as a matter of law and if his sentenced is reduced his parole will be terminated immediately.

For these reasons this Court should grant this appeal and motion to accelerate the appeal.

PROCEDURAL HISTORY / STATEMENT OF FACTS[1]

On January 10, 2023, defendant filed a motion, for Ind No's: 07-03-502; 08-01-123; and 09-09-1537; in the Law Division to change or reduce his sentence due to prior convictions being vacated. **(Da1-4)**[2]

On February 15, 2023, a hearing was conducted by the Honorable Joseph Paone, J.S.C., wherein the judge denied the motion to change or reduce a sentence pursuant to R. 3:21-10(b)(7) on all indictments. **(Da5-7)**[3]

The sentencing Court relied on the convictions when sentencing defendant on Indictment No's: 07-03-502; 08-01-123; and 09-09-1537. **(Da10-14)**

The trial Court did find that the sentencing Court considered the convictions when sentencing defendant. **(1T8:17-25)**[4]

However, the Court determined that the sentence was legal and that on the basis that the sentence was not illegal he was going to deny the defendant's motion. **(1T18:23 to 19-15)**

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[1] The Procedural History and Statement of Facts are being combined for the convenience of the Court and all parties as they are so closely interwoven.

[2] "Da" refers to Defendant's Appendix attached hereto in support of defendant's appeal.

[3] Judge Joseph Paone, J.S.C., presided over defendant's R. 3:21-10(b)(7) motion, which defendant filed in his NERA case on another indictment and these indictments were included for resentencing but were later removed and separated due to defendant's counsel failing to provided the court with the sentencing transcripts of these convictions – thus this motion had to be refiled at a later date - in the previous matter Judge Paone DID GRANT defendant a two year reduction of that NERA sentence and that sentence was legal as well.

[4] "1T" refers to the February 15, 2023, motion hearing transcript.

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR RESENTENCING PURSUANT TO RULE 3:21-10(b)(7) ON THE BASIS THAT THE SENTENCE WAS NOT ILLEGAL (1T8:17-25; 1T19:1-15)

Pursuant to ***Ct. R.*** **3:21-10(b)(7)** a defendant may motion the court for "changing or reducing a sentence when a prior conviction has been reversed on appeal or vacated by collateral attack." *Ibid.* Consideration of this motion request is not based on the legality of the sentence but only if the motion is based on a prior conviction or convictions being vacated. *See Ibid.*

In this case the defendant had two convictions vacated and both convictions were relied on by the sentencing Court when the defendant was originally sentenced to the indictments on this appeal. (See Da8-14)

The defendant sought to be resentenced pursuant to ***R.*** **3:21-10(b)(7)**, based on the 2 convictions that were relied on by the sentencing Court when he was sentenced and sought a sentencing modification/reduction. Although defendant has served all his custodial time in this matter he is still on parole until July of 2024 pursuant to a N.E.R.A. conviction, however, he sought the reduction so that he could reduce his parole time with any service credits he would have if the Court reduced his sentence. ***See State v. Njango*****, 247 N.J. 533 (2021)**

If the trial court would have resentenced defendant as the defendant was

entitled to pursuant to ***R.*** **3:21-10(b)(7)**; the Court would have had to consider the defendant as he stood before the Court and the trial court should consider evidence of any rehabilitative efforts since the time a defendant was last sentenced. *See* ***State v. Randolph*****, 210 N.J. 330, 354-55 (2012).**

In this case the trial court acknowledged that the sentencing Court did consider the convictions when he sentenced the defendant (1T18:17-25; 1T19:1-15), however, the Court did not resentence the defendant as required but instead ruled that he since the sentence was not illegal he was denying defendant's motion. (1T18-23 to 19:1-15)

The Court erred by denying the motion on the basis that the sentence was not illegal – legality is not the requisite factor to be considered for resentencing relief, the only factor to be considered under ***R.*** **3:21-10(b)(7)** is whether a prior conviction was vacated and whether that vacated conviction was considered by the sentencing Court when imposing the sentence that the defendant is requesting resentencing, change or reduction of sentence.

Although, the fact that prior convictions were vacated does not require a change or reduction in a sentence. ***Rule*** **3:21-10** indicated that a defendant must "set forth the basis for the relief sought." ***R.*** **3:21-10(c)** Of course there would be a basis for a change or reduction of a sentence if a prior conviction was reversed or vacated and that prior conviction impacted the sentence sought to be changed or

reduced. ***See Id.***

This matter should be reversed and remanded for resentencing in accordance with R. 3:21-10(b)(7); and the Court should consider evidence of any rehabilitative efforts since the time the defendant was last sentenced pursuant to ***State v. Randolph***, 210 N.J. 330, 354-55 (2012).

CONCLUSION

For all the reasons argued herein Appellant respectfully requests that the Court vacate the trial Court's Order and remand for a new proceedings where appellant may be resentenced in accordance with R. 3:21-10(7).

Respectfully submitted,

Dated: October 9, 2023

LeMont Love
Defendant-Appellant, Pro-se

c: Middlesex County Prosecutor's Office

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LETTER BRIEF ON BEHALF OF
THE STATE OF NEW JERSEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

RE: STATE OF NEW JERSEY (Plaintiff-Respondent) v.
LEMONT LOVE (Defendant-Appellant)

App. Div. Docket No. A-002211-22T4

Criminal Action: On Appeal From an Order of the Superior Court of New Jersey, Law Division, Middlesex County, Denying A Motion to Correct an Illegal Sentence

Sat Below: Hon. Joseph Paone, J.S.C.

Honorable Judges:

Pursuant to Rule 2:6-2(b), this letter brief is submitted in lieu of a formal brief on behalf of the State of New Jersey.

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COUNTERSTAEMENT OF PROCEDURAL HISTORY AND FACTS

For purposes of this brief, the State will rely upon and incorporate by reference the procedural history and facts delineated in the Appellate Division's unpublished opinion of the defendant's direct appeal of his third petition for post-conviction relief. See (Pa1-6).

> On March 1, 2007, a Middlesex County grand jury returned Indictment No. 07-03-0408 ("Indictment 0408"), charging defendant with two counts of third-degree aggravated assault on a police officer, contrary to N.J.S.A. 2C:12- 1(b)(5)(a), one count of third-degree resisting arrest, contrary to N.J.S.A. 2C:29- 2(a)(3)(a), and one count of fourth-degree obstructing the administration of law or other government function, contrary to N.J.S.A. 2C:29-1(b).
>
> On March 22, 2007, a Middlesex County grand jury returned Indictment No. 07-03-0502 ("Indictment 0502"), charging defendant with one count of third-degree eluding, contrary to N.J.S.A. 2C:29-2(b).
>
> On January 22, 2008, a Middlesex County grand jury returned Indictment No. 08-01-0123 ("Indictment 0123"), charging defendant with two counts of third-degree distribution of cocaine, contrary to N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3), one count of third-degree possession of phencyclidine ("PCP"), contrary to N.J.S.A. 2C:35-10(a)(1), one count of third-degree forgery, contrary to N.J.S.A. 2C:21-1(a)(2), and one count of fourth-degree theft or unlawful receipt of a credit card, contrary to N.J.S.A. 2C:21-6(c).
>
> Finally, on September 11, 2009, a Middlesex County grand jury returned Indictment No. 09-09-1537 ("Indictment 1537"), charging defendant with one count of second-degree distribution of cocaine within 500 feet of a

public park, contrary to N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7.1, third-degree possession of cocaine, contrary to N.J.S.A. 2C:35-10(a)(1), third-degree possession of cocaine with intent to distribute, contrary to N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3), and one count of fourth-degree tampering with evidence, contrary to N.J.S.A. 2C:28-6(1).

On March 16, 2010, defendant entered into a negotiated global plea agreement, resolving all charges reflected in the four indictments. Through this agreement, defendant pled guilty to one count of third-degree distribution of cocaine under Indictment 0123, one count of third-degree possession of cocaine with intent to distribute under Indictment 1537, fourth-degree obstructing the administration of law under Indictment 0408, and third-degree eluding under Indictment 0502. On December 8, 2010, consistent with the plea agreement, defendant was sentenced to an aggregate term of ten years' imprisonment, with five years of parole ineligibility.

Defendant has attempted to reverse his conviction or withdraw his plea seven times. On June 22, 2010, defendant submitted a certification in support of his application to withdraw his guilty plea, which was denied on July 2, 2010. On direct appeal, defendant argued that the court erred in denying his application to withdraw his guilty plea. On June 21, 2013, we rejected defendant's argument and affirmed. State v. Love, No. A-2483-10 (App. Div. June 21, 2013) (slip op. at 1).

On January 17, 2012, defendant filed his first PCR application self represented, claiming that he was "tricked" by plea counsel into accepting the plea deal. Specifically, defendant claimed that he only pled guilty because his attorney lied by telling him that he could easily take back his plea. On March 14, 2014, court-appointed PCR counsel filed a brief and exhibit in support of defendant's petition. On May 9, 2014, the court denied defendant's petition without an evidentiary hearing,

reasoning that defendant did not submit any competent evidence supporting his allegation of ineffective assistance of counsel.

Defendant filed a motion for reconsideration of the denial of his PCR on June 27, 2014, which was ultimately denied on August 22, 2014. On September 22, 2016, we affirmed the court's decision to deny defendant's motion, finding that defendant's "self-serving spurious allegations of impropriety" against his plea counsel were not sufficient to meet his burden of proof. State v. Love, No. A-0480-14 (App. Div. Sept. 14, 2016) (slip op. at 6). We further stated:

> Independent of this substantive deficiency, this court has addressed and rejected on direct appeal defendant's argument attacking the legal viability of his guilty plea.
> . . .
> Defendant's PCR is a transparent attempt to relitigate the issue we have previously rejected on appeal and is therefore procedurally barred under Rule 3:22-5.
> [Id. at 6-7.]

On October 12, 2016, defendant filed a second petition for PCR, alleging ineffective assistance of plea, appellate, and PCR counsel; and newly discovered evidence of racial profiling, selective policing, and prosecutorial misconduct based on a Brady violation. On August 21, 2018, the court conducted a hearing on the matter and issued an oral opinion. Following oral argument, the court first rejected defendant's racial profiling argument, finding that it was not relevant to defendant's claim of ineffective assistance of counsel. Then, the court found that defendant's second PCR was not procedurally time-barred under Rule 3:22-12(a), reasoning that the untimeliness was not egregious and that the thrust of defendant's second PCR was his claim that original PCR counsel was ineffective. However, the court did find that defendant's request to withdraw his guilty plea was procedurally barred under Rule 3:22-5

> because that argument had already been raised and rejected by both the trial court and this court.

On January 10, 2023, defendant Lamont Love filed a Notice of Motion with the Superior Court, Law Division seeking a motion to correct an illegal sentence, pursuant to Rule 3:21-10(b)(7).

On February 15, 2023, the defendant appeared before the Honorable Joseph Paone, J.S.C., for oral argument. See generally, (2T[1]). On this same date, Judge Paone denied the defendant's motion and issued an oral opinion. Da5-7; (2T10-6 to 19-23). While the court noted that the original sentencing judge relied upon a conviction that was subsequently vacated[2] [3], Judge Paone found that "the sentence imposed was a legal sentence at the time, notwithstanding the fac[t] that that one prior conviction, that drug conviction was vacated, it was a legal sentence." (2T16-9 to 16-23; 18-24 to 19-2). The court further found, "[b]ecause the defendant had a prior history[,] . . . served a prison sentence[,] . . . got the benefit of a plea bargain, and – and even though that one sentence was vacated, that wouldn't be sufficient to sat that this was an illegal sentence or improper . . . sentence." (2T19-8 to 19-14).

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[1] "1T" refers to Transcript of Proceedings, December 8, 2010;
"2T" refers to Transcript of Proceedings, February 15, 2023.

[2] On August 2, 2012, the Honorable Alan Rockoff, J.S.C., signed an order vacating the defendant's conviction under Middlesex County accusation number 99-03-0055. Da8.

[3] On March 10, 2020, the Honorable Alberto Rivas, A.J.S.C., vacated the defendant's conviction under Middlesex County indictment number 07-03-0408. Da9.

The court noted that the sentence was within the statutory authorized range and "[t]here's no indication in the record that the judge simply and exclusively relied on this particular accusation that was vacated in arriving at his findings regarding aggravating factors." (2T19-15 to 19-18).

On March 27, 2023, the defendant filed a Notice of Appeal with the Superior Court, Appellate Division. The State submits this brief in opposition.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT APPROPRIATELY DENIED THE DEFENDANT'S MOTION TO CORRECT AN ILLEGAL SENTENCE.

Defendant claims the trial court erred in denying his motion to reconsider his sentence because he established that his sentence was illegal. Db3-5. Specifically, defendant argues that his sentence was illegal because the original sentencing court relied upon two convictions that were subsequently vacated, and thus, he is entitled to reduced sentence. Db3. However, the defendant's contentions are wrong. Contrary to defendant's arguments, he failed to present any evidence to establish that his aggregate custodial sentence of ten years with 5 years of parole ineligibility was illegal. Further, the original sentence imposed by Judge Rivas, was within the statutory range and authorized by law. As such, the trial court's order denying the defendant's motion should be affirmed.

Pursuant to Rule 3:21-10(c)(7), "[a] motion may be filed and an order may be entered at any time . . . (7) changing or reducing a sentence when a prior conviction has been reversed on appeal or vacated by collateral attack." An illegal sentence "exceed[s] the penalties authorized by statute for a specific offense." State v. Murray, 162 N.J. 240, 246 (2000). "A sentence may also be illegal because it was not imposed in accordance with law. This category includes sentences that, although not in excess of the statutory maximum penalty," are not authorized by statute. Id. at 247. "In addition, a sentence may not be in accordance with law because it fails to satisfy required presentencing conditions" or "include a legislatively mandated term of parole ineligibility." Ibid.

In an attempt to receive a reduced sentence, the defendant simply claims his sentence was illegal because the original sentence court relied upon two prior convictions that were subsequently vacated when it imposed aggravating factor six, N.J.S.A. 2C:44-1(a)(6). Defendant's argument, however, ignores his extensive criminal history that independently supports the finding of aggravating factors six.

It is undisputed that after the imposition of his aggregate custodial term of ten years with five years of parole ineligibility, two of the defendant's prior convictions were later vacated. Da8-9. However, that fact alone does not entitle

the defendant to a new sentencing hearing or a reduced sentence, as he would otherwise suggest. On December 8, 2010, the defendant resolved three cases by way of guilty plea which called for two, five-year sentences with two and one-half years of parole ineligibility to run consecutively to one another. (1T19-17 to 20-5). Additionally, the defendant's third case, where he was sentenced to a custodial term of 18 months, was ordered to run concurrently to the aggregate 10-year sentence. Ibid.

During the sentencing hearing, the defendant's extensive juvenile and criminal history was outlined on the record. (1T8-7 to 9-19). The sentencing court noted his extensive prior history in finding aggravating factor six applicable to this defendant. (1T:19-17 to 19). The sentencing court also found aggravating factors three, N.J.S.A. 2C:44-1(a)(3), and nine, N.J.S.A. 2C:44-1(a)(9). (1T22-4 to 22-5). Further, the court found no mitigating factors. Ibid.

As aptly noted by the motion court, "[t]here's no indication in the record that the judge simply and exclusively relied on th[ese] particular accusation[s] that w[ere] vacated in arriving at his findings regarding the aggravating factors." (2T19-15 to 19-18). Indeed, the vacated convictions were just a fraction of his overall criminal history and constituted a minor consideration in the imposition of the sentence by the court. Moreover, there consists considerable evidence in the record that continues to support the finding of aggravating factor six,

N.J.S.A. 2C:44-1(a)(6), in this case even without the two convictions that were subsequently vacated.

The sentence imposed by Judge Rivas continues to remain within the authorized range, in accordance with the law, and pursuant to a global plea resolution. Further, the defendant failed to present any evidence to establish how the imposition of aggravating factor six was improper in this case and how that in turn made his sentence illegal. Therefore, this court should affirm the motion court's order denying the defendant's motion to correct an illegal sentence.

CONCLUSION

For the foregoing reasons, the State urges this court to affirm the denial of defendant's motion to correct an illegal sentence.

Respectfully submitted,

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MIDDLESEX COUNTY PROSECUTOR

Randolph Mershon III

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Date: March 6, 2024

c/Lemont Love, pro se
(via U.S. Mail)