SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1887-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM F. ROSADO, a/k/a
WILLIAM M. ROSADO,

Defendant-Appellant.

Submitted May 10, 2017 – Decided June 8, 2017

Before Judges Alvarez and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Union County, Indictment No. 15-02-0127 and Accusation No. 15-09-0615.

Joseph E. Krakora, Public Defender, attorney for appellant (Alicia J. Hubbard, Assistant Deputy Public Defender, of counsel and on the brief).

Grace H. Park, Acting Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant William Rosado appeals from a judgment of the Law Division finding him in violation of his probation and from the imposition of a custodial sentence. We affirm.

By way of background, defendant was indicted for third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7), and fourth-degree theft by unlawful taking, N.J.S.A. 2C:20-3. Thereafter, the State lodged an accusation charging him with fourth-degree stalking, N.J.S.A. 2C:12-10(b).

On September 8, 2015, defendant pled guilty to the theft by unlawful taking and to the stalking charge. On October 23, 2015, defendant was sentenced in accordance with the plea agreement to concurrent eighteen-month periods of probation along with fines and penalties. The judge also imposed a permanent stalking restraining order (RO). The RO restrained defendant from any contact with N.S., including at her residence and place of employment.

In November 2015, defendant was charged by the Union County Probation Department with violating the terms of his probation. On December 3, 2015, a hearing was conducted before the judge who imposed the sentence.

During the hearing, N.S. testified that three days after the RO was in place, defendant sent her numerous texts. She further testified that upon returning from a vacation, she observed

defendant outside her residence by a tree. While at that location, defendant called her cell phone. N.S. spoke to defendant who told her he loved her and was sorry. She recognized both defendant's voice and the cell phone number from which the call was placed. Eventually, N.S. left her residence by car.

On another occasion, N.S. observed defendant as she entered the apartment building of a friend she was visiting. Defendant attempted to follow her, causing N.S. to enter the apartment and secure the door. She contacted the Woodbridge Police Department, who responded to the scene, but defendant was not located.

The judge found N.S. to be credible. In determining that defendant violated the terms of the RO, the judge held:

> In terms of the house incident in Rahway, clearly[,] as I went over the credibility factors, this witness made her own personal observation. She saw the [d]efendant standing across the street by a tree. She was receiving phone calls. She saw him making or on his phone while her phone was ringing with his number coming up across the street.
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> . . . .
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> . . . She sees him standing there. She sees him on the cell phone. She sees her phone lighting up with his number on it and she has a conversation with him where he starts making comments to her.
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> Clearly, a communication. Clearly, in violation of the restraining order. Clearly, it's verbal. And under the circumstances[,] it would be the type of communication to cause

annoyance or alarm. In terms of the Woodbridge incident, I do believe she personally identified the [d]efendant that day. It doesn't matter. He knew based on this restraining order, stay away. You see her, you go the other way. He didn't.

He pursued her into a building that she identified him as trying to get into the door, which she had just closed and then went into an apartment to lock herself or secure herself in the apartment, which was door number two inside the common entranceway of the building.

She [saw] him on the outside of the building. She said candidly he came out of [nowhere]. Now, I mean we know no one can come out of [nowhere]. But what does that mean?

. . . .

And she also indicated that she felt scared and nervous when he was calling her on the phone. And when she saw him in Woodbridge, she felt scared. Stalking restraining orders are a piece of paper. They're intended to tell someone stay away. That message needs to be heard. It was a condition of probation.

And what shocks the conscience of this [c]ourt is that I issued this order on the 23rd. And somewhere after [October 23], but on or before November 2[], specifically October [] 30[], we had incidents with the [d]efendant violating the order roughly a week old.

So I do find by a preponderance of the evidence that this [d]efendant violated the conditions of his restraining order, which the [c]ourt took time to explain to him in open court when he was being served as how this applies and what it means, stay away, no

> contact. The [c]ourt couldn't be more clearer on that point.

After hearing from the State, defense counsel, and defendant, the judge imposed an eighteen-month custodial sentence with a nine-month period of parole ineligibility on each charge to be served concurrently. The judge stated the reasons for the sentence:

> This [c]ourt finds incarceration is required to protect the public as this [d]efendant fails to accept the privilege of probation, defies the law, and defies the standard of conditions of probation. His adjustment is poor. He violated the order within days. And as a result[,] the [c]ourt finds that he disregarded the purposes of probationary supervision and the goals of a probation sentence.
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> The [c]ourt finds aggravating factors [three, six, and nine]. The [c]ourt finds mitigating [ten] no longer applies. Accordingly, I'm convinced aggravating's [three, six, and nine] outweigh the non-existent mitigating's. Mr. Rosado, I note your prior record. I find you're no longer a good candidate for probation. Your prior sentence is vacated.
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> And I'm sentencing you as follows. You're remanded to the custody of the [Department of Corrections] for [eighteen] months, with a [nine] month minimum. This will run consecutive to your other case as they're separate instances. You're discharged from probation without improvement. Your supervision fee is vacated. All sums will be collected through the C.E.U. Now, I do need an update on jail credit.

On appeal, defendant argues that the judge erred in finding that he violated probation by a preponderance of the evidence and that the sentence was excessive. We disagree.

Upon an allegation that a defendant has violated a condition of probation, the court will not hold a new criminal prosecution but rather a hearing as "part of the corrections process." State v. Reyes, 207 N.J. Super. 126, 134 (App. Div.), certif. denied, 103 N.J. 499 (1986); State v. Lavoy, 259 N.J. Super. 594, 600 (App. Div. 1992). Thus, the court need only be satisfied "by a preponderance of the evidence that defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of probation." State v. Jenkins, 299 N.J. Super. 61, 73 (App. Div. 1997) (quoting Reyes, supra, 207 N.J. Super. at 137). N.J.S.A. 2C:45-3(a)(4) authorizes "[t]he court, if satisfied that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order . . ., [to] revoke the . . . probation and sentence . . . the defendant." Further, "[w]hen the court revokes . . . probation, it may impose on the defendant any sentence that might have been imposed originally for the offense of which he was convicted." N.J.S.A. 2C:45-3(b).

Our review of a trial judge's fact finding underlying a violation of probation is "exceedingly narrow." See State v.

Locurto, 157 N.J. 463, 470 (1999); see also State v. Johnson, 42 N.J. 146, 161-62 (1964). We defer to the lower court's findings of fact, especially those that are substantially influenced by the trial judge's opportunity to hear and see the witnesses and to have the sense of the case. State v. Elders, 192 N.J. 224, 244 (2007). Thus, we will not disturb a court's finding of a violation of probation when supported by sufficient credible evidence in the record. See Johnson, supra, 42 N.J. at 162.

Against this backdrop, we reject defendant's contention that there was insufficient proof to warrant a finding of a violation of probation. As the judge appropriately noted, within days of the sentence and issuance of the RO, defendant engaged in conduct clearly violative of that which was prohibited and placed N.S. in fear of her safety. This was not the conduct of a person who intended to abandon the course of conduct that led to his conviction. Rather, it was indicative by both the conduct itself, i.e., stalking, and the timing of the conduct, i.e., within days of the sentence that defendant was not a suitable candidate for probation.

Nor do we conclude that the sentence was erroneous. When imposing a sentence, the court must identify and weigh all of the relevant aggravating factors counterbalanced with the mitigating factors supported by credible evidence. State v. Dalziel, 182

N.J. 494, 504-05 (2005). A court shall apply such mitigating factors as are present in the record or state why such factors are rejected. State v. Bieniek, 200 N.J. 601, 609 (2010). When a court imposes a sentence for a violation of probation, the court must weigh all aggravating and mitigating factors and a violation of probation is not itself considered to be an aggravating factor. See State v. Baylass, 114 N.J. 169, 176 (1989). "The only aggravating factors the court may consider are those that existed at the time of the initial sentencing." Ibid.

In imposing sentence, the judge hewed to Baylass by considering only those aggravating factors that existed at the time of the initial sentence. Ibid. Further, since the sentence imposed was one that might have originally been imposed for the offenses for which defendant was convicted, it was within the appropriate statutory range. N.J.S.A. 2C:45-3(b).

Finally, predicated upon our review of the record and in light of our deferential standard of review, the sentence imposed does not shock our judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16 (1989).

Affirmed.