SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4703-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLOS PENA,

Defendant-Appellant.

Submitted December 6, 2016 – Decided February 14, 2017

Before Judges Messano and Suter.

On appeal from Superior Court of New Jersey, Law Division, Sussex County, Indictment No. 96-06-0123.

Carlos Pena, appellant pro se.

Francis A. Koch, Sussex County Prosecutor, attorney for respondent (Shaina Brenner, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Carlos Pena appeals an April 29, 2015 order, which denied his request under Rule 3:21-10(b)(1) for a change of custodial sentence to permit entry into a rehabilitation program. We affirm the denial.

Defendant pled guilty in 1998 to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a); third-degree terroristic threats, N.J.S.A. 2C:12-3(a); third-degree possession of a firearm without a permit, N.J.S.A. 2C:39-5(b); and third-degree burglary, N.J.S.A. 2C:18-2, after he admitted shooting to death his ex-wife on February 10, 1996 and burglarizing her home a year earlier in March 1995. Defendant was sentenced to an extended term of life in prison on the aggravated manslaughter charge with a twenty-five-year period of parole ineligibility. Defendant was sentenced to a five-year term on the burglary charge to run concurrently.

In 2012, defendant filed a motion under Rule 3:21-10(b)(3) for change of custody status or reduction of sentence, but the motion was denied at the trial level and affirmed on appeal.[1] In 2015, defendant filed a motion for "reconsideration" of his sentence, this time requesting relief under Rule 3:21-10(b)(1). Defendant contended that because the statutory minimum term for first-degree aggravated manslaughter is ten years, N.J.S.A. 2C:11-4(c), and he has already served more than eighty-five percent of this, he should be eligible for relief under Rule 3:21-10(b)(1).

[1] Defendant also has unsuccessfully appealed his conviction and sentence and filed three separate petitions for post-conviction relief, without succeeding on the merits of those claims. We have no need to discuss those issues here.

The motion judge denied defendant's application on April 29, 2015, finding that defendant had "not satisfied the NERA portion of his sentence."[2] He also found "the protection of the community and the need for deterrence are paramount in this case."

Defendant contends that the parole ineligibility portion of his sentence should be construed to permit a change in his custodial sentence in order to allow him to attend a custodial or non-custodial rehabilitation program for drug or alcohol addiction. He raises the following issues:

> I. MOTION FOR [RECONSIDERATION] OF SENTENCE IS NOT TIME-BARRED.
>
> II. THE DEFENDANT MEETS THE CRITERIA FOR TRANSFER TO A TREATMENT PROGRAM UNDER RULE 3:21-10(B)(1).
>
> III. THE COURT FAILED TO ASSIGN COUNSEL DESPITE GOOD CAUSE BEING GIVEN.

A request for reduction or change in a sentence must be made by defendant within specified time frames. R. 3:21-10(a). One exception to that Rule is to "permit entry of the defendant into a custodial or non-custodial treatment or rehabilitation program for drug or alcohol abuse," which application can be made "at any time." R. 3:21-10(b)(1). The burden rests with defendant to establish he is an appropriate candidate for relief under the

[2] Reference is to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Rule. State v. McKinney, 140 N.J. Super. 160, 163 (App. Div. 1976). A motion requesting a reduction or change in a sentence "shall be accompanied by supporting affidavits and such other documents and papers as set forth the basis for the relief sought." R. 3:21-10(c). "A hearing need not be conducted . . . unless the court . . . concludes that a hearing is required in the interest of justice." Ibid. If "good cause" is shown, the court may also assign the Office of the Public Defender to represent defendant. Ibid.

"Where a parole ineligibility term is required or mandated by statute, an application may not be granted under R. 3:21-10(b) so as to change or reduce that sentence." State v. Mendel, 212 N.J. Super. 110, 113 (App. Div. 1986). Certainly, NERA's requirement of parole ineligibility is mandatory by statute; it is not discretionary. See N.J.S.A. 2C:43-7.2(a) ("A court imposing a sentence of incarceration for a crime of the first or second degree . . . shall fix a minimum term of 85% of the sentence imposed, during which the defendant shall not be eligible for parole."); State v. Le, 354 N.J. Super. 91, 96 (Law Div. 2002) (holding that defendant could not apply for reconsideration of sentence until he served the NERA period of parole ineligibility).

However, there is no reference to NERA in the sentencing record provided to us on appeal. Defendant shot and killed his

ex-wife on February 10, 1996, before NERA was enacted on June 9, 1997. See L. 1997, c. 117, § 2. He pled guilty in May 1998 and was sentenced in June 1998, before NERA was amended on June 29, 2001 to provide that its mandatory period of parole ineligibility was to be "based upon the sentence of incarceration actually imposed." N.J.S.A. 2C:43-7.2(b). See also L. 2001, c. 129, § 1-2; State v. Meekins, 180 N.J. 321, 328 (2004). Under the earlier version of NERA, a defendant sentenced to an extended term was "only subject to parole ineligibility for the maximum ordinary portion of the sentence." Meekins, supra, 180 N.J. at 328. However, a trial court retained the discretion "to impose a longer period of parole ineligibility on an extended term sentence if authorized by statute." Ibid.

Defendant's extended term sentence of life with a twenty-five-year period of parole ineligibility was affirmed on appeal and is not at issue here. However, the parties have provided little information about the extended term sentence, and the sentencing record before us is not complete. The record provided does not permit us to determine if the twenty-five-year period of parole ineligibility was imposed under N.J.S.A. 2C:43-7(b) or 7(c). Under either section, defendant could be sentenced to a period of parole ineligibility of twenty-five years, but under subsection (b) the decision whether to impose a period of parole

ineligibility was discretionary, although once that decision was made the court had no choice but to impose a twenty-five-year term. State v. Pennington, 154 N.J. 344, 360 (1998). See also State v. Swint, 328 N.J. Super. 236, 262-63 (App. Div.) (clarifying that a twenty-five year period of parole ineligibility was required for a life sentence), certif. denied, 165 N.J. 492 (2000). Where the decision to impose a period of parole ineligibility is discretionary, and not required by statute, we have held that the court can consider defendant's application under Rule 3:21-10(b)(1) for a transfer to an outpatient drug treatment program. See State v. Farrington, 229 N.J. Super. 184, 185-86 (App. Div. 1988). If, however, the twenty-five-year period of parole ineligibility was based on N.J.S.A. 2C:43-7(c), which is mandatory in requiring a twenty-five-year period of parole ineligibility, then defendant would not be able to apply for a change in sentence under Rule 3:21-10(b)(1). In any event, to the extent the motion judge denied defendant's application under Rule 3:21-10(b)(1) because of NERA, that determination was in error.

We agree with the motion judge, however, that defendant did not establish that he was an appropriate candidate for a change in his sentence. See McKinney, supra, 140 N.J. Super. at 163. To do so, defendant must show he suffers from a "present addiction." See State v. Davis, 68 N.J. 69, 84-86 (1975). See also State v.

Dachielle, 195 N.J. Super. 40, 47 (Law Div. 1984) (holding that proof must be more than a mere suggestion of addiction).

The motion judge found that "[d]efendant remains a risk to the community" and denied the motion "[a]gainst [the] factual history of threatening and deadly violence by the [d]efendant." Also, defendant never proved he was presently addicted to alcohol (or any substance) given his incarceration for more than a decade.

Finally, we are satisfied that defendant did not show "good cause" for the appointment of counsel under Rule 3:21-10(c), nor did defendant raise any factual issues that required an evidentiary hearing.

Affirmed.