

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0806-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVON L. NICHOLS, a/k/a
DAVON LAMAR NICHOLS,
and CLUMP,

Defendant-Appellant.

Submitted April 5, 2022 – Decided May 6, 2022

Before Judges Currier and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Indictment No. 03-02-0156.

Joseph E. Krakora, Public Defender, attorney for appellant (Ruth E. Hunter, Designated Counsel, on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Jennifer E. Kmiecik, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

In 2002, seventeen-year-old Davon Nichols brutally attacked two victims. He was tried as an adult before a jury and convicted of kidnapping, aggravated sexual assault, simple assault, robbery, and criminal restraint. Defendant was sentenced in 2004 to an aggregate sentence of twenty-nine-years in prison, with an eighty-five percent period of parole ineligibility under the No Early Release Act N.J.S.A. 2C:43-7.2. We affirmed the convictions and sentence. State v. Nichols, No. A-6700-03 (App. Div. Dec. 6, 2005). We also affirmed the denial of defendant's subsequent petition for post-conviction relief (PCR). State v. Nichols, No. A-1164-10 (App. Div. Aug. 23, 2012).¹

Thereafter, defendant moved to correct an illegal sentence. He relied on Miller v. Alabama,² State v. Zuber,³ and State v. Comer,⁴ in asserting his sentence constituted a cruel and unusual punishment. In an oral decision, the trial judge found defendant was not entitled to resentencing because he had not been sentenced to the functional equivalent of life without parole. Therefore, the motion to correct an illegal sentence was denied.

¹ Defendant did not raise any issues regarding his sentence in his PCR petition.

² 567 U.S. 460 (2012).

³ 227 N.J. 422 (2017).

⁴ 249 N.J. 359 (2022).

On appeal defendant raises the following points for our consideration:

POINT I.

BECAUSE DEFENDANT WAS A JUVENILE AT THE TIME OF THE OFFENSES, THIS MATTER MUST BE REMANDED FOR A RESENTENCING FOR THE COURT TO "TAKE INTO ACCOUNT HOW CHILDREN ARE DIFFERENT." MILLER v. ALABAMA, 567 U.S. 460, 471 (2012).

A. A Trial Court's Obligation To Conduct an Individualized Assessment of Each Criminal Defendant Includes the Consideration of the Aggregate Sentence In Light of a Defendant's Youth.

B. Special Consideration Must Be Given [To] Defendant Because He Was a Juvenile, And Thus "Different" Than Adults, At the Time of the Offenses.

C. The Sentencing Court Failed To Consider Defendant's Youth and the Motion Court Incorrectly Determined That the Principles of Miller and Zuber Did Not Apply.

POINT II.

THIS COURT SHOULD REMAND FOR RESENTENCING BECAUSE THE TRIAL COURT DID NOT EXPLICITLY FIND THAT THE AGGREGATE SENTENCE WAS FAIR AS REQUIRED BY STATE v. TORRES, [246 N.J. 246 (2021)].

POINT III.

THIS COURT SHOULD ADDITIONALLY REMAND FOR RESENTENCING FOR THE TRIAL COURT TO RECONSIDER DEFENDANT'S SENTENCE BASED ON THE YOUTH MITIGATING FACTOR, "THE 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).

Under Rule 3:21-10(b)(5), "an order may be entered at any time . . . correcting a sentence not authorized by law including the Code of Criminal Justice." See State v. Acevedo, 205 N.J. 40, 47 n.4 (2011) ("[A] truly 'illegal' sentence can be corrected 'at any time.'" (quoting R. 3:21-10(b)(5); R. 3:22-12). "[A]n illegal sentence is one that 'exceeds the maximum penalty . . . for a particular offense' or a sentence 'not imposed in accordance with law.'" Id. at 45 (quoting State v. Murray, 162 N.J. 240, 247 (2000)). "That includes a sentence 'imposed without regard to some constitutional safeguard.'" Zuber, 227 N.J. at 437 (quoting State v. Tavares, 286 N.J. Super. 610, 618 (App. Div. 1996)). "Whether [a] defendant's sentence is unconstitutional is . . . an issue of law subject to de novo review." State v. Drake, 444 N.J. Super. 265, 271 (App. Div. 2016) (citing State v. Pomianek, 221 N.J. 66, 80 (2015)).

Defendant argues that the tenets of Miller and Zuber render his sentence illegal and require a resentencing in light of "the mitigating qualities of [defendant's] youth." Miller, 567 U.S. at 476. We are not persuaded.

Defendant was not sentenced to life without parole or even "the practical equivalent of life without parole," as discussed in Zuber, 227 N.J. at 429. At the time of sentencing, defendant was nineteen years old. He will be eligible for

parole in May 2027 after serving approximately twenty-three years in prison. And according to the information provided by defendant from the Department of Corrections, his maximum release date is also May 2027. He will be forty-one years old. Defendant's sentence is not proscribed by either Miller or Zuber.

In addition, under our Supreme Court's recent holdings in Comer and Zarate, when defendant has served twenty years in prison, he may petition for a review of his sentence.

At that time, judges will assess a series of factors the United States Supreme Court has set forth in Miller v. Alabama, [567 U.S. at 476-78] which are designed to consider the "mitigating qualities of youth."

. . . .

At the hearing, the trial court will assess factors it could not evaluate fully decades before—namely, whether the juvenile offender still fails to appreciate risks and consequences, and whether he [or she] has matured or been rehabilitated. The court may also consider the juvenile offender's behavior in prison since the time of the offense, among other relevant evidence.

After evaluating all the evidence, the trial court would have discretion to affirm or reduce the original base sentence within the statutory range, and to reduce the parole bar to no less than [twenty] years.

[Comer, 249 N.J.at 370.]

Defendant also contends he is entitled to resentencing under recently enacted mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), which allows a trial court to consider a defendant's youth as a mitigating factor if the defendant was under the age of twenty-six when the crime was committed. We are not convinced.

In State v. Bellamy, 468 N.J. Super. 29, 47-48 (App. Div. 2021), we held mitigating factor fourteen does not apply retroactively to criminal convictions that were not on direct appeal when the statute was enacted in October 2020, unless there is an independent basis to order a new sentencing hearing.

Here, defendant exhausted his avenues of appeal many years before N.J.S.A. 2C:44-1(b)(14) was enacted, and we find no independent basis to remand for resentencing. We are mindful the Court has granted certification in State v. Lane, No. A-0092-20 (App. Div. Mar. 23, 2021), in which the pure legal question before the Court is whether, and if so, to what extent, N.J.S.A. 2C:44-1(b)(14) applies retroactively. 248 N.J. 534 (2021). But unless and until such time as the Court holds to the contrary in Lane, we abide by our holding in Bellamy.

We turn to defendant's contention that he is entitled to a resentencing under Torres, 246 N.J. at 268, for the trial judge to provide an "explicit

statement" explaining the "overall fairness" of an aggregate sentence imposed on a defendant for multiple offenses. We disagree.

On direct appeal, and in our review of the denial of defendant's motion to correct an illegal sentence, we have found defendant's sentence was legal and imposed in accordance with the law. Therefore, we need not address the consecutive nature of the sentence.

Moreover, Torres did not create a new rule of law, requiring retroactive application to this matter where defendant was sentenced eighteen years ago. The Torres Court explained its intention "to underscore" and "promote" the "concepts of uniformity, predictability, and proportionality" that underlie the Yarbough factors. Id. at 252-53. The Court stated,

We reiterate the repeated instruction that a sentencing court's decision whether to impose consecutive sentences should retain focus on "the fairness of the overall sentence." [State v. Miller, 108 N.J. [112,] 122 [(1987)]; see also State v. Abdullah, 184 N.J. 497, 515 (2005). Toward that end, the sentencing court's explanation of its evaluation of the fairness of the overall sentence is "a necessary feature in any Yarbough analysis." [State v. Cuff, 239 N.J. [321,] 352 [(2019)].

[Id. at 270.]

Torres did not announce a new rule. It renewed and reemphasized the long-established requirement that a sentencing court provide "an explanation of

the overall fairness of [a] consecutive sentence." Ibid. Furthermore, the Court considered the sentencing issue in the context of Torres's direct appeal. Therefore, because there is no new rule of law, retroactivity is not applicable. See State v. Feal, 194 N.J. 293, 307 (2008); State v. Burstein, 85 N.J. 394, 403 (1981) (stating "retroactivity can arise only where there has been a departure from existing law.").

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION