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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1461-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELIJAH HENRY,

Defendant-Appellant.

Submitted May 9, 2022 – Decided June 3, 2022

Before Judges Rose and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Indictment No. 17-07-2047.

Joseph E. Krakora, Public Defender, attorney for appellant (Karen A. Lodeserto, Designated Counsel, on the brief).

Theodore N. Stephens II, Acting Essex County Prosecutor, attorney for respondent (Emily M. M. Pirro, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Elijah Henry appeals from his aggregate sentence following separate guilty pleas. Because the trial court improperly found aggravating factor two, N.J.S.A. 2C:44-1(a)(2), we vacate defendant's sentence and remand for resentencing without consideration of that aggravating factor. On remand the court should consider the youth mitigating factor, N.J.S.A. 2C:44-1(b)(14).

Defendant was seventeen years old when he shot and killed Anthony Gettis and robbed Jason Beverly at gunpoint on separate dates in July 2016. Because defendant was a juvenile when the offenses were committed, jurisdiction of his delinquency charges was waived to the Law Division pursuant to Rule 5:22-2.

The following year in July 2017, defendant was charged in a nine-count Essex County indictment with both crimes, as follows:

1. July 1, 2016 homicide:

   - first-degree murder, N.J.S.A. 2C:11-3(a)(1) and (2) (count one);

   - second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count two); and

   - second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count three).

2. July 23, 2016 robbery:

- second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 and 2C:15-1(a)(2) (count four);
- first-degree robbery, N.J.S.A. 2C:15-1(a)(2) (count five);
- second-degree unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)(1) (count six);
- second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count seven);
- third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) (2012 Hyundai Electra) (count eight); and
- third-degree receiving stolen property, N.J.S.A. 2C:20-7(a) (handgun) (count nine).

In January 2018, defendant pled guilty to count five. Pursuant to the terms of the negotiated plea agreement, the State recommended a custodial sentence of eleven years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and dismissal of counts four, and six through nine. The three homicide-related counts remained pending until September 2018, when defendant pled guilty to count one as amended to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), and count two. According to the terms of the second negotiated plea agreement, the State recommended an aggregate prison sentence

of fifteen years, subject to NERA to be served concurrently to the previously recommended eleven-year prison term on count five. The State also recommended dismissal of count three.

Defendant was sentenced on November 26, 2018 to an aggregate fifteen-year sentence, subject to NERA on counts one and five, pursuant to the terms of the plea agreements. Prior to sentencing, defense counsel submitted multiple certificates of achievement on defendant's behalf; counsel supplemented the submission at the sentencing hearing with thirteen additional certificates and defendant's high school diploma. All achievements were attained while defendant was incarcerated at the juvenile detention facility. Defense counsel said he "had a lot of contact with the counselors at the juvenile facility," and "[f]or the most part, [he] received good reports." Counsel also told the judge defendant's mentors would "vouch for his good character."

Although defendant declined the opportunity to speak in mitigation of his sentence, his mother spoke on his behalf. Acknowledging defendant pled guilty to "very serious charges," defense counsel asked the court to sentence defendant "in accordance with the plea agreement taking all that into consideration." Defense counsel did not seek application of specific mitigating factors.

Several family members of the victim addressed the court. All expressed their sorrow; most said they forgave defendant. The State asked the court to find aggravating factors three (risk of re-offense), and nine (general and specific deterrence). See N.J.S.A. 2C:44-1(a)(3) and (a)(9).

Before identifying and weighing the aggravating and mitigating factors, the court recounted defendant's juvenile record, which included thirteen petitions, with three deferred dispositions. Considering defendant's achievements while incarcerated, the court found and assigned "minimal weight" to the "catchall" mitigating factor, "any other reasons." The court also found and assigned heavy weight to aggravating factors three and nine.

In addition, the court sua sponte found and assigned heavy weight to aggravating factor two, "the gravity and seriousness of harm inflicted by [defendant]." See N.J.S.A. 2C:44-1(a)(2). The court tersely continued: "The harm that [defendant] caused is as grave and as serious as it gets. There is nothing more serious than the loss of human life."[1]

With misgivings, the trial court sentenced defendant pursuant to the terms of the plea agreement. Addressing defendant, the court stated:

[1] The judgment of conviction inaccurately reflects the court found aggravating factor six; it also omits aggravating factor two.

> The aggravating factors far preponderate over any of the mitigating factors in your case. In my opinion, they weigh toward the highest end of the range.[2] In my opinion, you should get the most-stringent, strict, harshest sentence absolutely possible for what you've caused.
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> When I heard [the victim's mother] speak, she struck me with her mercy and her grace towards you, as did other members of her family.
>
> The prosecutor has what they call, "prosecutorial discretion," that they're entitled to make offers they believe [are] fair. This is clearly one of those that falls within their discretion, but I had certain hesitancy as to whether I should go with the plea, and the only thing that's convinced me is the grace and the mercy of the Gettis family.

Defendant filed a direct appeal of his sentence, which this court heard on an excessive sentencing calendar pursuant to Rule 2:9-11. Following argument on September 22, 2021, we transferred the matter to the plenary calendar, concluding full briefing was necessary for disposition.

On appeal, defendant raises two overlapping contentions for our consideration:

POINT I

> THIS COURT SHOULD REMAND FOR RESENTENCING FOR THE TRIAL COURT TO

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[2] The sentencing range for aggravated manslaughter is ten to thirty years. N.J.S.A. 2C:11-4(c).

RECONSIDER DEFENDANT'S SENTENCE BASED ON THE NEW 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), AND BECAUSE THE TRIAL COURT ERRED IN ITS FINDING AND WEIGHING OF AGGRAVATING AND MITIGATING FACTORS.

A. The New Youth Mitigating Factor Law Should Be Given Retroactive Application.

B. Defendant's Sentence Of 15 Years Subject To NERA Is Excessive Because The Trial Court Erred In Its Finding And Weighing Of Aggravating And Mitigating Factors.

"Appellate review of the length of a sentence is limited." State v. Miller, 205 N.J. 109, 127 (2011). Ordinarily, we defer to the sentencing court's determination, State v. Fuentes, 217 N.J. 57, 70 (2014), and do not substitute our assessment of the aggravating and mitigating factors for that of the trial judge, Miller, 205 N.J. at 127. We must affirm the sentence unless "the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record." Fuentes, 217 N.J. at 70.

The Legislature recently added a fourteenth factor to the list of mitigating factors a court must consider when imposing a criminal sentence: "The defendant was under [twenty-six] years of age at the time of the commission of the offense." N.J.S.A. 2C:44-1(b)(14). Absent an independent basis to remand

and resentence defendant, the new mitigating factor does not apply retroactively under our holding in State v. Bellamy, 468 N.J. Super. 29 (App. Div. 2021).

In Bellamy, we remanded for resentencing to permit the sentencing court to consider previously undisclosed reports from the Division of Child Protection and Permanency and reconsider the aggravating and mitigating factors before a new judge. Id. at 51. We held the defendant had "yet to incur a penalty within the meaning of the savings statute" and was therefore entitled to application of the new mitigating factor at her resentencing. Id. at 45. Although we suggested in Bellamy the new mitigating factor is ameliorative, we made clear:

> This is not intended to mean cases in the pipeline in which a youthful defendant was sentenced before October 19, 2020, are automatically entitled to a reconsideration based on the enactment of this statute alone. Rather, it means where, for a reason unrelated to the adoption of the statute, a youthful defendant is resentenced, he or she is entitled to argue the new statute applies.
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> [Id. at 48.]

In the present matter, the crux of defendant's argument is that the court failed to consider his youth when imposing sentence. Defendant initially argues mitigating factor fourteen should be applied retroactively because his appeal was in the "pipeline" when the factor was enacted on October 19, 2020, and he is entitled to resentencing based on the statutory amendment. We are mindful

the Court has granted certification in State v. Lane, No. A-0092-20 (App. Div. Mar. 23, 2021), in which the sole 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). Unless and until such time as the Court holds to the contrary in Lane, we abide by our holding in Bellamy, concluding defendant is not entitled to resentencing for retroactive application of mitigating factor fourteen based solely on "a reason unrelated to the adoption of the statute." Bellamy, 468 N.J. Super. at 48.

We therefore turn to defendant's additional contentions regarding his sentence. Defendant generally argues the court misapplied the aggravating and mitigating factors. Acknowledging defense counsel did not argue for the application of specific mitigating factors or challenge the application of aggravating factors, defendant now suggests the court failed to sua sponte determine his youth supported the finding of the following mitigating factors: four (substantial grounds justified or excused defendant's conduct), seven (no prior history of juvenile delinquency or criminal activity), eight ("defendant's conduct was the result of circumstances unlikely to recur"), and nine (defendant's character and attitude indicate he is "unlikely to commit another offense"). See N.J.S.A. 2C:44-1(b)(4), (7), (8), and (9). Defendant also argues

the court erroneously found aggravating factor three.

Although defendant noted the court found aggravating factor two, he does not expressly argue the factor was found in error. Because defendant generally argued the court erroneously applied the aggravating and mitigating factors, we address the court's aggravating factor two finding to determine whether it was supported by "competent and credible evidence in the record." See Fuentes, 217 N.J. at 70.

Aggravating factor two involves an assessment of "[t]he gravity and seriousness of harm inflicted on the victim," taking into account the defendant's knowledge "that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, ill-health, or extreme youth, or was for any other reason substantially incapable of exercising normal physical or mental power of resistance." N.J.S.A. 2C:44-1(a)(2). This aggravating factor therefore "focuses on the setting of the offense itself with particular attention to any factors that rendered the victim vulnerable or incapable of resistance at the time of the crime." State v. Lawless, 214 N.J. 594, 611 (2013).

A sentencing court may not base its finding of aggravating factor two solely on the fact that the harm contemplated by the statute proscribing the criminal conduct occurred. See State v. Kromphold, 162 N.J. 345, 356-58

(2000); cf. State v. Locane, 454 N.J. Super. 98, 124 (App. Div. 2018) (holding the trial court erred in failing to find aggravating factor two where the victim's injuries exceeded those necessary to establish the assault by auto offense). A sentencing court engages in impermissible double counting when "elements of a crime for which a defendant is being sentenced" are "considered as aggravating circumstances in determining that sentence." Kromphold, 162 N.J. at 353. "[A] sentencing court must scrupulously avoid 'double-counting' facts that establish the elements of the relevant offense." Fuentes, 217 N.J. at 74-75; see also State v. Yarbough, 100 N.J. 627, 645 (1985).

In applying aggravating factor two in the present case, the court cited only the gravity of the harm inflicted by defendant's conduct in the shooting death of Gettis. Absent from the court's analysis was any assessment of "the setting of the offense" or any factors establishing the victim was particularly "vulnerable or incapable of resistance at the time of the crime." Lawless, 214 N.J. at 611. The record provided on appeal does not support the court's finding.[3] See Fuentes, 217 N.J. at 70.

[3] Although the presentence report provided on appeal references both the homicide and robbery offense, it did not include a summary of the homicide. Upon our inquiry, we were advised no other presentence report was prepared in this matter.

Instead, the factual basis underscoring defendant's guilty plea reveals: defendant "hopped out of [a] motor vehicle," armed with a handgun; chased "a group of people walking down Seventh Street"; "fire[d] the weapon . . . multiple times"; and thereafter learned Gettis was shot and killed. These facts establish defendant "manifested an extreme indifference to the value of human life" under N.J.S.A. 2C: 11-4(a)(1); they do not, however, bespeak the victim's vulnerability. We therefore conclude the court engaged in impermissible double counting by applying aggravating factor two to the circumstances presented here.

Based on the court's improper finding of aggravating factor two, we are constrained to vacate defendant's sentence and remand for resentencing without consideration of this factor. On remand, "the trial court should view defendant as he stands before the court on that day," State v. Randolph, 210 N.J. 330, 354 (2012), and consider his youth at the time he committed the crimes as a mitigating factor, Bellamy, 468 N.J. Super. at 45.

Because we are remanding for resentencing, it is unnecessary to address defendant's contention that the sentence imposed was excessive and we express no opinion regarding it. We simply note we disagree with the State's assertion that defendant "agreed to the prison term he received, regardless of which

aggravating and mitigating factors could have been applied." The plea agreement limited defendant's sentencing exposure to a maximum aggregate fifteen-year prison term, subject to NERA.

Reversed and remanded. 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