SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2971-20

STATE OF NEW JERSEY,

Plaintiff-Respondent/
Cross-Appellant,

v.

DENZELL SUITT,

Defendant-Appellant/
Cross Respondent.

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Submitted May 3, 2022 – Decided June 10, 2022

Before Judges Hoffman and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-02-0197.

Joseph E. Krakora, Public Defender, attorney for appellant/cross-respondent (Stefan Van Jura, Assistant Deputy Public Defender, of counsel and on the briefs).

Esther Suarez, Hudson County Prosecutor, attorney for respondent/cross-appellant (Erin M. Campbell, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant, a former Jersey City Police Officer, appeals his jury trial convictions for third-degree official misconduct and fourth-degree theft. The State cross-appeals defendant's probationary sentence. After carefully reviewing the record in light of the governing principles of law and the arguments of the parties, we affirm defendant's convictions. We are constrained, however, to remand the matter for resentencing. We conclude the trial court abused its discretion in finding that there were extraordinary circumstances sufficient to overcome the mandatory minimum term of imprisonment prescribed by N.J.S.A. 2C:43-6.5.

I.

We discern the following facts from the trial record. In March 2018, Jermaine Palms was living with his aunt, in East Orange, New Jersey. On March 24, 2018, his aunt loaned Palms $600 for a security deposit for an apartment in Corning, New York. The $600 was comprised of twelve $50 bills. Palm placed the $600 inside his wallet.

On the night of March 24, 2018, Palms and his girlfriend had their bags packed and planned to leave for the New York apartment. They went first to Jersey City to visit his girlfriend's mother. While she visited with her mother, Palms went to see his close friend Jonathan Davis.

Palms and Davis drove to a bar, where Davis purchased liquor. The two then drove to Bayside Park in Jersey City. At approximately 2:00 a.m. on March 25, 2018, Palms parked the car in front of a fire hydrant on Bayside Terrace.

A few minutes after parking, Palms noticed a marked police car approach with the headlights turned off. The police car parked in front of Palms' vehicle. Two officers from the Jersey City Police Department, South District, exited the vehicle. Defendant, one of the two officers, approached the driver's side of the Palms' vehicle while the other officer, Kevin Osorio, approached on the passenger side.

Defendant asked Palms to produce his license and registration. Palms notified defendant that he did not have a license. Defendant instructed Palms to step out and to place everything in his pockets on the roof of the car. Defendant took Palms' wallet, stepped back, and went through it. Palms watched as defendant searched through his wallet. He did not see defendant take anything from it. After going through the wallet, defendant placed it back on the roof of the car and told Palms and Davis they were free to leave. The officers did not issue any tickets or warnings even though Palms was operating a motor vehicle without a license.

After the encounter with the two officers, Palms and Davis drove to a local Domino's. Palms checked his wallet and noticed that the $600 was missing. Palms and Davis searched the vehicle for the money in vain. After the money could not be found, Palms deduced that defendant had taken the cash when he searched through the wallet.

The record before us indicates that a CCTV video recording showed both vehicles near Bayside Terrace consistent with Palms' version of events. However, the encounter involving defendant and Palms was not captured on video because the Jersey City CCTV camera located directly above the fire hydrant on Bayside Terrace was not working. At trial, the State introduced evidence that police officers are generally familiar with the location of CCTV cameras in their patrol area and that it was widely known that the cameras at the end of Bayside Terrace were not working.

Defendant's partner, Officer Osorio, testified at trial that he was a relatively new officer on the date of the incident. Osorio acknowledged that he and defendant did indeed have an encounter with Palms and Davis on the night of the incident. Osorio was in the passenger seat of the police car when he and defendant drove to Bayside Terrace and approached Palms' vehicle. Osorio testified that, contrary to his training, he did not notify the dispatcher or fellow

officers before approaching the vehicle. Moreover, although Officer Osorio was responsible for keeping the logbook for their patrol shift, he acknowledged that he did not write any notation about Bayside Terrace or the encounter with Palms and Davis.

Osorio testified that he and defendant approached Palms and asked him to produce his license and registration. Osorio explained that defendant decided to "cut these guys a break" and did not issue any tickets before releasing them. Osorio testified that he did not see defendant take anything from Palms' wallet, nor did he and defendant discuss taking anything from it.

In February 2019, a grand jury indicted defendant with third-degree theft, N.J.S.A. 2C:20-3, and second-degree official misconduct, N.J.S.A. 2C:30-2. Defendant moved to suppress Palms' out-of-court photo-array identification. On January 15, 2020, the motion court convened a Wade[1] hearing. On January 29, 2020, the motion court issued a written opinion and order denying defendant's motion to suppress Palms' out-of-court identification.

In February 2020, defendant was tried before a jury. The jury found defendant guilty of two lesser-included offenses: fourth-degree theft and third-

[1] United States v. Wade, 388 U.S. 228 (1967).

degree official misconduct.[2] On June 16, 2021, defendant was sentenced to a five-year noncustodial probationary sentence, N.J.S.A. 2C:43-6.5(c)(2).

Defendant filed a notice of appeal. The State filed a cross-appeal as to defendant's sentence.

Defendant raises the following contention for our consideration:

> POINT I
>
> THE DEFENDANT'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE TRIAL COURT'S ADMISSION OF AN IMPERMISSIBLY SUGGESTIVE IDENTIFICATION PROCEDURE WHICH TAINTED THE SUBSEQUENT IN-COURT IDENTIFICATION. U.S. CONST., AMEND. XIV; N.J. CONST., ART. 1, PAR. 10.

The State raises the following contentions on cross-appeal:

> POINT I
>
> THE TRIAL COURT PROPERLY ADMITTED THE OUT-OF-COURT IDENTIFICATION OF APPELLANT.
>
> POINT II
>
> THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT TO A TERM OF PROBATION.

[2] The Judgment of Conviction (JOC) inaccurately lists the final charges as third- and second-degree crimes. We direct the trial court to correct the JOC on the remand for resentencing.

II.

Defendant contends that his convictions must be reversed and a new trial ordered because his due process rights were violated during the criminal investigation and at trial. Specifically, defendant argues that Palms' out-of-court identification should have been suppressed based on the evidence revealed at the Wade hearing concerning the manner in which the victim was shown defendant's photo. He also contends that Palms' in-court identification should have been suppressed as a fruit of the impermissibly suggestive out-of-court identification procedure.

We disagree that defendant is entitled to a new trial. The record shows that the out-of-court identification procedure was administered by an internal affairs investigator, Sergeant Jocelyn Roldan, who was unfamiliar with the best practices for presenting a photo-array as part of a criminal investigation. We conclude, however, that for all practical purposes, she actually did not conduct a photo-array identification procedure as that term is defined in State v. Henderson, 208 N.J. 208 (2011), and Attorney General Guidelines. Rather, the out-of-court identification procedure in this instance was the functional equivalent of showing mugshots to an eyewitness to initially identify a suspect.

We are convinced, moreover, that the out-of-court investigative procedure in this case did not result in an unreliable identification and could not have led to an unjust result given that defendant's partner confirmed at trial that he and defendant were the two officers who confronted Palms at Bayside Terrace on the early morning hours of March 25, 2018. In these circumstances, we do not believe that the identity of the officer who rifled through Palms' wallet was a critical disputed issue at trial and so any error in admitting identification testimony was harmless.

A.

The following facts were elicited at the Wade hearing:

Sergeant Roldan of the Jersey City Police Department's Internal Affairs Unit was assigned to investigate Palms' allegations of theft. Roldan read the report Palms filed and then obtained police records, including vehicle logs.

Roldan compiled a list of fourteen officers in seven patrol cars who were on duty in the South District during the midnight shift when the encounter occurred. To winnow down the list of officers who might possibly have been involved, Roldan accounted for Palms' description of the two officers—Hispanic males. Roldan eliminated patrol cars that had either female or white male officers. This left her with six potential suspects. One of the six suspects was

a white male, so she removed that officer's picture. Because the white officer did not meet Palms' description, Sergeant Roldan substituted his photo with the photo of a Hispanic officer, Officer Guadalupe, as a "filler."[3] Officer Guadalupe was not on duty the night of the incident.

Roldan printed photographs of the six possible suspects, which included defendant. On March 29, 2018, Roldan met with Palms to show him the six photographs. Prior to showing the compiled photos, Roldan questioned Palms about the night of the alleged theft. According to Roldan, Palms said that he first saw the unknown officer as he was approaching Palms' car. During his interaction with the officer, Palms viewed him face-to-face for five or ten minutes. The officer had "low hair" on his face like "second day shadow" and a "short brook," which Sergeant Roldan interpreted to mean a "short afro" haircut. Palms said the officer was "Spanish" and "chubby." Palms also said that the second of the two officers—the one who interacted with Davis—had a "thick black moustache."

After questioning Palms, Roldan showed Palms all six photos. Roldan acknowledged at the hearing that this was the first time she had ever assembled

[3] The record does not provide a full name for Officer Guadalupe.

a photo array. She was aware that Attorney General Guidelines generally require a "blind"[4] administrator to show the photos to the victim sequentially. Attorney General Guidelines for Preparing and Conducting Out-of-Court Eyewitness Identifications (Feb. 9, 2021) [hereinafter Attorney General Guidelines]. However, Roldan did not show the six photographs to Palms sequentially because "it was an administrative investigation and [she] really had no suspect." Roldan instead spread out the photos on a table, presenting them to Palms simultaneously.

Roldan acknowledged at the hearing that she did not provide Palms with a pre-identification instruction in accordance with the Attorney General Guidelines other than to inform him that the officers might have grown facial hair since the photos were taken. The photos she used were taken almost immediately after each of the six officers graduated from the police academy. As academy recruits, they were required to shave their heads.

[4] A double-blind administrator is one who does not know who the suspect is or where the suspect's photograph is positioned in the photo array. Henderson, 208 N.J. at 248. The double-blind best practice established in Henderson removes the possibility that the officer who is administering the identification procedure will suggest to the witness, even unconsciously, which photo in the array depicts the suspect. Id. at 248–49.

Palms selected the photos of defendant and Osorio, stating, "[b]ut definitely the guys who took my money were these two." Palms signed his initials and the date—March 29, 2018—on the back of defendant and Osorio's photos. Palms also selected a third photo of someone who he thought could have been one of the two officers. He initialed and dated that photo as well and wrote "maybe" on it.[5]

After Roldan was finished testifying at the Wade hearing, defense counsel argued that the identification should be suppressed because the procedure used by Sergeant Roldan did not follow the Attorney General Guidelines and that suppression "is a necessity to . . . afford[] a defendant . . . a fair identification procedure."

On June 29, 2020, the motion court issued a written opinion.[6] The court acknowledged our Supreme Court's holding in Henderson and discussed the

[5] The third photograph selected was of Officer Aquino, who was working overtime on the night of the incident. The record before us does not indicate that Palms believed a third individual was involved in alleged theft. Rather, the record indicates that while Palms was confident in his selection of defendant and Osorio, he thought it was at least possible that Aquino could have been one of the two officers involved in the incident.

[6] The judge presiding at the Wade hearing, who we refer to as the motion judge, was not the judge who presided over the ensuing trial.

relevant system and estimator variables that trial courts should consider when determining the admissibility of an eyewitness identification. With respect to system variables, the motion court concluded that the manner in which Roldan presented the photo array was not impermissibly suggestive. The motion court made the following specific findings: (1) Sergeant Roldan did not know who the suspect was; (2) she "essentially acted as a blind administrator because she conducted the photo array with no knowledge of the identity of the subject"; (3) the photo array was compiled based on Palms' description of the officers, i.e., Hispanic males; (4) she eliminated suspects that did not meet those descriptions; and (5) defendant's photograph was included because "he was light to medium skin tone and working in the South District at the time of the theft."

The motion court also considered the fact that Palms did not receive pre-identification instructions. The motion court nonetheless noted that Roldan did instruct Palms that people in the photo array may have grown hair since the pictures were taken.

The motion court also found that,

> [a]s to the lineup construction, there was no suspect at the time that the array was compiled or administered. Four of the pictures in the photo array met the description of Hispanic male, which is why they were included in the photo array. Further, the witness did not receive information or feedback about the suspect

> or the crime before, during, or after the identification procedure, as the administrator, Sergeant Roldan, did not have a suspect.

The motion court acknowledged that, given the limited pool of individuals, there was a level of suggestibility to the identification procedure.

The court also considered the estimator variables in determining whether the identification was unreliable. The court found, "there was no evidence provided as to stress, weapons focus, lighting, witness characteristics, characteristics of perpetrator or race-bias." The motion court acknowledged that several days had passed between the incident and the identification, which could have affected Palms' memory of the officer. "However, Sergeant Roldan testified that . . . Palms had stated that the interaction between him and the Defendant lasted between 'five to ten minutes.'"

The motion court ultimately concluded:

> [T]he totality of the circumstances shows that the identification procedure was reliable and that no "substantial likelihood of irreparable misidentification" occurred when . . . Palms selected Defendant's photograph. Sergeant Roldan was not aware of who the suspect was and could not have influenced the witness's choice. Further, . . . Palms eliminated photographs and spontaneously provided several statements of confidence when making the identification. The Defendant fails to meet his burden of proving "a very substantial likelihood of irreparable misidentification." Henderson, 208 N.J. at 289. In her testimony, Sergeant

> Roldan admitted that she did not follow the Attorney General Guidelines, but that mistake alone does not show that a very substantial likelihood of irreparable misidentification exists. "The framework the Court adopted in Henderson 'avoided bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer made a mistake.'" [State v.] Anthony, 237 N.J. [213,] 226 (quoting Henderson, 208 N.J. at 303). The totality of the evidence shows that the identification was in fact his own and not the product of suggestive behavior by Sergeant Roldan.

B.

We begin our analysis by acknowledging the legal principles governing this appeal. "The Due Process Clause of the Fourteenth Amendment prohibits the admission of an unreliable out-of-court identification, which resulted from impermissibly suggestive procedures." State v. Smith, 436 N.J. Super. 556, 564 (App. Div. 2014) (citing Manson v. Brathwaite, 432 U.S. 98, 106 (1977)). "[E]yewitness evidence is 'inherently suspect'[,] . . . [but] it is 'equally . . . recognized that . . . an eyewitness's identification may be the most crucial evidence.'" Ibid. (quoting State v. Madison, 109 N.J. 223, 232 (1988)).

To challenge an out-of-court identification, "defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification[,]" which "in general, must be tied to a system—and not an estimator—variable." Henderson, 208 N.J. at 288–89. Once a hearing has

been granted, the State must present proof that the identification is reliable. Id. at 289. The State's burden to offer proof is the same as the burden of producing evidence described in N.J.R.E. 101(b)(2), which is sometimes referred to as the "burden of going forward." State v. Henderson, 433 N.J. Super. 94, 107 (App. Div. 2013). It remains defendant's ultimate burden, however, "to prove a very substantial likelihood of irreparable misidentification." Henderson, 208 N.J. at 289.

"[I]f after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence." Ibid. Importantly, "[t]he threshold for suppression [is] high." Id. at 303.

In Henderson, the Court carefully and comprehensively examined the frailties and vulnerabilities of human perception and memory. Id. at 217. The decision surveyed the circumstances that can lead to misidentification, specifying various "estimator" variables (e.g., lighting conditions, distance, the length of time the witness observes the perpetrator, stress during an encounter, and cross-racial effects) and "system" variables (i.e., the manner in which police administered a photo array procedure) that influence a witness's ability to

accurately identify a culprit. Id. at 247, 289–90. The opinion established best practices for police to use when administering eyewitness identification procedures. It also stressed the need to instruct juries on the risk of misidentification, being mindful that the predecessor standard for assessing eyewitness identification evidence overstated the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate. Id. at 218, 296; see Anthony, 237 N.J. at 228–29. Importantly, Henderson avoided a bright-line rule that would require suppression of reliable evidence whenever an eyewitness makes a mistake. 208 N.J. at 303.

Furthermore, if eyewitness identification testimony is improperly admitted, we apply the harmless error standard. The harmless error standard "requires that there be 'some degree of possibility that [the error] led to an unjust result.'" State v. R.B., 183 N.J. 308, 330 (2005) (alteration in original) (quoting State v. Bankston, 63 N.J. 263, 273 (1973)). To the extent an error requires reversal, "[t]he possibility must be real, one sufficient to raise a reasonable doubt as to whether [it] led the jury to a verdict it otherwise might not have reached." State v. Scott, 229 N.J. 469, 484 (2017) (alterations in original) (quoting R.B., 183 N.J. at 330).

Relatedly, if the record reveals a due process violation, we must remand for a new trial "unless we can determine that the constitutional violation was harmless beyond a reasonable doubt." State v. Jones, 224 N.J. 70, 86 (2016). In applying this standard, we are also mindful of the long-settled principle that,

> [a]s to "constitutional" errors, some may go so plainly to the integrity of the proceedings that a new trial is mandated without more. When this is true, a new trial is the just course because of the nature of the right infringed and its evident impact upon the fairness of the trial, rather than because the right happens to be embedded in the Constitution and is thus secured from legislative abolition. Equally clear must be the proposition that not every "constitutional" error can sensibly call for a new trial . . . . [A]n error may indeed be harmless despite its constitutional hue.
>
> [State v. Macon, 57 N.J. 325, 338 (1971).]

C.

We next apply these foundational principles to the identification procedure in this case. We agree with the motion court that in the final analysis, the identification procedure did not create a substantial likelihood of irreparable misidentification. Importantly, the motion court found that Roldan, the lead investigator, did not know who the suspect was. She was a "blind" administrator not because she was not involved in the investigation but rather because, at this nascent stage of the investigation, no one had a specific suspect in mind. That

leads us to conclude that the display of photographs to Palms was not a traditional photo-array as contemplated in Henderson and the Attorney General Guidelines, where police seek to have the eyewitness confirm the identity of the person that police believe to be the culprit. Rather, the procedure was more closely akin to the process of showing a collection of "mugshots"[7] to the victim in search of a suspect.

In Henderson, the Court recognized that "[i]t is typical for eyewitnesses to look through mugshot books in search of a suspect." 208 N.J. at 255 (emphasis added). The Court acknowledged that "[m]ultiple identification procedures that involve more than one viewing of the same suspect . . . can create a risk of 'mugshot exposure' and 'mugshot commitment.'"[8] Ibid. The Court added:

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[7] In this instance, the "mugshots" were not photographs of persons who had been arrested and booked, but rather photographs of police academy graduates.

[8] The Court explained that "[m]ugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone—who had been depicted in the earlier photos—at a later identification procedure." Henderson, 208 N.J. at 255. The Court added that "[m]ugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure." Id. at 256. The Court's principal concern, in other words, was the suggestive effect of "multiple viewings," noting,

> [B]oth mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification. As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.
>
> [Id. at 256.]

Importantly, however, the Court did not suggest that when police ask an eyewitness to view a collection of mugshots, they must use the same procedures that are used when administering a photo-array that contains a picture of the person police suspect to be the culprit and five fillers of persons whose photographs resemble the suspect's photograph. Defendant cites no authority for the proposition that police (1) must tell the witness that the culprit's photo may or may not be in the assemblage of mugshot photos, (2) must include photos of persons who resemble the as-yet unidentified suspect, and (3) must have the

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> [v]iewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.
>
> [Id. at 255.]

procedure conducted by a blind administrator.[9] In sum, we believe the procedure Roldan used was no more or less suggestive than if she had showed Palms a picture of every Jersey City police officer—a tedious process that would have been tantamount to having him go through an entire book of mugshots.

Defendant also complains that Roldan presented the six photographs simultaneously and thus failed to administer the photo array sequentially as suggested in the Attorney General Guidelines "whenever possible." Attorney General Guidelines 2. However, the Court in Henderson did not recommend, much less require, sequential presentation of the photographs comprising a photo array, noting that "there is insufficient authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure." 208 N.J. at 257–59.

We appreciate that in cases where a witness is asked to review an entire mugshot book, the process will be sequential in the sense that only so many

[9] We reiterate that the motion court concluded that Roldan "essentially acted as a blind administrator because she conducted the photo array with no knowledge of the identity of the subject." Her state of knowledge was thus comparable to an officer showing a book of mugshots to a witness without having a specific suspect in mind. In these circumstances, she could not have unwittingly provided a clue to Palms as to the photograph of the person suspected by police because police did not have a specific suspect in mind.

photographs can be reproduced on a single page. We are aware of no requirement that mugshot photos must be displayed one at a time. In this instance, Roldan was able to winnow down the number of officers who might have been involved, making it unnecessary for her to show to Palms police academy graduation photographs of every officer on the force. That winnowing-down process did not change the essential nature of the identification procedure, which was a search for a suspect, not to confirm the identity of the individual who police suspected of the alleged crime.

More fundamentally, we are convinced that the identification procedure in this case did not, indeed could not, have led to an unreliable identification and thus an unjust conviction for the simple reason that this prosecution did not hinge on identification. Officer Osorio testified that he and defendant were indeed the two officers who briefly detained Palms and Davis at Bayside Terrace on the night in question. Defendant on appeal argues:

> To be sure, defendant's defense at trial more directly challenged [Palms'] credibility, generally, than it asserted a traditional mistaken identification defense. But that was because a mistaken identification defense was unfairly removed from the menu of plausible defenses. The jury learned that Palms selected the photos of defendant and Osorio as "definite" perpetrators. Palms was then allowed to bolster his own identification at trial by pointing to defendant as the officer who stole his money. Yet, we know from the

> Wade hearing that there was a substantial likelihood that Palms was merely implicating defendant at trial because it jibed with his prior identification, not from independent memory.
>
> [(emphases added).]

We disagree that a mistaken identity defense was "removed from the menu of plausible defenses" by the manner in which defendant's photograph was presented to Palms. Rather, it was Osorio's testimony, ultimately, that removed mistaken identity from the menu of plausible defenses. Thus, even assuming for the sake of argument that Palms' identification testimony should have been suppressed, any such error in admitting that testimony was harmless beyond a reasonable doubt and could not have produced an unjust result. Jones, 224 N.J. at 86; Macon, 57 N.J. at 338.

III.

We turn next to the State's cross-appeal. The State argues that the trial court erred in waiving the mandatory term of imprisonment prescribed by N.J.S.A. 2C:43-6.5 and by sentencing defendant to a five-year term of noncustodial probation. The trial court recognized that the governing statute requires a two-year period of incarceration for conviction of a third-degree official misconduct offense unless the court finds by "clear and convincing evidence that extraordinary circumstances exist such that the imposition of a

mandatory minimum term would be [a] serious injustice that overrides the need to deter such conduct . . . ." The trial court remarked that the "residuum of power" residing with the court to waive a prison term "may be legitimately exercised in those truly extraordinary and unanticipated cases where the human cost of punishing a particular defendant will deter others from committing his offense would be too great."

While we do not dispute that the trial court correctly described the test for waiving the mandatory term of imprisonment, we believe the trial court erred in concluding that such extraordinary and unanticipated circumstances exist in this case. The fact that defendant has until now led a crime-free, indeed exemplary life is neither extraordinary nor unanticipated for a police officer entrusted with the responsibility to protect and serve the public. The need to deter the kind of official misconduct that occurred in this case is of paramount importance and outweighs the substantial hardships that defendant and his family will endure from imprisonment.

A.

In rendering its sentencing decision, the trial court noted, correctly in our view, that "the serious injustice standard" requires a "case-by-case analysis." The trial court further remarked that "if [defendant] was not a public official,

was not a police officer, [he] probably would have gotten [Pretrial Intervention] PTI. He probably wouldn't even have a conviction let alone looking to go to State Prison for a minimum of two years." We do not dispute that police officers are held to a higher standard than other citizens. That is as the Legislature clearly intended.

Turning to the specific circumstances of this case, the trial court first considered defendant's upbringing. The trial court stated,

> There is no doubt in this Court's mind [of] what [defendant] went through growing up. The fact that he quite honestly accomplished what he did becoming a police officer, graduating college, opening a business is probably nothing short of a miracle because I would suspect that if he showed his childhood history to anybody in the business[,] that would never be the predicted outcome.

The trial court then considered the statutory aggravating and mitigating factors. The court found only one aggravating factor, aggravating factor nine, N.J.S.A. 2C:44-1(a)(9) ("The need for deterring the defendant and others from violating the law"). The court noted that "[t]here is a need to deter both specific and general deterrence."

Regarding the mitigating factors, the trial court found factor six,[10] N.J.S.A. 2C:44-1(b)(6) ("The defendant has compensated or will compensate the victim of the defendant's conduct for the damage or injury that the victim sustained, or will participate in a program of community service"); factor seven, N.J.S.A. 2C:44-1(b)(7) ("The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense"); factor nine, N.J.S.A. 2C:44-1(b)(9) ("The character and attitude of the defendant indicate that the defendant is unlikely to commit another offense"); and factor ten, N.J.S.A. 2C:44-1(b)(10) ("The defendant is particularly likely to respond affirmatively to probationary treatment").

As to mitigating factor six, the trial court found that defendant will compensate Palms for the stolen cash. Regarding mitigating factor seven, the trial court found that defendant did not have a criminal history, which he noted as "remarkable" given defendant's upbringing.

[10] We note that the JOC does not appear to list mitigating factor six. However, the trial court at sentencing determined that defendant would be able to compensate Palms financially, indicating that the judge meant to find this factor applicable.

Regarding mitigating factor nine, the trial court noted that since this incident, defendant has continued to operate his business and speak to children in the foster care system. The trial judge also noted that he was moved by the letters submitted on defendant's behalf.

> All of the letters . . . point to a common theme that [defendant] is a man that continues to do—tries to do better by others. It's difficult for the [c]ourt to reconcile the events of the night of the incident with these letters
>
> But I've often told defendants when I sentence . . . that you can't let one moment or one incident define you. The letters from those that know [defendant] certainly don't define him as a thief or a crook[ed] police officer.
>
> If you look at the charges he's been convicted of, one would say that's what he is. But that's what he's been convicted of. It doesn't necessarily mean that's who he is.

The court also considered the human cost of punishing defendant. We reproduce verbatim the trial court's thoughtful and eloquent explanation of the challenge it faced in imposing a fair and just sentence in this case:

> Is the deterrence that would be achieved by taking him from the community and putting him in prison for a minimum of two years, too great for the person that stands before the Court?
>
> Probably one of the more difficult cases I've had the occasion to impose sentence on and . . . I wouldn't say that if it isn't true.

> The criminal justice system is based on punishment as all of our old cases define it as. Although[,] as I sit here over almost nine years now[,] I don't know that that isn't changing. We have a drug court in place for almost [twenty] years now to deal with rehabilitation.
>
> Less than [sixty] days ago, the Attorney General of this state entered a directive waiving mandatory minimum parole [for] non-violent drug offenses because simply locking people up for a minimum period of time served no purpose.[11]
>
> This talk of mental health courts being created in vicinages throughout the state because locking people up with mental health history isn't appropriate.
>
> Well, if our goal is simply to punish, it's difficult to reconcile those three and those are just three small examples of what our system of criminal justice really is.
>
> The system of criminal justice and the job I swore to uphold was to be one of fairness, temper punishment with compassion, recognize faults that individuals hold and carry with them, recognize there are victims like . . . Palms who suffered unnecessary indignity that night for no reason of his own.
>
> But is putting [defendant] in prison too great a cost? I think it is in this case. I think [defendant] would respond to probationary treatment. I find for all of the reasons including his upbringing, his letters, . . . [that] the mitigating factors . . . substantially outweigh the aggravating factors, [and] that the imposition of a mandatory minimum would be unduly harsh.

[11] We note the Attorney General Directive does not apply to mandatory minimum sentences imposed on convictions for official misconduct.

> It does not in any way indicate that this [c]ourt believes that the verdict was not appropriate. I believe the evidence, the conviction was appropriate, but . . . I believe . . . this case is one of those extraordinary and unanticipated cases where the interest of justice would not be served by putting [defendant] in custody.

B.

We begin our analysis by acknowledging that sentencing decisions are reviewed under a highly deferential standard. See State v. Roth, 95 N.J. 334, 364–65 (1984) (holding that an appellate court may not overturn a sentence unless "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience"). "[A]ppellate courts are cautioned not to substitute their judgment for those of our sentencing courts." State v. Case, 220 N.J. 49, 65 (2014) (citing State v. Lawless, 214 N.J. 594, 606 (2013)). Relatedly, a trial court's exercise of discretion that is in line with sentencing principles "should be immune from second-guessing." State v. Bieniek, 200 N.J. 601, 612 (2010).

Our review is therefore limited to considering:

> (1) whether guidelines for sentencing established by the Legislature or by the courts were violated; (2) whether the aggravating and mitigating factors found by the sentencing court were based on competent credible evidence in the record; and (3) whether the sentence

> was nevertheless "clearly unreasonable so as to shock the judicial conscience."
>
> [State v. Liepe, 239 N.J. 359, 371 (2019) (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)).]

This appeal focuses solely on the first criterion: whether guidelines for sentencing established by the Legislature or the courts were violated.

Pursuant to N.J.S.A. 2C:43-6.5(a),

> [A] person who serves or has served as a public officer or employee under the government of this State, or any political subdivision thereof, who is convicted of a crime that involves or touches such office or employment as set forth in subsection b. of this section, shall be sentenced to a mandatory minimum term of imprisonment without eligibility for parole as follows: for a crime of the fourth degree, the mandatory minimum term shall be one year; for a crime of the third degree, two years; for a crime of the second degree, five years; and for a crime of the first degree, 10 years; unless the provisions of any other law provide for a higher mandatory minimum term. As used in this subsection, "a crime that involves or touches such office or employment" means that the crime was related directly to the person's performance in, or circumstances flowing from, the specific public office or employment held by the person.

N.J.S.A. 43-6.5(c)(2) provides what might be described as a safety valve to avoid injustices that could result from the reflexive imposition of the mandatory term of imprisonment. This statutory exemption provides:

> If the court finds by clear and convincing evidence that extraordinary circumstances exist such that imposition of a mandatory minimum term would be a serious injustice which overrides the need to deter such conduct in others, the court may waive or reduce the mandatory minimum term of imprisonment required by subsection a. of this section. In making any such finding, the court must state with specificity its reasons for waiving or reducing the mandatory minimum sentence that would otherwise apply.
>
> [N.J.S.A. 2C:43-6.5(c)(2).]

In State v. Rice, we held that

> N.J.S.A. 2C:43–6.5(c)(2) imposes a "higher standard" on the judge when deciding to reduce a period of parole ineligibility than when deciding to downgrade an offense. A decision to "waiv[e] or reduc[e] the mandatory minimum sentence that would otherwise apply" affects the actual period of imprisonment a defendant must serve before being eligible for parole. Ibid. It is more akin to the "in or out" decision made under N.J.S.A. 2C:44–1(d) than it is to deciding whether a downgrade is appropriate. The Legislature chose to use the same "serious injustice" standard in adopting N.J.S.A. 2C:43–6.5(c)(2), and we presume the Legislature to have been aware of the Court's decision in [State v.]Megargel[, 143 N.J. 484 (1996)] announced more than a decade before the statute was enacted.
>
> [425 N.J. Super. 375, 388 (App. Div. 2012).]

We emphasized in Rice that "the decision to waive or reduce the mandatory minimum is justified only in 'the extraordinary or extremely unusual case where the human cost of imprisoning a defendant [for the statutory

mandatory minimum and] for the sake of deterrence constitutes a serious injustice.'" Id. at 389 (alteration in original) (quoting State v. Evers, 175 N.J. 355, 392 (2003)).

In considering whether to waive the mandatory period of imprisonment under N.J.S.A. 2C:43-6.5, courts also look to the case law that pertains to the closely analogous presumption of imprisonment set forth in N.J.S.A. 2C:44-1(d).[12] We are mindful that reviewing courts have rarely found justification to overcome the presumption of imprisonment. See State v. Jarbath, 114 N.J. 394, 407 (1989). In determining whether the presumption has been overcome, the focus is not on the offender but rather on the "gravity of the offense, which implicates the need for specific and general deterrence." Evers, 175 N.J. at 392. In Evers, the Court noted that in the context of first- and second-degree crimes,

[12] We note that while the presumption of imprisonment in N.J.S.A. 2C:44-1(d) employs the "serious injustice which overrides the need to deter such conduct by others" formulation nearly identical to the one used in N.J.S.A. 2C:43-6.5(c)(2), the latter statute additionally requires the sentencing court to "find[] by clear and convincing evidence that extraordinary circumstances exist." The presumption of imprisonment codified in N.J.S.A. 2C:44-1(d) does not require the court to make findings applying the clear-and-convincing standard of proof. We deem this distinction to mean that the standard for overcoming the mandatory term of imprisonment for convicted corrupt officials is even more rigorous—and certainly not less rigorous—than the standard for overcoming the presumption of imprisonment that applies to offenders convicted of first- or second-degree crimes.

there is an "overwhelming presumption that deterrence will be of value." Id. at 395.

Furthermore, our Supreme Court has stressed repeatedly that the presumption of imprisonment can only be overcome "in truly extraordinary and unanticipated circumstances." State v. Jabbour, 118 N.J. 1, 7 (1990) (quoting Roth, 95 N.J. at 358); see also State v. Nwobu, 139 N.J. 236, 252 (1995) (quoting Jabbour, 118 N.J. at 7) ("To forestall imprisonment a defendant must demonstrate something extraordinary or unusual, something 'idiosyncratic,' in his or her background."). The law is well-settled that a defendant does not overcome the presumption of imprisonment simply because he or she has led "a crime-free or blameless life" or happens to be a "first-time offender." Evers, 175 N.J. at 388, 400.

We recognize, as did the trial court in this case, that the Criminal Code entrusts courts with a "residuum of power . . . in those few cases where it would be entirely inappropriate to" incarcerate a defendant. Id. at 389 (citing Roth, 95 N.J. at 358). For example, in Jarbath the Supreme Court concluded that imprisonment in that case would not serve the goal of deterrence. 114 N.J. at 409. The court reasoned:

> Defendant's deficient mental and emotional condition were relevant not only to her culpability but also to her

> capacity to assimilate punishment . . . . There was little evidence to suggest that defendant could comprehend that she had committed a crime that deserved a prison term, or that she could modify her behavior based on her imprisonment. In addition, defendant did not have the understanding or emotional strength of relatively normal persons. She apparently could not endure life in prison without unusual suffering, that is, hardship and privation greatly exceeding that which would be accepted and endured by ordinary inmates as the inevitable consequences of punishment.
>
> [Id. at 408–09.]

Following Jarbath, in State v. E.R., we affirmed a trial court's decision not to sentence the defendant to imprisonment because the defendant had a terminal illness and had only six months to live. 273 N.J. Super. 262, 273–75 (App. Div. 1994).

We conclude that in this case, defendant has not shown any such injustice sufficient to override the need to deter police officers from exploiting vulnerable citizens during motor vehicle stops. Nor are we convinced that defendant's personal background is so unusual and idiosyncratic, see Jabbour, 118 N.J. at 7, as to justify an exception to the mandatory minimum sentence. While we agree with the trial court that defendant's difficult upbringing and his subsequent choice to become a police officer is a compelling mitigating circumstance, it does not lessen the need to deter other police officers from victimizing civilians

whom they are sworn to protect and to serve. Such crimes against the motoring public erode public confidence in police officers. These cases test our resolve to hold officers accountable for willful and, in this case profit-minded misdeeds. We thus conclude that while the mitigating circumstances substantially outweigh the aggravating circumstances, defendant does not fall within the extremely narrow category of cases where imprisonment would constitute a serious injustice that overrides the need to deter such conduct by other police officers. Cf. Jarbath, 114 N.J. at 408–09; E.R., 273 N.J. Super. at 273–75.

We therefore deem it necessary to remand for resentencing, at which the court shall impose the mandatory minimum sentence. We also instruct the trial court on remand to correct the JOC to reflect the degrees of the two crimes for which defendant was found guilty by the jury. See supra note 2. We do not retain jurisdiction.

Affirmed, in part, and reversed and remanded, in part.