SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0282-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MIGUEL A. GALVAN,

Defendant-Appellant.

Argued January 24, 2023 – Decided July 5, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Indictment No. 18-02-0055.

Eric V. Kleiner argued the cause for appellant.

Shaina Brenner, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Annmarie Taggart, Acting Sussex County Prosecutor, attorney; Shaina Brenner, of counsel and on the brief).

PER CURIAM

Following denial of his motion to dismiss two Sussex County indictments pursuant to the Interstate Agreement on Detainers (IAD), N.J.S.A. 2A:159A-1 to -15, defendant Miguel A. Galvan pled guilty to an amended charge of second-degree possession of cocaine with intent to distribute, N.J.S.A 2C:35-5(a)(1) and (b)(2). Pursuant to the terms of the conditional plea agreement, the court sentenced defendant to a five-year prison term with a twenty-five-month parole disqualifier, and dismissed the remaining counts of the same indictment and a related indictment.[1] The sentence was imposed concurrently but not coterminously with the ten-year prison term defendant was serving in New York State.

Defendant now appeals from the denial of his dismissal motion, asserting the State failed to bring him to trial within 180 days as required under the IAD, N.J.S.A. 2A:159A-3(a). In the alternative, defendant contends his sentence was excessive and the court failed to award gap time or "equitable" jail credits. Defendant articulates his arguments as follows:

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[1] The same indictment also charged first-degree maintaining or operating a controlled dangerous substance (CDS) production facility, N.J.S.A. 2C:35-4; second-degree possession of a firearm while committing a CDS offense, N.J.S.A. 2C:39-4.1(a); and fourth-degree possession of hollow point bullets, N.J.S.A 2C:39-3(f)(2). The related indictment charged second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7(b)(1).

Point I

THE [TRIAL] COURT COMMITTED REVERSIBLE ERROR IN FAILING TO DISMISS THE INDICTMENTS DUE TO SPEEDY TRIAL VIOLATIONS CONTRARY TO ARTICLE III OF THE IAD.

Point II

THE [TRIAL] COURT COMMITTED REVERSIBLE ERROR IN NOT AWARDING EQUITABLE OR GAP TIME JAIL CREDITS AND BY IMPOSING A SENTENCE THAT WAS MANIFESTLY EXCESSIVE AS TO THE TERM OF PAROLE INELIGIBILITY.

Unpersuaded by defendant's contentions, we affirm.

I.

The facts underpinning defendant's conviction are straightforward and, for purposes of this appeal, undisputed. On April 28, 2016, defendant was arrested at his home in Sussex County following a joint narcotics operation between New Jersey and New York law enforcement agencies. Pursuant to a search warrant executed at his residence, police seized more than four pounds of cocaine, drug manufacturing and packaging materials, a handgun, hollow point bullets, and more than $16,000 in cash.

The procedural history is protracted. We summarize the pertinent events. On April 29, 2016, an Orange County warrant issued for defendant's arrest for

drug charges in New York emanating from the joint investigation. On June 17, 2016, a New York indictment charged defendant with operating as a major drug trafficker. Shortly thereafter, defendant waived extradition. He was transported to New York on June 29, 2016.

Also on June 29, 2016, the Sussex County Prosecutor's Office (SCPO) forwarded a pre-indictment plea offer to defendant's retained counsel. The prosecutor noted that defendant likely would plead guilty to the New York indictment and serve his prison term in that state. The prosecutor indicated: "Once that occurs, your client would be advised to make an application as quickly as possible under the [IAD] to be transferred to Sussex County, New Jersey to address his charges here." The prosecutor further stated that after defendant was sentenced on the New Jersey charges, "he c[ould] be transferred back to New York to serve both sentences concurrently." In September 2017 defendant was sentenced to a ten-year prison term for the New York charge.

In February 2018, a Sussex County grand jury charged defendant with the present offenses. On March 26, 2018, defendant's attorney was relieved as counsel. The same day, the trial court issued a bench warrant as a detainer. The warrant noted defendant was confined at a correctional facility in Romulus, New

York. At some point defendant was transferred to Green Haven Correctional Facility (GHCF).

Thereafter, defendant retained new counsel. On June 3, 2019, the State forwarded a revised plea offer to this attorney, stating that should defendant wish to accept the offer, he was required to make an application to return to New Jersey under the IAD. Shortly thereafter, defendant's attorney was relieved as counsel.

In October 2019, defendant's present attorney entered his appearance on defendant's behalf. On December 5, 2019, defense counsel sent correspondence to GHCF notifying the prison that defendant wished to resolve his open charges in New Jersey. Blank IAD forms were annexed to the letter. Counsel demanded the prison complete IAD Forms III and IV and provide defendant with IAD Form II to complete and sign. Counsel also attached eCourts documentation indicating a bench warrant had been issued in this state and was "active."

The following day, defense counsel filed correspondence in the Law Division, seeking a hearing to ensure the interstate detainer had been issued so that defendant could return to New Jersey to address the present offenses while serving his New York prison sentence. Copies of the blank and unsigned IAD forms were annexed to the correspondence.

Defense counsel forwarded a copy of the submission, including the blank IAD forms, to the SCPO. On December 9, 2019, the SCPO emailed the March 26, 2018 warrant and detainer to GHCF. The prosecutor also contacted defense counsel and advised defendant was required to complete and forward the IAD paperwork to the SCPO so that the State could "comply with the IAD requirements." The GHCF did not acknowledge receipt of the detainer until April 8, 2020.

On September 9, 2020, SCPO Detective Kyle J. Phlegar, contacted GHCF, inquiring whether defendant had completed the IAD forms or asked about the statutory process. GHCF's inmate records coordinator, Carol Ann Murphy, advised the forms were provided to defendant on April 8, 2020, but he neither completed the paperwork nor communicated his wish to proceed under the IAD. Phlegar's September 9, 2020 investigation report memorialized his conversation with Murphy.

Defendant thereafter moved to dismiss the indictments for failure to comply with the IAD, contending the State did not timely respond to his December 6, 2019 "IAD request." Claiming the State sent the detainer to GHCF on April 8, 2020, defendant argued "the detainer/warrant should have been issued as of June 3, 2019 when the plea offer was made or as of December 7,

[sic] 2019 when [defense counsel] instructed the SCPO to place the detainer on the defendant in New York State."[2] In his October 1, 2020 certification, defendant acknowledged GHCF told him about the detainer on April 8, 2020, but asserted: "At no time did any jail officials ever provide me IAD forms to fill out and sign." Nor did he refuse to complete and sign the forms. Defendant argued the State improperly relied on Phlegar's hearsay conversation with Murphy that GHCF gave defendant the forms on April 8, 2020. Further, assuming the SCPO sent the detainer on December 6, 2019, defendant blamed GHCF for the "long time gap" between the prison's receipt of the detainer on that date and its April 8, 2020 notification to defendant. Following oral argument on November 5, 2020, the court reserved decision.

Thereafter, the court issued a cogent statement of reasons that accompanied the February 8, 2021 order. The court thoroughly recounted the procedural history and the arguments raised in view of our decisions in State v. Pero, 370 N.J. Super. 203 (App. Div. 2004), and State v. Ternaku, 156 N.J. Super. 30, 34 (App Div. 1978). Finding defendant "never completed and served

[2] We glean defendant's argument from the trial court's ensuing statement of reasons. Although defendant's appellate appendix includes the State's certification in response to his motion, and his reply certification, it does not include his attorney's certification in support of the motion.

New Jersey with the necessary IAD forms," the court concluded "defendant simply did not comply with all the procedural requirements of the IAD."

On March 20, 2021, defendant completed and submitted the requisite IAD forms to the State. He was transferred to New Jersey on May 4, 2021, and entered a timely guilty plea under the IAD on June 24, 2021. Defendant reserved the right to appeal the denial of his motion to dismiss the indictment for the alleged violation of the IAD. See R. 3:9-3(f). Following his August 2021 sentencing, defendant filed the present appeal.

II.

In his first point, defendant maintains both states violated the IAD's speedy trial mandate. Defendant argues, "the issuance of the detainer was late and [New York] failed to initiate the IAD Forms and paperwork to effectuate [his] transfer of custody to New Jersey." As the trial court correctly recognized, defendant's argument is contrary to our holding in Pero, which is directly on point and controlling on the issue presented on this appeal.

In Pero, as in this case, the defendant requested that he be transported to stand trial on New Jersey charges under Article III of the IAD, N.J.S.A.

2A:159A-3.[3] 370 N.J. Super. at 208-09. We explained that such a request by a prisoner held in another state requires the completion of four standard forms, in part by the prisoner and in part by prison officials. Id. at 208. The four forms are:

> Form 1 – "Notice of Untried Indictment, Information or Complaint and of Right to Request Disposition," to be signed and dated by the warden of the custodial institution where the inmate is held, and then signed and dated by the inmate to acknowledge receipt.
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> Form 2 – "Inmate's Notice of Place of Imprisonment and Request for Disposition of Indictments, Informations, or Complaints," to be addressed to the Prosecutor in the jurisdiction where a charge is pending, signed and dated by the inmate.
>
> Form 3 – "Certificate of Inmate Status," to be signed and dated by the warden, and to include: (1) The term of commitment under which the prisoner is being held, (2) the time already served, (3) time remaining to be served on the sentence, (4) the amount of good time earned, (5) the date of parole eligibility of the prisoner, (6) the decision of the parole board relating to the prisoner, (7) the maximum expiration date under the present sentence, and (8) [d]etainers currently on file against this inmate from the same state are as follows.

[3] Pursuant to the IAD, "either the prisoner himself (under Article III of the IAD, N.J.S.A. 2A:159A-3) or the prosecutor in the jurisdiction where the charge is pending (under Article IV, N.J.S.A. 2A:159A-4) can initiate proceedings to bring the prisoner to trial." Pero, 370 N.J. Super. at 206.

> Form 4 – "Offer to Deliver Temporary Custody," to be signed by the warden.
>
> [Ibid.]

The defendant and a prison official in Pero had completed the necessary forms and sent them to the county prosecutor in New Jersey, but the forms did not contain the prison warden's signature. Id. at 209. The New Jersey prosecutor did not receive signed forms until several months later. Id. at 211. We held the defendant was not entitled to dismissal of the charges in accordance with the IAD, N.J.S.A. 2A:159A-5(c), on the ground that more than 180 days had passed since the initial request to be brought before the New Jersey court to stand trial. Id. at 220-21. To trigger the time limit of N.J.S.A. 2A:159A-3, the defendant was required to show the completed and signed documentation was received by the appropriate New Jersey officials. Id. at 223-24.

In the present matter, the trial court correctly concluded the blank forms annexed to defense counsel's December 2019 correspondence fell short of triggering the IAD's time limits. The court rejected defendant's reliance on our decision in State v. Wells, 186 N.J. Super. 497 (App. Div. 1982), where we reversed the trial court's decision, denying defendant's motion to dismiss the indictment under the IAD. Id. at 502. We excused the defendant's failure to strictly comply with the statute based on Florida's mishandling of the detainer

warrant. Ibid. Unlike the present matter, however, the defendant in Wells had completed the requisite IAD forms. Id. at 499. We thus were "entirely satisfied that the detainer had been properly lodged . . . when defendant completed the IAD forms and entrusted them to the proper official of the Florida Department of Corrections." Id. at 501 (emphasis added). Conversely, here, the motion judge found, "Unlike the situation in Wells, where the detainer was in place but had not followed the defendant when he moved to another state's facility, here . . . defendant has never completed and served New Jersey with the necessary IAD forms."

After defendant complied with the IAD's mandates, he was promptly brought to New Jersey to answer the present charges, evincing the SCPO's compliance under the statute. As we stated in Pero, "It does not serve either the legislative intent behind the IAD, or the public interest, for courts to dismiss an indictment where the prosecuting authority is not in violation of the compact." 370 N.J. Super. at 221. Because the State could not comply with the IAD's requirement until defendant fulfilled his statutory obligation, we discern no basis to disturb to the motion judge's decision.

Defendant's remaining contentions under this point lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

III.

We turn to defendant's two-fold sentencing argument. Defendant argues the imposition of a parole disqualifier was "manifestly excessive," and the judge abused his discretion by failing to award gap time or equitable jail credits. Defendant's contentions are unavailing.

We begin with the terms of the plea agreement. Defendant's guilty plea was premised on the State's offer to recommend a five-year prison term, subject to a thirty-month parole-ineligibility period pursuant and N.J.S.A. 2C:43-6(b).[4] The State also agreed to gap-time credits of four months with the "exact dates to be determined at the time of sentence," and "front[-]end jail credits of [sixty-five] days." At the sentencing hearing, however, the State agreed to reduce the parole-ineligibility period to twenty-five months in recognition of our Supreme Court's decision in State v. Carreker, 172 N.J. 100 (2002), which precludes the award of gap-time credit under the circumstances of this case.

Finding aggravating factors three (risk that defendant will re-offend); six (extent and seriousness of defendant's prior record); nine (general and specific deterrence), and eleven (imposition of a lesser penalty without imprisonment would be perceived as the cost of doing business), N.J.S.A. 2C:44-1(a)(3), (6),

[4] The plea form also incorrectly cited N.J.S.A. 2C:44-3(a).

(9), and (11), substantially outweighed the non-statutory mitigating factors of remorse, and participating in drug treatment and attaining a high school diploma while incarcerated, the court sentenced defendant pursuant to the State's revised recommendation. Defendant does not challenge the court's finding or assessment of aggravating and mitigating factors.

Instead, defendant maintains the parole-ineligibility period imposed in this case contravenes our Supreme Court's holding in State v. Kruse, 105 N.J. 354 (1987), and the "Attorney General Law Enforcement Directive No. 2021-4" (AG Directive) applied here. See Att'y Gen. Law Enforcement Directive #2021-04, "Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12" (Apr. 19, 2021). Defendant's contentions are misplaced.

Parole ineligibility is addressed in N.J.S.A. 2C:43-6(b), which provides, in pertinent part:

> As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in [N.J.S.A. 2C:44-1(a) and (b)] . . . the court may fix a minimum term not to exceed one-half of the term set pursuant to [N.J.S.A. 2C:43-6(a)] . . . during which the defendant shall not be eligible for parole . . . .

See also Kruse, 105 N.J. at 359.

In Kruse, the Court considered whether the sentencing court could impose a parole ineligibility period without increasing the presumptive term of imprisonment. Id. at 360. The defendant in Kruse argued "notwithstanding the permissive language in the statute, such a sentence constitutes an abuse of judicial discretion and contravenes the legislative desire for uniformity." Ibid. Citing our decisions in State v. Martelli, 201 N.J. Super. 378 (1985), and State v. Guzman, 199 N.J. Super. 346 (1985), where we rejected similar arguments, the Court held "in certain limited situations, a court may impose a period of parole ineligibility in conjunction with a presumptive sentence." Kruse, 105 N.J. at 360-61. Those situations include "when the parties have entered a plea agreement limiting the maximum sentence to the presumptive term." Id. at 361.

The Court reasoned:

> Increasing the presumptive term is not a prerequisite for the imposition of parole ineligibility, and a sentencing court should not increase the presumptive term merely to justify a period of parole ineligibility. The length of the sentence and the period of parole ineligibility are separate facets of the sentencing decision, and each independently reflects the exercise of judicial discretion. Although the trial court may impose a period of parole ineligibility while also imposing the presumptive sentence, the need for uniformity in sentencing and the heightened standard applicable to the imposition of parole ineligibility suggest that such ineligibility will be imposed but

> rarely when the court has imposed the presumptive sentence.
>
> [Id. at 362.]

Stating the sentencing court's rationale was "a condition precedent to the imposition of a period of parole ineligibility," the Court remanded the matter for the court to explain its reasoning for qualitatively weighing the aggravating and mitigating factors. Id. at 363.

Citing the Court's decision in Kruse, defendant argues the sentencing court in this case was not permitted to impose a parole ineligibility because his five-year sentence was below the presumptive term for second-degree offenses.[5] See N.J.S.A. 2C:43-6(a)(2) (fixing a five- to ten-year prison term for second-degree offenses). Although the Court in Kruse did not consider this precise issue, the same rationale applies here, where the negotiated plea agreement expressly limited the maximum sentence to five years. See Kruse, 105 N.J. at 361.

Indeed, the plea agreement resolved four offenses charged in one indictment, including two first-degree drug offenses, and a weapons offense, which subjected defendant to a mandatory minimum of forty-two months under

[5] However, in State v. Natale, 184 N.J. 458, 496 (2005), the Court declared unconstitutional the presumptive terms previously set forth in N.J.S.A. 2C:44-1(f).

the Graves Act, N.J.S.A. 2C:43-6(c). The related indictment charged second-degree certain persons not to possess weapons, which exposed defendant to a five-year mandatory minimum period of parole ineligibility.

Moreover, unlike the sentencing judge in Kruse, the court here explained its reasons for assessing the aggravating and mitigating factors. For example, noting the remaining charges would be dismissed under the terms of the plea agreement the judge explained, in pertinent part:

> You possessed a firearm. You also claim, for the record, you possessed body-armor piercing bullets. . . . That's frightening to me. It's frightening because not only is . . . dangerous to possess a weapon, but that means that law enforcement authority could be hurt or killed by these things.

Nor are we persuaded by defendant's argument that the AG Directive was applicable here. Pertinent to this appeal the AG Directive provides:

> Plea offers. Whenever a state, county, or municipal prosecuting attorney extends a plea offer contemplating a conviction for a violation of N.J.S.A. 2C:35-3, 35-4, 35-5, 35-6, 35-7, and/or 35-8, or any violation subject to a mandatory extended term pursuant to 2C:43-6(f) (the "qualifying Chapter 35 offenses"), the offer must include a provision agreeing that, pursuant to N.J.S.A. 2C:35-12 (Section 12), the court at sentencing shall impose a period of parole ineligibility for any qualifying Chapter 35 offense equal to one-third of the sentence less commutation, minimum custody, and work credits earned while in custody, consistent with N.J.S.A. 30:4-123.51(a), as if

> the individual had not been subject to a mandatory minimum term.
>
> [(Emphasis added).]

Although neither the court nor the State addressed defendant's contentions, by its plain terms the AG Directive is inapplicable here. Defendant pled guilty to second-degree possession of cocaine with intent to distribute, N.J.S.A 2C:35-5(a)(1) and (b)(2), which is not a qualifying Chapter 35 offense.

Applying our well-settled, deferential standard of review, see e.g., State v. Trinidad, 241 N.J. 425, 453 (2020), we discern no basis to disturb defendant's sentence, which was imposed at the lowest end of the second-degree range, see N.J.S.A. 2C:43-6(a)(2), and is consistent with the terms of the negotiated plea agreement, see State v. Fuentes, 217 N.J. 57, 70 (2014) (recognizing "[a] sentence imposed pursuant to a plea agreement is presumed to be reasonable"). In view of the circumstances of the offense and defendant's criminal history, the sentence does not shock the judicial conscience. See State v. Blackmon, 202 N.J. 283, 297 (2010).

Lastly, we consider defendant's contentions that the court failed to award "gap time and/or equitable jail credits to remediate in some way the time lost in receiving [him] from [GHCF]." Having conducted a de novo review, see State v. Walters, 445 N.J. Super. 596, 600 (App. Div. 2016), we are unpersuaded.

"Unlike jail credit, gap-time credit is mandated by statute, N.J.S.A. 2C:44-5(b)(2)." State v. Joe, 228 N.J. 125, 131 (2017). The Court has explained the gap-time statute generally "applies when: (1) a defendant has been sentenced previously to a term of imprisonment, (2) he or she is sentenced subsequently to another term, and (3) both offenses occurred prior to the imposition of the first sentence." Carreker, 172 N.J. at 105. However, the Court in Carreker held the statute does not apply to any portion of a time served on an out-of-state sentence. Id. at 111. In view of these principles, we discern no error in the court's denial of gap-time credits.

Moreover, the State's initial agreement provided for a four-month gap-time award. In view of the Court's holding in Carreker, the State reduced its recommended parole ineligibility by five months, and the court imposed defendant's sentence accordingly. Implicitly, therefore, the court awarded equitable relief.

Affirmed.