

**NOT FOR PUBLICATION WITHOUT THE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-0902-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHRISTOPHER C. SCHWARTZ,
a/k/a CHRISTOPH C. SCHWARTZ,
CHRISTOPHER SCHWARTZ,
CHOYCE SCHWARTZ, CHOYCE
C. SCHWARTZ, CHRISTOPHER
CHOYCE, and CHRIS CHOYCE,

Defendant-Appellant.

Argued May 16, 2023 – Decided June 5, 2023

Before Judges Geiger and Chase.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Indictment No. 15-11-
1962.

Susan L. Romeo, Assistant Deputy Public Defender
argued the cause for appellant (Joseph E. Krakora,
Public Defender, attorney; Susan L. Romeo, of counsel
and on the briefs).

Daniel I. Bornstein, Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago, Monmouth County Prosecutor, attorney; Daniel I. Bornstein, of counsel and on the briefs).

Rachel E. Simon argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, PC, attorneys; Rachel E Simon, of counsel and on the brief).

Claudia Joy Demitro, Assistant Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Claudia Joy Demitro, of counsel and on the brief; Mercedes N. Robertson, Deputy Attorney General, on the brief).

PER CURIAM

Defendant Christopher C. Schwartz was indicted on charges resulting from two separate narcotics investigations. In his first appeal, he challenged the denial of his motion to suppress physical evidence seized from his person and vehicle under Indictment No. 15-12-2070, and the twenty-year extended term sentence, subject to a ten-year period of parole ineligibility, imposed on count twenty-four of Indictment No. 15-11-1962. State v. Schwartz, No. A-2572-18 (App. Div. May 19, 2021) (slip op. at 2). We affirmed the denial of the suppression motion and defendant's convictions but reversed his sentence on count twenty-four and remanded for resentencing of that count.

We recounted the pertinent facts in our prior opinion:

[D]efendant was the subject of a narcotics investigation in Neptune Township. Defendant sold heroin to an undercover detective on six occasions between May 14 and June 17, 2015. In the aggregate, defendant sold more than one-half ounce of heroin packaged in seventeen bricks, in exchange for more than \$3000. Distribution of one-half ounce or more of heroin is a second-degree crime. N.J.S.A. 2C:35-5(b)(2).

[Ibid.]

Indictment No. 15-11-1962 charged defendant with twenty offenses relating to the six undercover buys. Count twenty-four charged second-degree distribution of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-5(b)(2).

The case proceeded to trial.

The consolidated trial of both indictments commenced on June 6, 2018. The next day, defendant entered into a global plea agreement with the State, entering an open plea to the remaining counts of both indictments. Because it was an open plea, the plea agreement contained no recommended sentence, but the State agreed that the sentences would all run concurrently and that it would not oppose defendant's application for equitable jail credit. However, the State reserved its right to move for a mandatory extended term on Ind. No. 15-11-1962.

On September 20, 2018, the State moved under N.J.S.A. 2C:43-6(f) for a mandatory extended term on Ind. No. 15-11-1962. Its moving papers revealed that defendant was forty-four years old at the time of the offenses and had been previously convicted of the

following offenses: two counts of third-degree possession of CDS with intent to distribute in 1997; first-degree possession of CDS with intent to distribute in 1998; third-degree possession of CDS with intent to distribute in a school zone and second-degree possession of CDS with intent to distribute in 2003; and first-degree robbery in 2008. The State did not move for a discretionary extended term as a persistent offender under N.J.S.A. 2C:44-3(a).

[Schwartz, slip op. at 8-9.]

During oral argument on the motion for an extended term, the State argued that defendant's prior convictions triggered mandatory extended term sentencing under N.J.S.A. 2C:43-6(f), exposing defendant to a maximum extended term of twenty years, subject to a ten-year period of parole ineligibility. Id. at 9. The State emphasized that during the six undercover buys defendant sold "at least 17 bricks, or approximately 850 bags of heroin to an undercover officer." Ibid. The State sought both the maximum term and maximum period of parole ineligibility on count twenty-four. Id. at 10.

In his sentencing analysis, the judge incorrectly referred to N.J.S.A. 2C:44-3(a), and its interpretive caselaw, which pertains to discretionary extended terms for persistent offenders, rather than N.J.S.A. 2C:43-6(f), which pertains to mandatory extended terms. Id. at 11-12. The judge found aggravating factors three (risk of reoffending), six ("prior criminal record and

the seriousness of [current] offenses"), and nine ("need for deterring the defendant and others from violating the law"). Id. at 12. The court found no mitigating factors and that the aggravating factors substantially outweighed the non-existent mitigating factors. Id. at 12-13. Following merger, the judge sentenced defendant to the maximum possible sentence, an extended twenty-year term with ten years of parole ineligibility. Id. at 13.

Defendant challenged his sentence on count twenty-four, arguing resentencing was required because the judge: (1) erred by applying the standards from the persistent offender law, rather than the extended term for drug offenses sought by the State; and (2) abused his discretion by imposing the maximum sentence where defendant was a drug addict, not a drug kingpin, and his predicate offenses were almost two decades old. Id. at 14. Defendant did not argue he was ineligible for a mandatory extended term under N.J.S.A. 2C:43-6(f). Id. at 22.

In addressing defendant's sentencing arguments, we explained:

The Comprehensive Drug Reform Act of 1987 (CDRA), N.J.S.A. 2C:35-1 to 36A-1, L. 1987, c. 106, requires extended mandatory minimum terms for certain enumerated offenses based on the defendant's prior drug convictions. Under the CDRA, a person convicted of distributing CDS, "who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute [CDS]

. . . shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by section c. of N.J.S.A. 2C:43-7, notwithstanding that extended terms are ordinarily discretionary with the court." N.J.S.A. 2C:43-6(f). In addition, "[t]he term of imprisonment shall, except as may be provided in N.J.S.A. 2C:35-12, include the imposition of a minimum term . . . fixed at, or between, one-third and one-half of the sentence imposed by the court[,] . . . during which the defendant shall be ineligible for parole." Ibid.

[Id. at 21.]

We noted that the State did not move for a discretionary extended term, which can only be imposed "upon application of the prosecuting attorney." N.J.S.A. 2C:44-3. Moreover, "N.J.S.A. 2C:44-5(a)(2) bars the imposition of a discretionary extended term and a mandatory extended term in the same sentencing proceeding." State v. Robinson, 217 N.J. 594, 610 (2014). The judge nevertheless applied the four-step process for discretionary extended term sentences adopted in State v. Dunbar, 108 N.J. 80, 89 (1987), in finding that a mandatory extended term was appropriate. Id. at 23-24.

We concluded that the record supported the application of aggravating factors three, six, and nine, and the rejection of mitigating factors two and three sought by defendant. Id. at 24. However, the judge "did not express any consideration of the fact that defendant will be sixty-four years old when he

serves his entire term and fifty-four years old when he first becomes eligible for parole." Id. at 25. We also noted "[t]he court did not address the remoteness of some of those convictions, defendant's long-standing substance abuse that began when he was only eleven years old, and that he has not received clinically based substance abuse treatment for his opiate addiction and reported daily use of cocaine and marijuana." Id. at 25-26. We further noted these were non-violent drug offenses and there was no evidence defendant was armed. Id. at 26. We also noted that "[e]ach of the six undercover buys involved third-degree weight. No two sales occurred on the same date; they all took place at least three days apart." Id. at 26 n.1. The State did not argue defendant distributed large quantities of heroin to other dealers. Id. at 26-27. We also explained:

The ten-year period of parole ineligibility sought by the State and imposed by the court far exceeded the maximum period of parole ineligibility permitted for plea offers by the Revised Brimage Guidelines under the circumstances of this case. While the Guidelines apply to prosecutors during plea negotiations and not courts during sentencing on an open plea, the ten-year period of parole ineligibility was nearly double the limit imposed on prosecutors by the Guidelines, which were adopted to reduce sentencing disparity.

[Id. at 27 (footnotes omitted).]

Our opinion discussed attempts to revise sentencing of non-violent drug offenders to mandatory minimum terms that impose lengthy periods of parole

ineligibility. Id. at 28-29. As part of that discussion, we focused on Attorney General Law Enforcement Directive No. 2021-4, 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, at 5 (Apr. 19, 2021) (Directive 2021-4), which "establishe[d] statewide rules that require prosecutors to seek the waiver of mandatory parole disqualifiers for non-violent drug crimes during plea negotiations, following a probation violation, and after conviction at trial."

Notably, Directive 2021-4 requires prosecutors to offer defendants convicted after trial "the opportunity to enter into an agreement prior to sentencing" pursuant to N.J.S.A. 2C:35-12 that imposes ordinary parole eligibility, including application of "commutation, minimum custody, and work credits earned while in custody." Id. at 7. Directive 2021-4 took effect on May 19, 2021. Id. at 10. However, the prosecutor may still seek an extended term under N.J.S.A. 2C:35-12, and the sentencing court retains authority to impose a discretionary period of parole ineligibility pursuant to N.J.S.A. 2C:43-6(b). Id. at 7-8. We emphasized that "[t]he clear mandate of Directive 2021-4 is to largely eliminate plea negotiations for periods of parole ineligibility formally countenanced by the revised Brimage Guidelines." Schwartz, slip op. at 29.

We found defendant's sentence on count twenty-four was "manifestly excessive, unduly punitive, and shock[ed] our judicial conscience." Id. at 30-31. We remanded for resentencing of that count.

On remand, a different judge conducted the resentencing hearing. The State sought an extended sixteen-year base term pursuant to N.J.S.A. 2C:43-6(a) and an eight-year discretionary parole ineligibility period pursuant to N.J.S.A. 2C:43-6(b), which matched its final pretrial plea offer defendant rejected. Defendant requested a ten-year term with no enhanced period of parole ineligibility. Defendant emphasized that he had taken affirmative steps to address his addiction since the prior sentencing, including completing the Gateway Program for substance abuse disorders while in prison.

The judge noted the legislative declaration that the distribution of CDS "pose[d] a serious and pervasive threat to the health, safety and welfare of the citizens of this State." N.J.S.A. 2C:35-1.1(b). Considering defendant as he stood before the court at resentencing, which we need not recount here, the judge gave heavy weight to aggravating factors three, six, and nine. The judge noted defendant was selling "a particularly dangerous mix," "heroin laced with Fentanyl." She considered the negative impact narcotics had on communities, including an increase in violent crime.

The judge found defendant's addiction was not the motivation for these offenses. Rather, "defendant was motivated by money and for purposes of economic gain." The judge found the facts "[did] not portray an individual struggling to support a habit, but rather a lucrative, criminal enterprise." The judge noted defendant's prior opportunities for substance abuse treatment.

The judge recognized that she was not bound by the State's plea offers or sentencing recommendations. She noted defendant pled open after trial had begun. The judge stated she was clearly convinced that the aggravating factors substantially outweighed mitigating factors and that a period of parole ineligibility was appropriate under N.J.S.A. 2C:43-6(b). The judge imposed a sixteen-year term, subject to an eight-year period of parole ineligibility.

This appeal followed. We invited the Association of Criminal Defense Lawyers of New Jersey (ACDL) and the Attorney General of New Jersey to participate as *amicus curiae*.

Defendant raises the following points for our consideration:

I. DEFENDANT'S SENTENCE MUST BE REVERSED BECAUSE THE RESENTENCING PROCEDURES HERE VIOLATED THE ATTORNEY GENERAL'S DIRECTIVE 2021-4, EQUAL PROTECTION PRINCIPLES, AND THE PRINCIPLES EXPRESSED IN THE APPELLATE DIVISION'S REMAND DECISION, SUCH THAT DEFENDANT IS NOW SUBJECT TO AN ILLEGAL

SENTENCE WITH A LONGER PERIOD OF PAROLE INELIGIBILITY UNDER N.J.S.A. 2C:43-6(b) THAN IF HIS INITIAL MANDATORY MINIMUM SENTENCE UNDER N.J.S.A. 2C:43-6(f) HAD NOT BEEN REVERSED AS MANIFESTLY EXCESSIVE, UNDULY PUNITIVE AND SHOCKING TO THE REVIEWING COURT'S CONSCIENCE.

1. The Directive Applied to Defendant's Resentencing.

2. Defendant's Sentence Was Illegal Because Defendant Was Not Awarded the Prison Credits Mandated by the Directive and by N.J.S.A. 30:4-123.51.

3. Defendant's Sentence Violated His Equal Protection Rights.

4. The State Applied the Wrong Standard Under the Directive in Seeking a Discretionary Minimum Term.

5. The State Made No Showing that the Circumstances of Defendant's Offenses Rendered His Case One of the Directive's Rare, "Small Number of Cases" that Warranted the Imposition of an Additional Discretionary Period of Parole Ineligibility.

II. DEFENDANT'S SENTENCE MUST BE REVERSED BECAUSE THE COURT RELIED ON INCOMPETENT EVIDENCE TO SUPPORT ITS FINDINGS ON AGGRAVATING AND MITIGATING FACTORS.

Amicus curiae ACDL argues:

I. THE DIRECTIVE IS CONSTITUTIONALLY DEFICIENT FOR ITS FAILURE TO LIMIT OR GUIDE THE EXERCISE OF PROSECUTORIAL DISCRETION AT INITIAL SENTENCING.

A. The Directive Is Intended to Ameliorate Outdated Drug Laws.

B. Directive Section I.B as Drafted Is Unconstitutional Under New Jersey Supreme Court Precedent.

C. In the Interest of Sentencing Uniformity, the Best Solution Is to Apply Directive Section I.D Criteria to Section I.B Agreements.

II. NEITHER THE PROSECUTOR NOR SENTENCING COURT FOLLOWED THE PLAIN LANGUAGE OF THE DIRECTIVE.

Amicus curiae Attorney General argues:

THE STATE COMPLIED WITH THE TEXT AND THE LOGIC OF DIRECTIVE NO. 2021-4.

A. The State Did Not Violate the Directive In Seeking a Discretionary Term Based on Its Judgment Regarding the Particular Facts of a Case.

B. The Decision to Impose a Discretionary-Parole-Ineligibility Term Lies Within the Discretion of the Sentencing Court, Such That [Division of Criminal Justice] Director Approval Is Not Required or Necessary.

"Appellate review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard." State v. Blackmon, 202 N.J. 283, 297 (2010). "[A]n appellate court must not 'substitute its judgment for that of the sentencing court.'" State v. Liepe, 239 N.J. 359, 370 (2019) (quoting State v. Fuentes, 217 N.J. 57, 70 (2014)).

Appellate review is thus limited to consideration of:

(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."

[Id. at 371 (quoting State v. McGuire, 419 N.J. Super. 88, 158 (App. Div. 2011)).]

Typically, "when the aggravating factors preponderate, sentences will tend toward the higher end of the range." Fuentes, 217 N.J. at 73 (quoting State v. Natale, 184 N.J. 458, 488 (2005)). However, a sentencing court must consider "the nature and circumstances" of the offenses and the "history and characteristics" of the defendant. Id. at 72. "Thus, a judge may impose sentence lower than that recommended by the prosecutor, but not less than [the] mandatory minimum." Cannel, N.J. Criminal Code Annotated, cmt. 6 on N.J.S.A. 2C:44-1 (2023) (citing State v. Press, 176 N.J. 68 (2003)). The court

must also consider the real time consequences of a sentence imposing a period of parole ineligibility "in determining the appropriate term of imprisonment." N.J.S.A. 2C:44-1(c)(2).

The CDRA requires extended mandatory minimum terms for certain enumerated offenses based on the defendant's prior drug convictions in certain circumstances. Under the CDRA, a person convicted of distributing CDS, "who has been previously convicted of manufacturing, distributing, dispensing or possessing with intent to distribute [CDS] . . . shall upon application of the prosecuting attorney be sentenced by the court to an extended term as authorized by section c. of N.J.S.A. 2C:43-7, notwithstanding that extended terms are ordinarily discretionary with the court." N.J.S.A. 2C:43-6(f). In addition, "[t]he term of imprisonment shall, except as may be provided in N.J.S.A. 2C:35-12, include the imposition of a minimum term . . . fixed at, or between, one-third and one-half of the sentence imposed by the court[,] . . . during which the defendant shall be ineligible for parole." Ibid. Defendant does not argue he was ineligible for a mandatory extended term under N.J.S.A. 2C:43-6(f).

We found that defendant's prior sentence of a twenty-year term, subject to a ten-year period of parole ineligibility was "manifestly excessive, unduly punitive, and shock[ed] our judicial conscience." Schwartz, slip op. at 30-31.

As we previously held, the finding of aggravating factors three, six, and nine is supported by the record. So too is the finding that no mitigating factors applied. Consequently, we have no basis to disturb the finding that the aggravating factors substantially outweighed the non-existent mitigating factors. As a result, a discretionary period of parole ineligibility was appropriate. Directive 2021-4 applies to the executive branch, not the courts.

Defendant argues the judge improperly found the heroin he sold was laced with Fentanyl. We disagree. The rules of evidence are relaxed at sentencing proceedings. N.J.R.E. 101(a)(3)(C). A sentencing court may consider evidence that may not be admissible at trial. See State v. Davis, 96 N.J. 611, 619-20 (1984) (explaining that "[a] sentencing judge may exercise a far-ranging discretion as to the sources and types of evidence used . . . in determining the . . . punishment to be imposed," including presentence materials, "without surmounting regular hurdles of evidential admissibility" and that "would not satisfy conventional evidential standards"); State v. Smith, 262 N.J. Super. 487, 530 (App. Div. 1993) (stating that "sentencing judges may consider material that otherwise would not be admissible at trial, as long as it is relevant and trustworthy"). Indeed, the sentencing court must give "due consideration" to the

facts set forth in the presentence report that are not shown to be inaccurate. N.J.S.A. 2C:44-6(a).

Here, the prosecutor's office submitted certified laboratory reports showing that multiple seized items tested positive for heroin and five seized items tested positive for Fentanyl. The positive test results are listed in the presentence report, and lab reports are attached to it.¹ A sentencing court may consider "relevant and trustworthy" "information . . . presented for the court's use in exercising a sentencing or other dispositional discretion" N.J.R.E. 101(a)(3); see also Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 2 on N.J.R.E. 101(a) (2022-2023) (discussing relaxation of the rules of evidence in sentencing). The State Police Laboratory Reports provided relevant and sufficiently trustworthy information that was properly considered by the judge as part of her sentencing analysis.

The judge rendered a comprehensive oral decision that included a detailed individualized assessment of defendant as he stood before the court at resentencing, see State v. Randolph, 210 N.J. 330, 333 (2012), based on "the

¹ To the extent that our earlier opinion indicated there was no evidence that the heroin was laced with Fentanyl, we stand corrected. The presentence report prepared for the original sentencing did not list detection of Fentanyl or attach the lab reports.

nature and circumstances" of the offenses, Fuentes, 217 N.J. at 72, the "history and characteristics" of the defendant, ibid., and the applicable aggravating and mitigating factors, see Randolph, 210 N.J. at 333. The judge stated her reasons for imposing the sentence and considered the real-time consequences of the sentence. Her findings are supported by the record. "On appeal, a trial judge's sentencing determinations are entitled to substantial deference." State v. Jaffe, 220 N.J. 114, 124-25 (2014) (quoting State v. Pagan, 378 N.J. Super. 549, 558 (App. Div. 2005)).

Because the aggravating circumstances substantially outweighed the mitigating circumstances, a sentence at "the higher end of the range" is typical. Fuentes, 217 N.J. at 73 (quoting Natale, 184 N.J. at 488). Here, the sixteen-year base term is barely above the midpoint of the extended ten to twenty-year range. Given those same findings, a discretionary period of parole ineligibility not to exceed one-half of the base term may also be imposed. N.J.S.A. 2C:43-6(b). "In deciding the length of the period of parole ineligibility, the court should again consult the same balance of aggravating and mitigating factors as used in the base term of incarceration." Cannel, cmt. 3 on N.J.S.A. 2C:43-6 (citing State v. Kirk, 145 N.J. 159, 178 (1996); State v. Ghertler, 114 N.J. 383, 389 (1989)).

Accordingly, imposing the maximum period of parole ineligibility was supported by the sentencing factors.

Compared with the original sentence, the new sentence has a base term four years shorter and a period of parole ineligibility two years shorter. Unlike the original sentence, the new sentence is not manifestly excessive or unduly punitive and does not shock our judicial conscience.

Defendant argues his sentence is illegal because the discretionary period of parole ineligibility was not reduced by commutation credits, minimum custody credits, or work credits. We disagree. Pursuant to N.J.S.A. 30:4-123.51(a), those credits do not reduce a period of parole ineligibility, whether mandatory or discretionary. The sentence is not illegal.

The ACDL argues Directive 2021-4 is constitutionally deficient by failing to limit or guide the exercise of prosecutorial discretion at sentencing. We need not reach this issue.² Trial courts are statutorily authorized by N.J.S.A. 2C:43-6(b) to impose periods of parole ineligibility when "the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors." The court's authority to do so does not require the prosecutor to file a

² See Comm. to Recall Robert Menendez from the Off. of U.S. Senator v. Wells, 204 N.J. 79, 95 (2010) (stating that courts "strive to avoid reaching constitutional questions unless required to do so").

motion or hinge on the prosecutor's sentencing position. Nor is the prosecutor's discretion unfettered. Moreover, Directive 2021-4 does not apply to the judiciary or limit the court's discretion under N.J.S.A. 2C:43-6(b).

The Attorney General argues the prosecutor did not violate Directive 2021-4 in seeking a discretionary period of parole ineligibility based on its judgment regarding the facts of the case. It further argues that the approval of the Director of the Division of Criminal Justice is not required to impose a discretionary parole-ineligibility term. We agree. Directive 2021-4 only requires prosecutors to seek waiver of mandatory parole disqualifiers for non-violent drug offenses. It does not prohibit a prosecutor from seeking, or a court from imposing, a discretionary period of parole ineligibility when aggravating factors substantially outweigh the mitigating factors. See Directive 2021-4, at 2 n.3 ("This Directive only addresses the imposition of statutorily required periods of parole ineligibility. As always, the court retains the authority to impose discretionary parole ineligibility when circumstances warrant."); see also 2019 N.J. Crim. Sent'g & Disposition Comm'n, Ann. Rep. 11 (noting the significant difference between mandatory sentences and the longstanding use of discretionary parole ineligibility "in cases where an extended term or period of

parole eligibility might be warranted"). Here, in full compliance with Directive 2021-4, the State waived any period of mandatory parole ineligibility.

For the reasons we have stated, we discern no basis to disturb the sentence imposed, which was considerably shorter than defendant's original sentence.

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

Affirmed.

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



CLERK OF THE APPELLATE DIVISION