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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2188-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CYNTHIA RIVERA,

Defendant-Appellant.

Argued April 25, 2023 – Decided May 18, 2023

Before Judges Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-05-0681.

Morgan A. Birck, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Morgan A. Birck, of counsel and on the brief.)

Erin M. Campbell, Assistant Prosecutor, argued the cause for respondent (Yolanda Ciccone, Middlesex County Prosecutor, attorney; Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

After the Supreme Court vacated defendant Cynthia Rivera's sentence and remanded for resentencing, the Law Division judge imposed the same aggregate fifteen-year prison term, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, as the original sentence. Defendant now appeals from a March 21, 2022 judgment of conviction, raising the following point for our consideration:

THE RESENTENCING COURT ERRED IN FAILING TO FIND TWO MITIGATING FACTORS THAT THE STATE CONCEDED WERE AMPLY SUPPORTED BY THE RECORD (TWELVE AND NINE) AND REFUSING TO CONSIDER DEFENDANT'S REHABILITATIVE EFFORTS IN RELATION TO MITIGAT[I]NG FACTOR NINE, AGGRAVATING FACTOR THREE, OR THE LENGTH OF THE SENTENCE.

In essence, defendant argues the judge failed to find mitigating factor twelve, N.J.S.A. 2C:44-1(b)(12) (defendant's willingness to cooperate with law enforcement), notwithstanding the State's concession that the factor applied and without articulating a change of circumstances that warranted its removal. Defendant further contends the judge failed to consider her post-offense rehabilitation in its assessment of the aggravating and mitigating factors, particularly aggravating factor three, N.J.S.A. 2C:44-1(a)(3) (risk of committing

another offense), and mitigating factor nine, N.J.S.A. 2C:44-1(b)(9) (defendant's character and attitude indicate an unlikelihood of reoffending).

Defendant seeks resentencing before a different judge. The State acknowledges the judge should have found mitigating factor twelve, for the same reasons the judge found the factor when imposing defendant's original sentence. But the State claims resentencing is not warranted. Having considered defendant's contentions in view of the record and the applicable legal principles, we vacate her sentence and remand for a new sentencing before another judge.

I.

The details underlying defendant's June 2018 guilty plea are set forth at length in the Court's opinion, State v. Rivera, 249 N.J. 285, 291-92 (2021), and need not be repeated here. It suffices to say, defendant was eighteen years old, with no prior arrests, when she participated in a robbery gone wrong that began in the Bronx and ended in Woodbridge, resulting in the death of Andrew Torres and serious bodily injury to the intended robbery victim, Justin Garcia. Id. at 291-92, 294. Defendant committed the offenses with her then boyfriend, Martin Martinez Jr., and his associate, John Mingo. Id. at 291-92. In May 2018, defendant, Martinez, and Mingo were charged in a Middlesex County indictment with multiple offenses stemming from the incident.

The following month, in June 2018, defendant pled guilty to count two, as amended to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1); count four, as amended to second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); and count five, second-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2(a)(1) and N.J.S.A. 2C:15-1(a)(1). Pursuant to the terms of the negotiated plea agreement, defendant agreed to cooperate with the State and testify against Martinez and Mingo. In exchange, the State agreed to recommend an aggregate fifteen-year prison term, subject to NERA, and dismissal of the remaining offenses charged in the ten-count indictment. During the plea hearing, defendant acknowledged her participation in the offenses and provided a detailed factual basis, inculcating her co-defendants.

In February 2019, defendant was sentenced in accordance with the terms of the plea agreement. The judge found aggravating factors three and nine, N.J.S.A. 2C:44-1(a)(9) (general and specific deterrence) outweighed mitigating factors seven, N.J.S.A. 2C:44-1(b)(7) (defendant had no history of criminal activity as an adult or delinquency as a minor), and twelve. Assigning "great weight" to aggravating factor three, the judge speculated defendant would have engaged in other criminal conduct but did not have the opportunity to do so because of her youth. The judge did not address mitigating factor nine.

On direct appeal, defendant only challenged her sentence, which this court heard on an excessive sentencing calendar pursuant to Rule 2:9-11. Citing the Supreme Court's decision in State v. Case, 220 N.J. 49 (2014), defendant argued the sentencing judge failed to provide an adequate basis for finding aggravating factor three and mitigating factor seven. Defendant further claimed the judge's assessment of aggravating factor three improperly considered defendant's youth. We affirmed, State v. Rivera, No. A-4825-18 (App. Div. Apr. 1, 2020), and the Court reversed, 249 N.J. at 290.

Crediting defendant's argument, the Court in Rivera held a defendant's "youth may be considered only as a mitigating factor in sentencing and cannot support an aggravating factor." Id. at 296. The Court continued:

The sentencing court was obliged to consider defendant as "she [stood] before the court on the day of sentencing." [State v.] Jaffe, 220 N.J. [114,] 124 [2014]. As in Jaffe, defendant had taken meaningful post-offense steps towards rehabilitation, including ending her abusive relationship with co-defendant Martinez and making educational plans. Defendant had no prior juvenile adjudications, no arrests, and no criminal record. Defendant cooperated substantially with law enforcement and expressed sincere remorse for her role in the crime. She stood before the court as a first-time offender and should have been considered as one.

[Id. at 303 (alteration in original).]

The Court provided the following remand instructions:

On resentencing, the court should give due consideration to all credible evidence in the record and all relevant sentencing factors on the day defendant stands before the court. [State v.]Randolph, 210 N.J. [330,] 354 [(2012)]. In other words, both defendant and the State are entitled to bring all relevant factors to the court's attention, so long as they are supported by competent and credible evidence. Also, the court on resentencing is free to consider defendant's youth at the time of the offense and apply mitigating factor fourteen, which was given immediate effect in all sentencing proceedings on or after October 19, 2020. See N.J.S.A 2C:44-1(b)(14); L. 2020, c. 110.

[(Id. at 303-04) (footnote omitted).]

The Court noted the sentencing judge failed to address mitigating factor nine, despite the State's concession that the factor applied. Id. at 303 n.2. Recognizing a trial judge need not find sentencing factors that are unsupported by the record, the Court reiterated the judge, however, is required to consider the factors raised by the parties. Ibid. (citing Case, 220 N.J. at 64).

Following the Court's remand, defense counsel filed a thirty-three-page brief in mitigation of sentence. Seeking an aggregate ten-year prison term subject to NERA, counsel acknowledged "[defendant]'s crimes were serious," but contended they "encompassed a single period of aberrant behavior influenced by the hallmark immaturities of older adolescents." Counsel argued

"[defendant] has demonstrated significant rehabilitation" while incarcerated. Learning "she was pregnant [with Martinez's child] during intake at the Middlesex County Adult Correctional Center," counsel asserted defendant has changed her life since becoming a mother. Counsel cited defendant's achievements, and appended copies of her high school diploma, medical records, character letters, and defendant's certification, describing her troubled upbringing, Martinez's abusive behavior, and the progress she has made while incarcerated.

At sentencing, counsel reiterated her argument, asserting mitigating factors two, seven, eight, nine, eleven, twelve, and fourteen, see N.J.S.A. 2C:44-1(b)(2) (defendant failed to consider "her conduct would cause or threaten serious harm"), (7), (8) ("defendant's conduct was the result of circumstances unlikely to recur"), (9), (11) (defendant's imprisonment would cause excessive hardship), (12), and (14) "substantially outweigh[ed] any aggravating factors." Twenty-two years old at the time of resentencing, defendant expressed remorse. The State again conceded the application of mitigating factors seven, nine, and twelve. Pursuant to the Court's opinion, the State also acknowledged mitigating factor fourteen applied.

The judge applied and weighed aggravating factors three and nine, and mitigating factors seven and fourteen, finding they were "balanced." The judge rejected all other mitigating factors. Defendant was sentenced to a fifteen-year prison term on count two, a ten-year prison term on count four, and a ten-year prison term on count five. All sentences were subject to NERA and imposed concurrently. The judge concluded "the negotiated sentence [wa]s within the authorized range"; "in accordance with the law"; and "fair and in the interest of justice." This appeal followed.

II.

In determining the appropriate sentence to impose within the statutory range, trial courts first must identify any relevant aggravating and mitigating factors, set forth in N.J.S.A. 2C:44-1(a) and (b), that apply to the case. State v. Fuentes, 217 N.J. 57, 72 (2014). The finding of any factor must be supported by competent, credible evidence in the record. State v. Roth, 95 N.J. 334, 363 (1984). On resentencing, the court "must engage in a de novo review of the aggravating and mitigating factors applicable to the defendant at the time of . . . resentencing." Jaffe, 220 N.J. at 122. Whether a sentence should gravitate toward the upper or lower end of the range depends on a balancing of the relevant factors. Fuentes, 217 N.J. at 72-73.

We do not substitute our assessment of the aggravating and mitigating factors for that of the sentencing judge. State v. Miller, 205 N.J. 109, 127 (2011). We must affirm the sentence, unless: "the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record." State v. Miller, 237 N.J. 15, 28 (2019) (quoting Fuentes, 217 N.J. at 70). We therefore review a sentencing court's decision "in accordance with a deferential standard." Fuentes, 217 N.J. at 70; see also State v. Trinidad, 241 N.J. 425, 453 (2020). That deference, however, "applies only if the trial judge follows the Code and the basic precepts that channel sentencing discretion." Case, 220 N.J. at 65; see also Trinidad, 241 N.J. at 453. Ordinarily, we will not disturb a sentence that is not manifestly excessive or unduly punitive, does not constitute an abuse of discretion, and does not shock the judicial conscience. State v. O'Donnell, 117 N.J. 210, 215-16 (1989); Roth, 95 N.J. at 342.

We first consider defendant's contention that the sentencing judge failed to find mitigating factor twelve. Notwithstanding the State's concession and the judge's previous finding, the judge concluded: "You only get mitigating factor [twelve] if you cooperate with law enforcement in a separate investigation targeted at other people, not the people . . . who you've been arrested with. It

doesn't apply . . . in the prosecution of other defendants." The judge's understanding of the law was mistaken. See e.g., State v. Dalziel, 182 N.J. 494 (2005).

Similar to defendant in the present matter, the defendant in Dalziel pled guilty "in exchange for truthful testimony against [his co-defendant]." Id. at 498. Noting the defendant's cooperation with law enforcement "was part of the plea agreement, and therefore was rooted in the record," the Supreme Court concluded the sentencing court erred by failing to acknowledge his cooperation. Id. at 505-06. The Court therefore vacated the defendant's sentence and remanded for resentencing. Id. at 506; see also State v. Henry, 323 N.J. Super. 157, 166 (App. Div. 1999) (recognizing the sentencing court failed to find mitigating factor twelve where the defendant testified against one co-defendant and the other remained a fugitive at the time of the defendant's sentencing).

We turn to defendant's argument that the judge failed to consider her post-offense rehabilitation in his reassessment of the aggravating and mitigating factors. See Rivera, 249 N.J. at 300; see also State v. Bellamy, 468 N.J. Super. 29, 39-40 (App. Div. 2021) (explaining absent specific limiting instructions, a remand for resentencing requires the court consider the defendant as he or she

stands on the day of sentencing). Defendant argues the judge failed to find mitigating factor nine and improperly found aggravating three.

Our review of the record reveals the judge considered mitigating factor nine, but concluded defendant's post-offense rehabilitation did not warrant mitigation of sentence. The judge stated:

Now, I do recognize that she's doing well for herself while incarcerated. Okay? But that goes to serving the objectives of rehabilitation and recidivism. Okay?

By . . . being restrained in the jail for the time that she's being sentenced to, . . . the hope is that that will deter her from committing future activity because she will be able to rehabilitate herself with programs within the Department of Corrections. Okay?

Those rehabilitative efforts don't go to cutting short her time beyond . . . what the jail affords her in . . . good behavior credits and extra credits that she can earn. Good for her. Okay?

What that really goes to is just proving that being incarcerated while in service of the sentence for . . . these crimes that she pled guilty to, she's making herself a better person because when she's ultimately up for parole, she will be able to tell the Parole Board this is how – I didn't waste time in prison; I've changed myself. This is why you should give me parole because I am way better than I was when I first got in here.

Again, the judge's finding and reasoning are erroneous. Although defendant's rehabilitative efforts may be relevant to the Parole Board's

consideration in the future, defendant was entitled to consideration of those efforts on resentencing. In essence, the judge failed to consider defendant as she stood before him on the day of her resentencing hearing.

Turning to aggravating factor three, the judge found:

So, in the end, I am finding aggravating factor three applies, that there's a risk that she'll commit another offense, and it's only a risk; it's not that she will. I had found it much stronger the first sentencing, but on this sentencing, I'm hoping that I am completely wrong.

I think the risk has been lessened because I have no clue once she gets out who Ms. Rivera's going to be involved . . . with, if anyone, and what kind of influence they're going to have over her.

I'm just going to find it because I think that in this instance where she went from no criminal behavior into a doozy of criminal behavior, the possibility still could exist that [she] could be . . . under the same kind of circumstances that influenced her to commit these crimes when she gets released.

I hope not. I hope not. And I'm . . . going to bank on that she isn't, but as far as this case goes and in an assessment of this case, I'm going to find that there's a risk because nothing's ever guaranteed.

The judge's reason for ascribing less weight to aggravating factor three is subjective and speculative. It does not appear that the judge considered defendant's post-offense rehabilitation in his assessment of aggravating factor three.

Therefore, we are constrained to vacate defendant's sentence and remand for a third sentencing. In view of our decision, we direct the matter be reassigned to another judge on remand. See State v. Melvin, 248 N.J. 321, 352-53 (2021) ("Viewing the proceedings from the defendant's perspective, it might be difficult to comprehend how the same judge who has twice sentenced him [or her] could arrive at a different determination at a third sentencing."); see also R. 1:12-1(d); Pressler and Verniero, Current N.J. Court Rules, cmt. 4 on R. 1:12-1 (2023) (providing "the appellate court has the authority to direct that a different judge consider the matter on remand and in subsequent proceedings in order to preserve the appearance of a fair and unprejudiced hearing"). On remand, and in accordance with the Supreme Court's decision in Rivera, the judge shall consider defendant's post-offense conduct as she stands before the court on that day. 249 N.J. at 303. The judge shall reassess the aggravating and mitigating factors anew. See Jaffe, 220 N.J. at 122.

Defendant's sentence is vacated, and the matter is remanded for resentencing. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION