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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3248-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHATARA S. CARTER,
a/k/a FIESTY RUE,

Defendant-Appellant.

Submitted May 10, 2023 - Decided July 26, 2023

Before Judges Currier and Mayer.

On appeal from the Superior Court of New Jersey, Law
Division, Camden County, Accusation No. 10-05-1501.

Joseph E. Krakora, Public Defender, attorney for
appellant (Ruth E. Hunter, Designated Counsel, on the
brief).

Grace C. MacAulay, Camden County Prosecutor,
attorney for respondent (Jason Magid, Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the February 19, 2021 order denying her motion to correct an illegal sentence. We affirm.

At age fourteen, defendant was involved in a gang-related murder of two people and charged with first-degree murder. With the representation of counsel, defendant agreed to a voluntary waiver to the Law Division. She was then charged in a 2010 accusation with first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), to which she subsequently pleaded guilty. The recommended sentence was subject to a Memorandum of Understanding (MOU) that included the following cooperation agreement provision:

[Defendant] agrees that she will provide information and tape-recorded statements regarding her participation and the participation of all others involved in the homicides of [the victims] . . . and the attempted homicides of [two others] She will work together with investigators and prosecutors, truthfully respond to their questions, and assist them in furthering their investigation and preparing matters for [c]ourt.

[Defendant] further agrees to provide the State, in timely fashion, with any and all information she may learn regarding the homicides of [the victims] and the attempted homicides of [two others] and all related crimes.

. . . .

[Defendant] agrees, as consideration for the State's agreement to permit her sentencing to proceed as would normally be scheduled rather than have said

sentencing held in abeyance until completion of any and all related criminal proceedings in which her cooperation and/or testimony are required, the State may move before the [c]ourt to annul the plea agreement and sentence within thirty (30) days of the completion of any and all criminal matters in which her cooperation and/or testimony are required should the State determine that [defendant] has violated a term(s) of the agreement.

The court sentenced her to the recommended twenty-year sentence with an eighty-five percent period of parole ineligibility subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. On appeal, we affirmed the sentence. State v. Carter, No. A-2667-10 (App. Div. Dec. 13, 2011).

Thereafter, the State moved to vacate the plea agreement because defendant, then seventeen years old, did not give truthful testimony at the trial of one of the co-defendants. During a 2014 hearing, defense counsel asserted defendant should have been represented by counsel during her trial testimony. The court granted the State's motion, finding there was no precedential case law extending a defendant's Sixth Amendment right to counsel to those circumstances.

The parties then agreed to a re-negotiated plea agreement under which defendant would plead guilty to the aggravated manslaughter charge, the State

would not charge her with perjury, and the sentence would be capped at twenty-five years subject to NERA.

The court sentenced defendant to twenty-two years, stating, "[T]wo additional years [was] sufficient punishment for not completely fulfilling her end of the bargain," that is, her failure to testify truthfully at the co-defendant's trial. Defendant did not appeal from the February 21, 2014 judgment of conviction. Her parole eligibility date is November 11, 2028, at which time she will be thirty-three years old.

In June 2015, defendant filed a pro se petition for post-conviction relief (PCR), later supplemented by counsel. Defendant argued trial counsel was ineffective: (1) by advising her to voluntarily waive the charge to adult court; (2) in "requesting that . . . defendant be sentenced prior to her testifying in accordance with the [MOU] as it deprived her of her right to continual representation while the other co-defendants' cases were resolved"; and (3) in failing "to file an appeal of the trial court's [o]rder granting the State's application to set aside the original sentence and plea." Defendant also asserted "the [MOU] was unenforceable because it was signed by a minor and therefore [her] original sentence and plea should be reinstated." Defendant also contended that the then-newly enacted amendments to the juvenile waiver statute, N.J.S.A.

2A:4A-26.1, which raised the minimum waiver age from fourteen to fifteen years old, should apply retroactively to her. The court denied the petition.

On appeal, we affirmed, finding the PCR arguments lacked merit and stating:

Most significantly, defendant confessed, in graphic detail, to her personal participation in a particularly brutal and senseless murder. The defense psychological report was inadequate to demonstrate that she could be rehabilitated before age nineteen. Defendant faced almost certain waiver to adult court, where she would be tried for first-degree murder. Defendant has not established that there was any additional evidence that her attorney could have presented that would have been more persuasive than [the psychologist's] report. See State v. Jack, 144 N.J. 240, 254-55 (1996). As a result, she has not presented a prima facie case that her trial attorney was ineffective in advising her to enter into the plea agreement. Ibid.

We also find no evidence that the attorney was ineffective in obtaining for defendant an agreement she wanted, allowing her to be sentenced in advance of her cooperation in testifying against co-defendants. That was a very favorable aspect of the deal, because she got the benefit of her bargain before providing the State with the promised cooperation. Defendant also did not provide any certification, or other legally competent evidence explaining how that provision of the cooperation agreement came about or denying that it represented her wishes. Bald assertions are insufficient to support a PCR petition or to justify holding an evidentiary hearing. See State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Defendant did not provide any legally competent evidence, or even a representation, that she asked her attorney to file an appeal from the February 21, 2014 judgment of conviction. Nor did she certify that the attorney either failed to consult with her about filing an appeal or that he advised her against filing an appeal. As a result, she is not entitled to PCR with respect to her attorney's alleged "failure" to file an appeal. See Roe v. Flores-Ortega, 528 U.S. 470, 477-80 (2000); State v. Jones, 446 N.J. Super. 28, 33-35 (App. Div. 2016). Defendant is also barred by Rule 3:22-4 from raising, on PCR, issues that she could have raised on that appeal. On a direct appeal, defendant could have raised the claim that, because she was unrepresented during her testimony about the co-defendant, the trial court should not have set aside her original plea deal based on her violation of the cooperation agreement. Hence, she cannot raise the issue in a PCR petition. See R. 3:22-4.

Lastly, we need not address the retroactive application of N.J.S.A. 2A:4A-26.1, prohibiting involuntary waivers of minors under the age of fifteen. Because defendant voluntarily agreed to the waiver, her reliance on State in the Interest of J.F., 446 N.J. Super. 39, 55 (App. Div. 2016), is misplaced. J.F. held that N.J.S.A. 2A:4A-26.1(c)(1) would be applied retroactively in that case. However, when the Legislature enacted N.J.S.A. 2A:4A-26.1, it left untouched the provisions of N.J.S.A. 2A:4A-27, which permits voluntary waivers by minors age fourteen and older, and voluntary waivers by minors under fourteen who are charged with murder. We conclude that N.J.S.A. 2A:4A-27 applies here. Even if we were so inclined, we could not rewrite that section of the statute to provide defendant relief. See O'Connell v. State, 171 N.J. 484, 488 (2002).

[State v. Carter, No. A-2382-16 (App. Div. July 12, 2018) (slip op. at 10-13).]

In August 2019, defendant filed a pro se motion to correct an illegal sentence. Defense counsel later filed a brief.

Defendant asserted her sentence was illegal and excessive because she was a juvenile offender, and, under N.J.S.A. 2A:4A-44(d)(1)(c), amended in 2020, a juvenile sentence for any first-degree crime other than murder must not exceed four years. The State contended that defendant's twenty-two-year sentence fell between the ten-to-thirty-year range for a first-degree aggravated manslaughter sentence.

On February 19, 2021, the trial court denied defendant's motion in a well-reasoned oral opinion and accompanying order. The judge stated that once defendant waived to the Law Division, she was subject to the adult criminal code, and defendant's sentence was not illegal under the adult code. In addition, defendant was not sentenced to life or life without parole or life with an eighty-five percent parole ineligibility period. Therefore, defendant's sentence did not violate the tenets of Miller v. Alabama, 567 U.S. 460, 479-80 (2012), or State v. Tormasi, 466 N.J. Super. 51, 66 (App. Div. 2021). In addition, this court stated in Tormasi that the mitigating factor added to N.J.S.A. 2C:44-1(b)(14) in

2020 did not provide a basis to render a sentence illegal or unconstitutional. 466
N.J. Super. at 67.¹

On appeal defendant presents the following points for our consideration:

POINT I

A RESENTENCING PURSUANT TO [MILLER V. ALABAMA, 567 U.S. 460 (2012)], AND STATE V. ZUBER, 227 N.J. 422 (2017), IS REQUIRED BECAUSE NO COURT RECOGNIZED OR UNDERSTOOD "HOW [DEFENDANT AT FOURTEEN-YEARS OLD WAS] CONSTITUTIONALLY DIFFERENT, FOR PURPOSES OF SENTENCING," AND BECAUSE THE SENTENCE WAS NOT BASED ON "COMPETENT, REASONABLY CREDIBLE EVIDENCE," SEE STATE V. CASE, 220 N.J. 49, 64 (2014).

A. No Trial Court Below Considered Or Understood That Defendant Was "Constitutionally Different" As A Fourteen-Year Old.

B. Defendant's Youth Was Impermissibly Used To Aggravate Her Sentence.

C. The Findings Of Aggravating And Mitigating Factors Were Not Based On "Competent, Reasonably Credible Evidence" In The Record.

D. Because a Miller Resentencing is Required, the Court Should Consider Defendant's Rehabilitative

¹ In State v. Lane, 251 N.J. 84, 97 (2022), decided after the trial court's order here, the Supreme Court held that mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), applies prospectively only to defendants sentenced on or after its effective date of October 19, 2020.

Efforts Since She Was Sentenced and Also Apply the Youth Mitigating Factor, "The Defendant Was Under 26 Years of Age At the Time of the Commission of the Offense," N.J.S.A. 2C:44-1(b)(14).

POINT II

THIS COURT SHOULD REVERSE THE DECISION TO WAIVE JURISDICTION TO ADULT COURT BECAUSE DEFENDANT DID NOT HAVE "COMPETENT COUNSEL" AND THE COURT ACCORDINGLY MADE A "CLEAR ERROR OF JUDGMENT."

POINT III

DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT VACATED HER GUILTY PLEA ON THE STATE'S MOTION AND RESENTENCED HER TO A HIGHER TERM. AT A MINIMUM, THERE SHOULD HAVE BEEN A HEARING ON WHETHER THE DEFENDANT VIOLATED THE PLEA AGREEMENT, WHICH WAS THE PURPORTED BASIS FOR THE MOTION.

POINT IV

THE JUDGMENT OF CONVICTION SHOULD BE AMENDED TO PROVIDE FOR PRIOR SERVICE CREDIT FROM THE DATE OF THE ORIGINAL SENTENCING TO THE DATE OF THE RESENTENCING.

The only issue properly before this court for review is the legality of the sentence imposed on February 21, 2014 after the trial court denied defendant's motion to vacate the plea agreement. "Whether a sentence is illegal as unconstitutional . . . is a question of law to which a reviewing court affords no

deference." State v. Thomas, 470 N.J. Super. 167, 196 (App. Div. 2022) (citing State v. Zuber, 227 N.J. 422, 437 (2017)).

"A defendant may challenge an illegal sentence at any time." Zuber, 227 N.J. at 437 (first citing R. 3:21-10(b)(5); and then citing State v. Acevedo, 205 N.J. 40, 47 n.4 (2011)). "An 'illegal sentence' is one 'not imposed in accordance with the law.'" Ibid. (quoting Acevedo, 205 N.J. at 45).

Defendant does not and cannot argue her sentence is explicitly illegal because the sentence was imposed within the sentencing range for an aggravated manslaughter conviction under the New Jersey Criminal Code, N.J.S.A. 2C:11-4(c). She instead contends she is entitled to a resentencing hearing under Miller and Zuber because the sentencing court did not appreciate her youth, and therefore her sentence is "unconstitutional as cruel and unusual punishment." We disagree.

In Miller, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," including in homicide cases. 567 U.S. at 476-79. In Zuber, our Supreme Court held that Miller "applie[d] with equal strength to a sentence that is the practical equivalent of life without parole." 227 N.J. at 446-47.

Defendant's sentence is clearly distinguishable from those imposed in Miller and Zuber. Defendant was sentenced to twenty-two years in prison subject to an eighty-five percent parole ineligibility period for first-degree aggravated manslaughter. Defendant will be eligible for parole in 2028, when she will be in her early thirties. This is not a life sentence or one that is the "practical equivalent of life without parole." See Zuber, 227 N.J. at 447. Defendant is not entitled to a resentencing under Miller or Zuber.

We need not address the remaining contentions set forth under Point I. Any arguments regarding defendant's sentence, including a challenge of the aggravating and mitigating factors, should have been raised in a direct appeal. Defendant did not file a direct appeal from her sentence. Instead, she presented a PCR petition. On appeal from the denial of the PCR petition, this court considered and rejected defendant's argument that trial counsel was ineffective in not filing a direct appeal because defendant was advised of her appeal rights, acknowledged she discussed the issue with her attorney, and she did not contend she asked her attorney to file an appeal. Carter, No. A-2382-16, slip op. at 6.

For similar reasons, we need only briefly address the argument raised under Point II. In our July 12, 2018 opinion, we considered and rejected

defendant's arguments that she was entitled to a retroactive application of the amended waiver statute, N.J.S.A. 2A:4A-26.1. We stated:

Lastly, we need not address the retroactive application of N.J.S.A. 2A:4A-26.1, prohibiting involuntary waivers of minors under the age of fifteen. Because defendant voluntarily agreed to the waiver, her reliance on [J.F.] is misplaced. J.F. held that N.J.S.A. 2A:4A-26.1(c)(1) would be applied retroactively in that case. However, when the Legislature enacted N.J.S.A. 2A:4A-26.1, it left untouched the provisions of N.J.S.A. 2A:4A-27, which permits voluntary waivers by minors age fourteen and older, and voluntary waivers by minors under fourteen who are charged with murder. We conclude that N.J.S.A. 2A:4A-27 applies here. Even if we were so inclined, we could not rewrite that section of the statute to provide defendant relief.

[Id., slip op. at 11-12.]

In addition, we addressed defendant's argument, renewed here, that trial counsel was ineffective in advising her to waive the rehabilitation hearing and proceed to adult court. We stated:

Most significantly, defendant confessed, in graphic detail, to her personal participation in a particularly brutal and senseless murder. The defense psychological report was inadequate to demonstrate that she could be rehabilitated before age nineteen. Defendant faced almost certain waiver to adult court, where she would be tried for first-degree murder. Defendant has not established that there was any additional evidence that her attorney could have presented that would have been more persuasive than [the psychologist's] report. As a result, she has not

presented a prima facie case that her trial attorney was ineffective in advising her to enter the plea agreement.

[Id., slip op. at 10.]

Turning to Point III, we note defendant did not raise these arguments before the trial court in her motion to correct an illegal sentence. Ordinarily we "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). We do not find defendant's arguments fit within the parameters required under Nieder for consideration.

Moreover, in our July 2018 decision, we found defendant presented "no evidence that [her trial] attorney was ineffective in obtaining for defendant an agreement she wanted, [and] allowing her to be sentenced in advance of her cooperation in testifying against co-defendants." Carter, slip op. at 10-11. We reasoned this "was a very favorable aspect of the deal, because [defendant] got the benefit of her bargain before providing the State with the promised cooperation." Id., slip op. at 11.

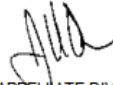
In addition, the prosecutor at the waiver hearing confirmed with defendant that she understood if she violated any provision of the MOU, she would not return to juvenile court. The judge presiding over the first plea hearing also ensured defense counsel had reviewed the MOU with defendant and that she signed it. The MOU clearly stated that defendant "agree[d] to testify fully and truthfully if called as a witness at any proceeding." Defendant's argument for the first time that the MOU was not specific regarding its requirements lacks merit.

In Point IV, defendant requests the amendment of her judgment of conviction to include "prior service credits from the date of the original sentencing on August 19, 2010 to the date of the resentencing on February 21, 2014 (1,282 days)."

A review of the judgment of conviction reflects defendant was accorded those credits—"1282 days prior service credit (08-19-10 to 02-20-14)."

Affirmed.

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



CLERK OF THE APPELLATE DIVISION