SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3655-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KHALIF O. JAMES, a/k/a
OMAR KHALIF,

Defendant-Appellant.

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Submitted September 12, 2023 – Decided October 13, 2023

Before Judges Whipple, Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 97-07-0733.

Joseph E. Krakora, Public Defender, attorney for appellant (Alison Gifford, Assistant Deputy Public Defender, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Regina M. Oberholzer, Deputy Attorney General, of counsel and on the brief).

Appellant filed pro se supplemental briefs.

PER CURIAM

Defendant Khalif James appeals from two orders dated June 4, 2021. One order denied his motion to reduce or modify his sentence; the second order denied his motion to reconsider the denial of his motion for a new trial. We affirm both orders.

The facts giving rise to defendant's convictions and sentence are detailed in our decision from his direct appeal, State v. James, 346 N.J. Super. 441 (App. Div. 2002), certif. denied, 174 N.J. 1993 (2002). Therefore, it is sufficient to summarize only those facts pertinent to this appeal.

> According to the State's proofs, on January 27, 1997, Jason Means was driving his [car] when he saw his friend, Lawrence McGriff, in front of Means's home. He picked up McGriff[] and . . . [a juvenile,] who sat in the rear of the vehicle. . . . At McGriff's suggestion, they invited defendant into the car. . . . While they were driving around, defendant and McGriff began discussing "robbing someone." At some point, Means agreed to participate in a robbery with McGriff and defendant.[1] According to Means, it was agreed that if they "came across someone who looked vulnerable that [they] were going to rob him." While in the car, McGriff discharged his gun, a Colt .38 caliber revolver. . . . [D]efendant told the others that he had a gun with him.

[1] Means [later confirmed] . . . [the] juvenile[] did not want to participate. [The juvenile] was not charged with the crimes [committed by defendant or his co-defendants].

> Means realized he needed gas because they "had been riding around for a long period of time." Defendant suggested they rob [a] gas station. According to Means, "[t]he plan was for [him] to go get the gas, to draw the attendant out and as he was out of the booth, they would come up and rob him."
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> Means dropped McGriff and defendant off near the gas station. He . . . drove to the gas station with [the juvenile] and obtained gas in the amount of $3.00 . . . . Means then drove to the location where he . . . let McGriff and defendant out of the car. They had agreed that Means would park his car at that location and defendant and McGriff would return there after completing the robbery. Means observed defendant and McGriff approach the gas station. As he was waiting for them to return, he heard gunshots. Defendant ran back to the car. . . . Within seconds, McGriff returned. After defendant and McGriff entered the vehicle, they began to argue about who . . . shot Ramon Medina, the gas station attendant.
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> [Id. at 447-48.]

Medina died at the scene, having been shot four times. Id. at 449. A ballistics examiner later opined "the bullet that caused the fatal wound was discharged from the Colt revolver[,]" McGriff's weapon. Ibid. However, "[t]wo bullets found at the scene, including one found in the lining of [Medina's] jacket, were determined to have been fired from a Smith & Wesson .38 caliber revolver," a gun used by defendant during the robbery. Id. at 448.

Defendant, McGriff and Means were indicted on various charges as a result of the fatal incident. Defendant's case was severed from his co-defendants' cases and he stood trial alone. Following a jury trial, during which Means identified defendant as the person who suggested the three co-defendants rob the gas station, defendant was convicted of: first-degree murder, N.J.S.A. 2C:11-3(a)(1), (2); first-degree felony murder, N.J.S.A. 2C:11-3(a)(3); first-degree robbery, N.J.S.A. 2C:15-1; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); and third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b).

In July 1998, Judge Miriam N. Span, the trial judge, sentenced defendant to life in prison with a thirty-year parole ineligibility period for the murder conviction, after merging the felony murder conviction. The judge also sentenced defendant to a concurrent twenty-year sentence with a ten-year parole ineligibility period for the robbery conviction, after merging the second-degree weapons conviction. Lastly, the judge imposed a concurrent five-year term for defendant's third-degree weapons conviction.

We affirmed defendant's convictions and sentences on direct appeal. James, 346 N.J. Super. at 459. The Supreme Court denied certification. State v. James, 174 N.J. 197 (2002).

In or about April 1999, McGriff accepted a plea offer from the State and pleaded guilty to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a), first-degree robbery, and second-degree possession of a weapon for an unlawful purpose. Judge Katherine R. Dupuis sentenced him to a thirty-year term for his aggravated manslaughter conviction, subject to a fifteen-year parole disqualifier, and a consecutive twenty-year sentence with a ten-year parole disqualifier for the robbery conviction. McGriff also received a concurrent sentence of five years for his weapons conviction, resulting in an aggregate fifty-year term, with a twenty-five-year parole ineligibility period.

In 2009, we affirmed the denial of defendant's first post-conviction relief (PCR) petition and his motion for a new trial in his back-to-back appeals. State v. James, No. A-3407-06, A-0324-07 (App. Div. Sept. 4, 2009) (slip op. at 10). In 2015, we dismissed defendant's second PCR petition, due to his failure to provide an adequate record on appeal. State v. James, No. A-0020-14 (App. Div. Dec. 22, 2015) (slip op. at 2).

In 2016, while self-represented, defendant filed another motion for a new trial. He claimed he was entitled to a new trial due to his receipt of "newly discovered evidence," namely his discovery of McGriff's plea agreement with

the State and McGriff's resulting sentence. Appointed counsel later provided the trial court with additional documentation in support of the motion.

In May 2018, Judge William A. Daniel heard argument on defendant's motion. During the hearing, defense counsel contended defendant was entitled to a new trial because after defendant was convicted and sentenced, McGriff "was allowed to plead to a crime of lesser culpability." Moreover, McGriff received a lighter sentence than defendant did, even though McGriff was responsible for fatally shooting Medina. Additionally, defense counsel argued defendant's "jury was misled by the State" because the assistant prosecutor told the jury McGriff "would be taken to trial for the murder he committed." Counsel also claimed that had the jury known McGriff would be allowed to plead guilty to aggravated manslaughter, it would not have convicted defendant of murder. Defendant made similar arguments directly to the judge.

On January 8, 2019, Judge Daniel orally denied defendant's motion for a new trial. Citing State v. Carter, 85 N.J. 300, 314 (1981), the judge explained that a defendant seeking a new trial based on newly discovered evidence

> must show . . . the evidence is material to the case and not merely cumulative, impeaching, or contradictory[;] . . . . the evidence was discovered at the completion of trial and was not discoverable by reasonable diligence beforehand[;] [a]nd . . . the evidence would probably change the jury's verdict if a new trial was granted. . . .

> All three prongs must be satisfied in order for a trial to be warranted.

Relying on this framework, the judge found defendant "elected to go to trial on the charges . . . he was facing following a severance of the other defendants from this same indictment" and "McGriff's subsequent plea negotiations with the State, . . . and his sentence were not material to defendant's trial." The judge explained, "[t]here was an abundance of competent evidence presented against . . . defendant . . . at his trial." Therefore, the judge concluded the newly discovered evidence involving McGriff's "plea deal" and sentence "was not essential to [defendant's] case and did not change the proofs against . . . defendant as to the charges."

Next, the judge agreed with defendant that neither McGriff's plea deal nor his aggregate sentence were discoverable when defendant was tried for his offenses. But given the timing of McGriff's plea and sentencing, the judge was not persuaded, as defendant argued, that the State misled the jury by falsely stating McGriff would be tried for murder. Judge Daniel ultimately found defendant "failed to meet his burden on []his motion" for a new trial. He entered a conforming order following argument.

Ten days later, defendant moved to amend the January 8 order, contending Judge Daniel failed to apply the proper standard of review on his motion for a

new trial. Not long after, defendant filed additional motions for: a change or reduction of sentence under Rule 3:21-10(b); sanctions against the State; and the ability to proceed pro se "with the assistance of [s]tandby [c]ounsel."

On May 10, 2021, Judge Daniel denied defendant's motion for sanctions but granted his motion to represent himself with the assistance of standby counsel. The judge reserved decision on defendant's remaining motions.

On June 4, 2021, Judge Daniel orally denied defendant's motion to amend or reconsider the January 8, 2019 order as authorized under Rules 1:7-4(b) and 4:49-2. The judge found there was no basis for him to reconsider his prior denial of defendant's motion for a new trial under the January 8 order. He also denied defendant's application for a change or reduction of sentence.

Regarding his denial of defendant's motion to amend or reconsider the January 8 order, Judge Daniel initially explained he relied on and incorporated his findings from prior hearings in this matter. In summarizing his findings from the January 8 hearing, the judge stated he previously concluded "defendant had not met . . . the criteria set forth in . . . Carter," including the third prong of the Carter test, and that any newly discovered evidence pertaining to McGriff's plea and sentence "would not change the jury's verdict if a new trial was granted." Judge Daniel also reiterated his prior conclusions that McGriff's "plea deal was

not material to a finding of . . . defendant's guilt" and "there was an abundance of evidence against . . . defendant linking him to the crime[s at] issue." The judge continued:

> [E]ven if . . . McGriff's plea deal[] was relevant and admissible at trial, which this court . . . found it was not relevant, . . . it does not therefore flow that [defendant] would probably be acquitted of the charges.
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> What may or may not have happened to defendant's severed . . . codefendants[,] . . . including . . . McGriff[,] had no bearing on the jury's finding of fact. Even if [McGriff] was never prosecuted for the underlying offense, . . . defendant could still be found guilty of . . . purposeful murder under the theory of accomplice . . . liability.

The judge also rejected defendant's renewed argument that the State misled jurors during his trial by telling jurors McGriff would be tried and held accountable for fatally shooting Medina. Judge Daniel found any statements made by the State in this regard "had no bearing on the outcome of defendant's trial" as "[t]he jury was properly instructed as to what they could and could not consider as evidence[,] including statements made by both parties."

Lastly, Judge Daniel addressed defendant's motion for resentencing. First, he acknowledged that under Rule 3:21-10(b)(4), "a motion for a change or reduction in sentence may be filed at any time" to change "a sentence as

authorized by the [New Jersey] [C]ode of [C]riminal [J]ustice [(Code)]." But the judge found because "Judge Span's sentenc[e] was authorized by the . . . Code . . . [and] was properly administered," and other exceptions under Rule 3:21-10(b) did not apply to defendant's case, he was "not entitled to resentencing." In reaching this conclusion, the judge explained the "Code mandates that a person convicted of murder shall be sentenced . . . to . . . [thirty] years[,] during which [they] shall not be eligible for parole, or [they shall] be sentenced to a specific term of years . . . between [thirty] years and life imprisonment."

Judge Daniel also rejected defendant's newly raised contention that if he were resentenced, he was entitled to the benefit of mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14). The judge noted this recently enacted mitigating factor "allows a sentencing court to consider the youthfulness of a defendant who is under [twenty-six] years of age" at the time of their offense. However, Judge Daniel concluded defendant was not entitled to the benefit of this new mitigating factor because it was not to be prospectively applied.

On appeal, defendant raises the following arguments through counsel:

POINT I

THE COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE BECAUSE IT APPLIED THE WRONG STANDARD AND BECAUSE UNDER THE CORRECT STANDARD, A NEW TRIAL IS WARRANTED.

POINT II

THE DISPARITY BETWEEN DEFENDANT'S SENTENCE AND THE SENTENCE IMPOSED ON HIS CO-DEFENDANT RENDERS DEFENDANT'S SENTENCE ILLEGAL.

Defendant separately raises the following pro se arguments:[2]

POINT I

THE MOTION COURT ERRED WHEN FAILING TO MAKE FINDINGS OF FACT OR CONCLUSIONS OF LAW IN REGARD[] TO [THE] DISPARITY CLAIM. THEREFORE, THE ORDER OF DENIAL MUST BE REVERSED FOR A NEW SENTENCING HEARING.

POINT II

[THE] MOTION COURT FAILED TO RECTIFY DISPARATE FACT-FINDINGS MADE BY THE TRIAL COURT CONTRARY TO THE SENTENCING GUIDELINES IN ACCORDANCE WITH 2C CODE OF CRIMINAL JUSTICE.

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[2] Defendant's pro se arguments are recited verbatim, except where grammatical errors were corrected.

A. REQUIREMENT (1): THE SENTENCING GUIDELINES WERE VIOLATED.

B. REQUIREMENT (2): THE AGGRAVATING AND MITIGATING FACTORS FOUND WERE NOT BASED UPON COMPETENT AND CREDIBLE EVIDENCE IN THE RECORD.

C. REQUIREMENT (3): THE APPLICATION OF THE GUIDELINES TO THE FACTS OF THE CASE MAKES THE SENTENCE CLEARLY UNREASONABLE SO AS TO SHOCK THE JUDICIAL CONSCIENCE.

POINT III

[THE] MOTION COURT ERRED WHEN DENYING MOTION FOR SANCTIONS[] AND FAILING TO DEEM [THE] REDUCTION OR CHANGE OF SENTENCING MOTION UNCONTESTED.

Defendant also raises the following additional contentions in his pro se reply brief:

POINT I

MCGRIFF'S CERTIFICATION WAS DISPUTED BY THE STATE, AND BECAUSE THERE EXISTS A DISPUTE OVER MATERIAL FACTS, THERE SHOULD HAVE BEEN AN EVIDENTIARY HEARING TO DETERMINE WHETHER THOSE FACTS WITHIN THE CERTIFICATION WERE TRUE BEFORE A DECISION COULD BE MADE.

POINT II

PURSUANT TO RULE 2:5-5 CORRECTION OR SUPPLEMENTATION OF RECORD: (A) MOTION TO SETTLE THE RECORD. DEFENDANT RESPECTFULLY REQUESTS FOR THIS COURT TO ORDER THE STATE TO PRODUCE THE NEW EVIDENCE OF THE DEFENDANT SHOOTING THE VICTIM THREE TIMES BEFORE THE COURT. THE NEW EVIDENCE THAT THE STATE NOW CLAIMS BEFORE THE COURT TO EXIST IS NOT ANYWHERE WITHIN DEFENDANT'S TRIAL TRANSCRIPTS.

POINT III

THE SENTENCING CLAIMS RAISED BELOW ARE BASED ON THE LAW AND THE FUNDAMENTAL GOAL OF UNIFORMITY UNDER TITLE 2C CODE OF CRIMINAL JUSTICE, THEREFORE, THE MOTION COURT'S DENIAL SHOULD BE REVERSED BY THIS COURT.

None of these arguments are convincing. Moreover, defendant's pro se arguments are either completely lacking in merit, Rule 2:11-3(e)(2), improperly raised in his reply brief,[3] or raised in contravention of our October 5, 2021 order, which limited his appeal to a review of the June 4, 2021 orders. Thus, we affirm

[3] "Raising an issue for the first time in a reply brief is improper." Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001) (citation omitted).

the challenged orders substantially for the reasons stated by Judge Daniel in his thoughtful oral opinion, and we add the following comments.

A motion for a new trial is guided by Rule 3:20-1, which provides:

> The trial judge on defendant's motion may grant the defendant a new trial if required in the interest of justice. . . . The trial judge shall not, however, set aside the verdict of the jury as against the weight of the evidence unless, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a manifest denial of justice under the law.

"[A] motion for a new trial is addressed to the sound discretion of the trial [court], and the exercise of that discretion will not be interfered with on appeal unless a clear abuse has been shown." State v. Russo, 333 N.J. Super. 119, 137 (App. Div. 2000) (citation omitted). A court abuses its discretion "when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (internal quotation marks omitted).

A defendant is permitted to seek a new trial "'on the ground of newly discovered evidence'" at any time. State v. Szemple, 247 N.J. 82, 99 (2021) (quoting R. 3:20-2). In Carter, the Court repeated the well-established standard for granting a new trial based on newly discovered evidence:

> [T]o qualify as newly discovered evidence entitling a party to a new trial, the new evidence must be (1) material to the issue and not merely cumulative or impeaching or contradictory; (2) discovered since the trial and not discoverable by reasonable diligence beforehand; and (3) of the sort that would probably change the jury's verdict if a new trial were granted.
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> [85 N.J. at 314.]

"All three tests must be met before the evidence can be said to justify a new trial." Ibid. (citing State v. Johnson, 34 N.J. 212, 223 (1961)). A defendant bears "the burden to establish each prong is met." State v. Fortin, 464 N.J. Super. 193, 216 (App. Div. 2020) (quoting State v. Smith, 29 N.J. 561, 573 (1959)); see also State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008) ("[t]he absence of any one of these elements warrants denial of the motion.").

"Under prong one of the Carter test, [a trial court] first must look to the issue of materiality as that term pertains to the defense in a criminal case." State v. Ways, 180 N.J. 171, 188 (2004) (citing Carter, 85 N.J. at 314). "Material evidence is any evidence that would 'have some bearing on the claims being advanced.'" Ibid. (quoting State v. Henries, 306 N.J. Super. 512, 531 (App. Div. 1991)). The second prong of the Carter test "recognizes that judgments must be accorded a degree of finality and, therefore, requires that the new evidence must have been discovered after completion of trial and must not have been

discoverable earlier through the exercise of reasonable diligence." Id. at 192 (citing Carter, 85 N.J. at 314).

The first and third prongs of the Carter test "are inextricably intertwined." State v. Nash, 212 N.J. 518, 549 (2013); see also State v. Behn, 375 N.J. Super. 409, 432 (App. Div. 2005) (recognizing the "analysis of newly discovered evidence essentially merges the first and third prongs of the Carter test"). Thus, "[d]etermining whether evidence is merely cumulative, or impeaching, or contradictory, necessarily implicates prong three, whether the evidence is of the sort that would probably change the jury's verdict if a new trial were granted." Nash, 212 N.J. at 549 (alteration in original) (internal quotation marks omitted) (quoting Ways, 180 N.J. at 188-89).

Under Carter, "evidence that would have the probable effect of raising a reasonable doubt as to the defendant's guilt would not be considered merely cumulative, impeaching, or contradictory." Ibid. (quoting Ways, 180 N.J. at 189). But "[t]he characterization of evidence as 'merely cumulative, or impeaching, or contradictory' is a judgment that such evidence is not of great significance and would probably not alter the outcome of a verdict." Ways, 180 N.J. at 189. In short, "[t]he power of the newly discovered evidence to alter the verdict is the central issue, not the label to be placed on that evidence." Id. at

191-92. This requires assessing such evidence in the context of the "'corroborative proofs' in th[e] record." Szemple, 247 N.J. at 110 (quoting State v. Herrerra, 211 N.J. 308, 343 (2012)).

"[T]he purpose of post-conviction review in light of newly discovered evidence is to provide a safeguard in the system for those who are unjustly convicted of a crime." Ways, 180 N.J. at 188. However, "[n]ewly discovered evidence must be reviewed with a certain degree of circumspection to ensure that it is not the product of fabrication, and, if credible and material, is of sufficient weight that it would probably alter the outcome of the verdict in a new trial." Id. at 187-88.

Pertinent to this appeal, we also recognize "it is entirely appropriate for a judge to reconsider a prior ruling given the right set of circumstances," including rulings in criminal matters. State v. Puryear, 441 N.J. Super. 280, 293-95 (App. Div. 2015) (citing R. 1:7-4(b), 4:42-2, and 4:49-2). We review orders denying reconsideration for an abuse of discretion. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016).

Governed by these standards, we are satisfied Judge Daniel did not abuse his discretion in denying defendant's motion to reconsider the denial of his motion for a new trial under the January 8 order. Like the judge, we conclude

defendant failed to establish prongs one and three of the Carter test, and therefore, was not entitled to a new trial. We reach this determination, understanding that the impact of newly discovered evidence must be "placed in context with the trial evidence." Ways, 180 N.J. at 195. Here, as the judge observed, "there was an abundance of evidence against . . . defendant linking him to the crime[s at] issue." Such evidence included testimony from several witnesses, including Means, who inculpated defendant in the planning of the robbery. Additionally, the jury was presented with ballistics evidence tying two bullets found at the scene to a revolver defendant possessed without a permit, and one of those bullets was found in the lining of Medina's jacket.

Finally, we briefly address defendant's contention that his "sentence is so grossly disparate as to warrant reduction under Rule 3:21-10(b)(5)." In that regard, he specifically argues he is entitled to be resentenced because "the disparity between [his] sentence and the sentence imposed on [McGriff] renders defendant's sentence illegal." We find no merit in defendant's position.

Under Rule 3:21-10(b)(5), a motion for a change or reduction of sentence may be filed at any time to "correct[] a sentence not authorized by law[,] including the Code." "Disparity [in sentencing] may invalidate an otherwise sound and lawful sentence." State v. Roach, 146 N.J. 208, 232 (1996).

Additionally, "[d]isparate sentencing undermines public confidence in the fairness of [the] justice system," and thus may raise constitutional issues. State v. Moran, 202 N.J. 311, 326 (2010). Thus, when a "co-defendant is identical or substantially similar to the defendant regarding all relevant sentencing criteria. . . . the court must give the sentence imposed on the co-defendant substantive weight . . . to avoid excessive disparity." Roach, 146 N.J. at 233. Also, differences in sentences among co-defendants requires resentencing where "'there is an obvious sense of unfairness in having disparate punishments for equally culpable perpetrators.'" Id. at 232 (quoting State v. Hubbard, 176 N.J. Super. 174, 177 (App. Div. 1980)).

However, "'a sentence of one defendant not otherwise excessive is not erroneous merely because a co-defendant's sentence is lighter.'" Ibid. (quoting State v. Hicks, 54 N.J. 390, 391 (1969)). Because "some disparity in sentencing is inevitable," the central question in assessing disparity in sentences is "whether the disparity is justifiable or unjustifiable." Id. at 233, 234.

Our scope of review of alleged sentencing disparity is no different than when ordinary excessiveness of sentence is asserted, State v. Tango, 287 N.J. Super. 416, 422 (App. Div. 1996) (citing State v. Lee, 235 N.J. Super. 410, 414 (App. Div. 1989)), namely "whether, on the basis of the evidence, no reasonable

sentencing court could have imposed the sentence under review." State v. Ghertler, 114 N.J. 383, 388 (1989) (citing State v. Roth, 95 N.J. 334, 365 (1984)).

Guided by these principles, and recognizing defendant received a harsher aggregate sentence than McGriff for the armed robbery and fatal shooting of Medina, we perceive no reason to disturb defendant's sentence based on the differences between the co-defendants' sentences. That is because when defendant and McGriff were sentenced, they were not "identical or substantially similar . . . regarding all relevant sentencing criteria." Roach, 146 N.J. at 233.

For example, unlike defendant, McGriff was not tried and convicted of murder. Instead, he accepted a plea offer from the State and acknowledged his guilt for Medina's fatal shooting during the January 27, 1997 robbery, so that McGriff was convicted of the lesser offense of aggravated manslaughter. See State v. Balfour, 135 N.J. 30, 38-39 (1994) ("a guilty plea can have a lenient influence" on the sentence imposed, "partly because it reflects a defendant's acceptance of responsibility for his or her criminal conduct and partly because it assists in the efficient disposition of cases."). Thus, defendant and McGriff were not similarly situated when they appeared before their respective sentencing judges.

We also do not ignore that despite the seriousness of defendant's offenses, he received the benefit of concurrent sentences on his convictions, whereas McGriff received consecutive sentences on his convictions, so that his aggregate parole ineligibility period of twenty-five years was only five years shorter than defendant's parole ineligibility period. Under these circumstances, we are satisfied defendant's aggregate sentence was lawful and justified, and not so disparate from the aggregate sentence McGriff received so as to necessitate defendant's resentencing.

Defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.