

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4408-18

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANDREAS M. ERAZO,

Defendant-Appellant.

Argued January 12, 2022 – Decided March 28, 2022
Remanded by the Supreme Court June 21, 2023
Reargued October 3, 2023 – Decided October 12, 2023

Before Judges Haas, Gooden Brown and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Indictment No. 17-10-
1376.

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 briefs).

Melinda A. Harrigan, Assistant Prosecutor, argued the
cause for respondent (Raymond S. Santiago,

Monmouth County Prosecutor, attorney; Melinda A. Harrigan, of counsel and on the brief).

PER CURIAM

This matter returns to us following a remand by the Supreme Court for consideration of defendant Andreas M. Erazo's contention that his sentence is excessive and constitutes cruel and unusual punishment. State v. Erazo, 254 N.J. 277, 305 (2023). After carefully reviewing the record in view of the governing principles of law and the arguments raised by the parties, we affirm defendant's sentence.

I.

We assume familiarity with, and incorporate by reference, the underlying procedural history and facts contained in the Supreme Court's opinion. Id. at 283-95. Defendant raped A.S., an eleven-year-old girl, in his apartment and killed the child by stabbing her in the neck with a knife. The next day, the police found the child tied with computer cords and wrapped in a futon cover on a section of the roof of a shed outside of defendant's window. Defendant made statements to detectives that same day. Defendant was eighteen years and seven months old at the time of the offenses and his statements.

A Monmouth County Grand Jury charged defendant with first-degree murder, first-degree felony murder, three counts of first-degree aggravated

sexual assault, fourth-degree unlawful possession of a weapon, and fourth-degree possession of a weapon for an unlawful purpose. Id. at 291. After the trial court denied defendant's motion to suppress the statements he made to the detectives, defendant pled guilty to first-degree murder and first-degree aggravated assault of a victim under the age of thirteen. Id. at 293. In return for his guilty plea, the State agree to recommend that the trial court sentence defendant to life in prison on the murder charge, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, and to a concurrent fifty-year term also subject to NERA on the aggravated sexual assault charge. The State agreed to dismiss the remaining charges at the time of sentencing.

At sentencing, defendant's attorney noted that some of A.S.'s family members were present to make statements pursuant to N.J.S.A. 52:4B-36. Defense counsel asked that the prosecutor remind the family members that their statements should not "ridicule or verbally attack defendant."

The attorney then reviewed defendant's personal circumstances, including his age at the time of the crimes. Defense counsel noted that defendant was raised by a single mother and was later placed in a group home. He was living with a maternal aunt at the time of the offenses involved in this case. The attorney asserted that defendant suffered from "major depressive disorder,

ADHD, bipolar disorder," and had made multiple suicide attempts. Defendant had been abusing drugs, including cocaine and heroin, since the age of twelve. He had no adult convictions and only one prior contact with the criminal justice system as a juvenile.

Defense counsel argued that there were no aggravating factors present in the case and that any mitigating factors found by the judge would therefore "substantially outweigh the aggravating factors." The attorney also asked the judge to consider defendant's age as a "nonstatutory mitigating factor[]," and impose a sentence less than the aggregate life sentence set forth in the plea agreement.

At the beginning of the prosecutor's argument, she told the judge that three of A.S.'s family members wished to address the court. The first, V.M., identified herself as A.S.'s sister-in-law. V.M. discussed her relationship with the child, the things the child liked to do, and how she felt after the child's death. At the end of her statement, V.M. said:

Your Honor, the punishment for this person who brutally raped and murdered [A.S.], who I cannot bring myself to call a man, but must fit the heinous crime he committed, a maximum life in prison in solitary confinement[.] [H]e must not have access to any of the opportunities he stole from [A.S.]. He must not have access to have any life simple pleasures such as reading or even watching T.V. He deserves to die in prison,

alone, scared, and in pain in his final moments just like he did to [A.S.].
Thank you.

C.B., who was A.S.'s aunt, was the next family member to speak. C.B. recounted what occurred on the day A.S. disappeared and the day the police found her body. She related how she felt when she learned how A.S. died and how the loss of the child had affected her since that time. C.B. stated that as she "looked at [A.S.'s] cold lifeless body in the casket, [she] felt pure rage. Why [are] we burying our baby girl while the heartless wicked boy who raped and killed her was still alive? Why?" At the end of her remarks, C.B. stated:

[Defendant] has had nothing but time to reflect on the abuse he inflicted on [A.S.] and the horrific way he took her from this world, but he has shown no remorse and he has yet to apologize for what he did. He is a hardened cold[-]blooded, sexual predator and a very dangerous criminal with a twisted mind. That wicked heartless boy does not deserve to have anything close to a normal life in prison. He deserves the death penalty, but since that is not an option, he must spend the rest of his miserable life in one of this country's toughest prisons.

Thank you.

Finally, A.S.'s mother addressed the court.¹ She told the court about the life of her child and how she was attempting to cope with her daughter's death. During the course of her lengthy statement, she referred to defendant at various times as "a wicked cold-hearted pedophile and murderer," a "disgusting person and a cold-blooded killer just waiting to strike," a "wicked man," "an evil monster who snuffed out our [A.S.'s] life," and "one of [the] wickedest inhabitants" of "this wicked world."

At the end of her remarks, A.S.'s mother stated:

I miss my daughter with every fiber of my being. I believe in my heart that there is no punishment that will fit for this crime. Not even torture and death would be justice.

[Defendant], your justice will come when you remain in jail for the rest of your life. Then burn in hell for all eternity for raping and murdering my precious daughter.

[Defendant], you mentioned in your confession that when you stabbed my daughter, [A.S.] in her neck, she was moving about like a fish out of water. My question to you is who looks and feels like a fish out of water now? Certainly not [A.S.], because her little soul is with God while yours will be with the devil.

My message this morning to you . . . is you disgust me. Ever since you took my baby's life, you have shown no

¹ A.S.'s mother has the same initials as A.S.'s aunt, C.B. Therefore, we will identify the mother by her parental status to avoid confusion.

remorse, sympathy, or empathy and this just tells me how wicked you are from I was born out of my mother's [womb] I have never come across someone as cruel and demonic as you.

A.S.'s mother continued:

My family and I will never, ever forgive you, [defendant], for all the wickedness you have done to my innocent baby girl, Princess [A.S.] My tears will not go in vain and I know that the good Lord up above will give me my just reward.

Your Honor, I am impleading to you this morning, please, my daughter, [A.S.], cannot speak for herself today, but I stand here to intercede on her behalf. I believe that there is no punishment suitable for [defendant]. He has not shown even an ounce of remorse throughout this trial for the crime he committed, for the pain and agony my baby girl suffered, while he brutally raped her, then savagely plunged a knife through her neck and for the pain and suffering our family will endure for the rest of our lives.

Thank you so much for listening.

The prosecutor resumed her argument after the family members spoke. She reiterated that defendant had shown no remorse for his actions, and asked that the judge find aggravating factors one, two, three, six, and nine.

Before asking defendant whether he wished to speak, defense counsel asked the judge "to disregard some of the things we heard in the victim impact statement[s] that fit the definition of ridicule or verbal attack." The judge

replied, "I took those statements in the context of the circumstances from the grieved victims." Defendant's attorney stated that he understood and explained that was why he had not objected to any of the statements as the family members were making them. However, defense counsel again asked the judge "to disregard the words that went into the territory of ridicule" The judge replied, "I'm not going to disregard a single word that was spoken in this courtroom. What weight I attach to is it another matter."

Defendant declined to speak at the sentencing hearing. The judge then made lengthy findings before imposing a sentence.

The judge noted defendant's age both at the time of the offense and at the time of sentencing. He found that defendant had no adult convictions. He had previously been employed and obtained his G.E.D. The judge noted that defendant had been using drugs for a number of years.

The judge found aggravating factors one and two, N.J.S.A. 2C:44-1(a)(1) and (2), concerning the heinous nature of the offense conduct and the harm inflicted on the victim. In explaining this decision, the judge stated:

The record is unclear as to which act defendant committed first, but setting aside the unspeakable question of whether necrophilia may have been involved here it really is no moment for sentencing purposes. The victim did not spend the night of [the offenses] in the comfort of her own bed, in her own

bedroom, in her own house surrounded by those she loved and trusted. She was found instead wrapped in a futon [cover], a cruel irony given her distaste for blankets of any kind, her hands and feet bound by cord, on the roof of a shed directly under the defendant's bedroom. Discarded like someone's refuse.

Defendant knew or should have known that this [eleven] year[-]old, who he knew, her previously seemingly innocent encounter as a neighbor was not capable of exercising sufficient mental or physical resistance to a then [eighteen]-year-old man [who was] five foot ten inches tall and weighing 200 pounds.

The judge also found aggravating factor nine, N.J.S.A. 2C:44-1(a)(9), the need to deter defendant and others from violating the law. During his discussion of this factor, the judge stated that he had reviewed letters from several community members and had heard the victim statements made in court by V.M., C.B., and A.S.'s mother. The judge stated the witnesses were individuals "who spoke so movingly and eloquently about their anguish over their loss of one so loved and so admired and which needs no further explanation or elaboration by the [c]ourt."

In explaining his decision to find aggravating factor nine, the judge further stated:

The need to deter is an aggravating factor designed to underscore the boundaries between tolerable and intolerable behavior in our society in general and in our community. In particular, between civilization and

barbarism; and, on a more fundamental level, that which separates mankind from the beasts of the wild.

Sometimes, as in the case here, the need to deter must reach that far down into the realm of the unspeakable and yet, amidst the unspeakable, the community finds its voice, strengthened by a common outrage against vulgar acts of depravity, but also by the memory of a beloved child, pure in their innocence and unlimited in potential she will never reach. That voice screams enough and although piercing, it is seldom heeded to a lasting effect. The community that loved and will miss the victim for as long as memory will serve it can only hope that another such tragedy will never befall the community again and from that hope springs the need to deter.

The judge considered all the mitigating factors raised by defense counsel. The judge found that mitigating factor four, N.J.S.A. 2C:44-1(b)(4), there were substantial grounds tending to excuse defendant's conduct, did not apply. The judge noted that defendant "may have been diagnosed with certain mental health disorders." However, the judge found there was "no causal connection whatsoever between these mental conditions and the crimes for which [defendant] now stands convicted."

The judge next rejected defendant's request to apply mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), the lack of a history of prior delinquency or criminal activity. The judge found that defendant had a prior juvenile adjudication and had violated the terms of his probation.

The judge also stated he could not find mitigating factors eight or nine, N.J.S.A. 2C:44-1(a)(8) and (9). As to factor eight, the judge found that he could not conclude that defendant's conduct was the result of circumstances unlikely to recur "because the time that [defendant] will spend in State prison will make it unlikely that he will commit any further acts of gradation upon anyone in polite society."

As to mitigating factor nine, the judge explained that defendant's attitude did not indicate it was unlikely he would commit another offense. In this regard, the court observed:

It's interesting that both the victim's aunt and her mother told the [c]ourt that the defendant expressed no remorse whatsoever for what he did. He was present in court and heard the victim's aunt, the victim's sister-in-law, and the mother, he never looked over at them. And when they gave him an opportunity to express remorse for what he did to the family members who presented such impassioned eloquent statements[,] he said nothing. I can't find [mitigating factor nine] applicable.

Finally, the judge rejected defendant's argument that his age should be considered as a mitigating factor. The judge noted that defendant was an adult. The judge also noted that unlike a youthful offender, defendant appreciated the risks and consequences of his behavior. He also considered defendant's "family and home environment," and found that the record did not support defendant's

claim that he "suffered a brutal and dysfunctional upbringing." Defendant "denied he was physically abused." Although he asserted he was "sexually abused" as a youth, the alleged abuse consisted of defendant's "sexual experimentation with peers rather than abuse at the hands of an adult." Therefore, the judge did not "consider [defendant's] age as mitigating in any respect."

In the absence of any mitigating factors, the judge found "by clear and convincing evidence [that] the aggravating factors substantially outweigh[ed] the mitigating factors" Under these circumstances, the judge found the parties' plea agreement to be "fair and in the interest of justice[,]" and he sentenced defendant to an aggregate life sentence² in accordance with the terms of that agreement. The judge then dismissed the remaining counts of the indictment.

Defendant appealed his conviction and sentence. Another panel of this court reversed defendant's conviction after concluding that defendant's statements to the detectives should have been suppressed. Erazo, 254 N.J. at

² The judge explained that defendant would be required to serve sixty-three years and nine months of his life sentence before becoming eligible for parole.

293. Therefore, the court did not address defendant's arguments concerning his sentence.

The Supreme Court subsequently granted the State's petition for certification and reversed the Appellate Division's decision. Id. at 295, 305. The Court remanded the matter to this court "to consider defendant's contentions about his sentence."

II.

On appeal, defendant argues that his sentence was "excessive as the trial court relied upon statements from the victim's family denigrating the defendant." He also asserts that the trial court's "imposition of a life sentence subject to NERA was cruel and unusual punishment because the [trial] court imposed it upon an eighteen-year-old offender in the face of science that counseled strongly against imposing such a sentence upon a person of that age."

The scope of our review of the sentence is limited. Trial judges have broad sentencing discretion as long as the sentence is based on competent credible evidence and fits within the statutory framework. State v. Dalziel, 182 N.J. 494, 500 (2005). Judges must identify and consider any relevant aggravating and mitigating factors that are called to the court's attention, and

explain how they arrived at a particular sentence. State v. Case, 220 N.J. 49, 64-65 (2014).

"Appellate review of sentencing is deferential," and we therefore avoid substituting our judgment for the judgment of the trial court. Id. at 65; State v. O'Donnell, 117 N.J. 210, 215 (1989); State v. Roth, 95 N.J. 334, 365 (1984).

Rather,

[t]he appellate court must affirm the sentence unless (1) the sentencing guidelines were violated; (2) the aggravating and mitigating factors found by the sentencing court were not based upon competent and credible evidence in the record; or (3) "the application of the guidelines to the facts of [the] case makes the sentence clearly unreasonable so as to shock the judicial conscience."

[State v. Fuentes, 217 N.J. 57, 70 (2014) (second alteration in original) (quoting Roth, 95 N.J. at 364–65).]

We will now address defendant's contentions concerning his sentence in turn.

III.

Defendant first argues that the trial judge erred by denying his request to disregard the comments made by A.S.'s family members at the time of sentencing "that verbally attacked him." As a result, defendant contends that we must conclude that the sentence the judge imposed was excessive. We disagree.

In the case of a homicide, the victim's survivors may make an in-person statement directly to the sentencing court concerning the impact of the crime prior to sentencing. See N.J.S.A. 52:46-36(n) and N.J.S.A. 52:4B-36.1. As the Supreme Court observed over a decade ago in a case involving such statements:

There can be little doubt that from the standpoint of the victims, who are to be treated with fairness, compassion, respect, and dignity, their statements at sentencing will carry more meaning if they are heard not only by the judge but the defendant as well. That said, sentencing hearings in general are not a time to ridicule or verbally attack a defendant. As always, judges must ensure the solemnity of the proceedings.

[State v. Tedesco, 214 N.J. 177, 196 (2013).]

In State v. Hess, the Court stated:

Clearly, the victim's sister had a right to speak to the court at sentencing. Family members have the right to describe the depths of their loss without a filter on their thoughts. But there are limits. An overly lengthy video, baby photographs of an adult victim, and a video scored to religious and pop music do not advance any legitimate objective even against the broad contours of the Victims' Bill of Rights. Ultimately, the trial court must be guided by the relevant aggravating and mitigating factors in determining the appropriate sentence.

State v. Hess, 207 N.J. 123, 159 (2011) (emphasis added).

Applying these principles, we discern no basis in this record to conclude that the trial judge improperly relied upon the statements made by A.S.'s survivors in determining defendant's aggregate sentence. Each of the survivors gave a lengthy statement. As quoted in Section II of this opinion, during portions of those statements, the survivors personally addressed defendant and used derogatory terms.

Defense counsel did not object to these comments while they were being made. When defense counsel later asked the judge to disregard the remarks, the judge stated that he "took those statements in the context of the circumstances from the grieved victims." The judge told defense counsel he would not "disregard a single word that was spoken in this courtroom[,]" but made clear that the "weight [he would] attach to it is another matter."

In keeping with the Supreme Court's guidance in Hess, the judge then proceeded to carefully review the "relevant aggravating and mitigating factors in determining the appropriate sentence." Hess, 207 N.J. at 159. The judge gave appropriate weight to aggravating factors one, two, and nine, and correctly found that no mitigating factors applied. The judge further considered defendant's personal circumstances, including his age at the time of the offenses. The

judge's detailed findings were based on competent and credible evidence in the record.

In making his thorough findings, the judge only referred to the survivors' statements twice. First, in his discussion of aggravating factor nine, the judge noted all of the letters he had received from family and community members and acknowledged the "eloquent" in-court statements of V.M., C.B., and A.S.'s mother. Later, in his analysis of mitigating factor nine, the judge noted that A.S.'s mother and aunt had both remarked that defendant "expressed no remorse whatsoever for what he did." This point was already evident from the record and was also presented by the prosecutor in her sentencing argument.

Contrary to defendant's contention, there is no evidence that the judge gave undue weight or consideration to the more pointed remarks made by A.S.'s survivors in determining the sentence. Instead, the judge's analysis was sober, dispassionate, and in accord with the sentencing guidelines in the New Jersey Code of Criminal Justice.

Under these circumstances, we discern no basis to second-guess the sentence. We therefore reject defendant's argument on this point.

IV.

Defendant next argues that for purposes of the Eighth Amendment prohibition against cruel and unusual punishment, young adult offenders should be treated the same as juvenile offenders.³ Again, we disagree.

The gravamen of defendant's constitutional argument is that his sentence violates principles established by the United States Supreme Court in Miller v. Alabama, 567 U.S. 460 (2012) and embraced and amplified by our Supreme Court in State v. Zuber, 227 N.J. 422 (2017). In Miller, a case involving fourteen-year-old defendants, the United States Supreme Court recognized that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." Miller, 567 U.S. at 465, 472. It continued, "the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate." Id. at 473. That led the Court to

³ Defendant's reliance before us on certain behavioral science studies and articles in support of this contention is misplaced. First, there is no evidence in the record that defendant presented these materials to the trial judge. Second, these articles are untethered to the facts underlying defendant's crimes and his specific circumstances. Indeed, the record is devoid of any expert proofs, judicially noticeable facts, or relevant medical records explaining how defendant's violent, criminal actions were caused by his purported "youthful" status. See Celino v. Gen. Accident Ins., 211 N.J. Super. 538, 544 (App. Div. 1986) ("Facts intended to be relied on which do not already appear of record and which are not judicially noticeable are required to be submitted to the [trier of fact] by way of affidavit or testimony.").

prohibit sentencing schemes that "mandate[] life in prison without possibility of parole for juvenile offenders," while leaving open the possibility that sentencing courts could impose such a sentence in homicide cases if the mitigating effect of the defendant's age is properly taken into account. Id. at 479-80.

In Zuber, a case involving seventeen-year-old defendants, the New Jersey Supreme Court expanded the protections for juveniles outlined in Miller. Zuber, 227 N.J. at 430, 433, 438. The Court held Miller's requirement "that a sentencing judge 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison' applies with equal strength to a sentence that is the practical equivalent of life without parole." Id. at 446-47 (citation omitted). Further, the Court found "that the force and logic of Miller's concerns apply broadly: to cases in which a defendant commits multiple offenses during a single criminal episode; to cases in which a defendant commits multiple offenses on different occasions; and to homicide and non-homicide cases." Id. at 448.

In State v Ryan, the defendant argued that his sentence of life without parole under New Jersey's "Three Strikes Law," N.J.S.A. 2C:43-7.1(a), was illegal. 249 N.J. 581, 586 (2022). He based his argument, in part, on the sentencing judge not applying the Miller factors to his "first strike" conviction,

which he committed when he was sixteen. Id. at 590. In rejecting the defendant's appeal, the Court emphasized that "[b]ecause [the] defendant committed his third offense and received an enhanced sentence of life without parole as an adult, we hold that this appeal does not implicate Miller or Zuber." Id. at 586-87.

Put simply, the Court reviewed its decision in Zuber and reaffirmed that Miller did not apply to defendants sentenced for crimes committed when they were over the age of eighteen. Id. at 596. The Court unequivocally held that it "did not . . . extend Miller's protections to defendants sentenced for crimes committed when those defendants were over the age of eighteen." Ibid.; see also State v. Comer, 249 N.J. 359, 384 (2022) (quoting Miller for the proposition that "children are constitutionally different from adults for purposes of sentencing").⁴

Defendant was eighteen-years-old at the time he raped and killed A.S. He may have been a young adult, but he was an adult nonetheless. See N.J.S.A.

⁴ In Comer, the Court held that juvenile offenders waived to the adult Criminal Part and sentenced to a term exceeding twenty years may petition for review of the sentence after they have served twenty years in prison. 249 N.J. at 402-03. Significantly, the Court did not extend this right to sentence review to offenders who were eighteen years of age or older at the time of their crimes.

2A:4A-22(a) (defining a juvenile as an individual under the age of eighteen). In view of the severity of the crimes he committed, defendant cannot show that the aggregate life prison term subject to NERA is cruel and unusual punishment.

Finally, defendant is not entitled to the benefit of the new mitigating factor regarding youthful offenders. N.J.S.A. 2C:44-1(b)(14).⁵ In State v. Lane, our Supreme Court made clear that this sentencing provision is to be given prospective application only. 251 N.J. 84, 96-97 (2022) ("In short, nothing in N.J.S.A. 2C:44-1(b)(14)'s text warrants a determination that the presumption of prospective application is overcome.").⁶

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

⁵ N.J.S.A. 2C:44-1(b)(14), which became effective on October 19, 2020, defines a mitigating circumstance when "[t]he defendant was under [twenty-six] years of age at the time of the commission of the offense."

⁶ In any event, the trial judge considered defendant's age during his sentencing decision, together with his lack of an adult criminal record.