SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2581-22

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVEN KADONSKY,

Defendant-Appellant.

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Argued May 8, 2024 – Decided June 25, 2024

Before Judges Currier, Firko and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Indictment Nos. 92-04-0210, 92-06-0288 and 94-06-0324.

Mark Zavotsky, Designated Counsel, argued the cause for appellant (Jennifer Nicole Sellitti, Public Defender, attorney; Mark Zavotsky, on the briefs).

David Galemba, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; David Galemba, of counsel and on the brief).

PER CURIAM

Defendant Steven Kadonsky appeals a March 6, 2023 Law Division order entered by Judge Julie M. Marino denying his third petition for post-conviction relief (PCR). Between 1993 and 1995, defendant pled guilty to charges relating to the large-scale distribution of marijuana, including Leader of a Narcotics Trafficking Network (Leader offense), N.J.S.A. 2C:35-3. He was sentenced on the Leader conviction to life imprisonment with a twenty-five-year period of parole ineligibility.[1] He contends it is fundamentally unfair to continue to punish him for that first-degree crime in light of recent marijuana reforms codified in the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA), N.J.S.A. 24:6I-31 to -56, and implemented in the Attorney General Law Enforcement Directive Governing Dismissal of Certain Pending Marijuana Charges No. 2021-1 (Directive). After carefully reviewing the record in light of the governing legal principles, we affirm substantially for the reasons explained in Judge Marino's cogent sixteen-page written opinion.

[1] Defendant was recently released from prison after serving twenty-six years. He remains on parole for life.

I.

We need only briefly summarize the pertinent facts, which are recounted in our prior published opinion, State v. Kadonsky, 288 N.J. Super. 41, 44 (App. Div. 1996). In February 1992, police executed a search warrant at a warehouse in Piscataway as part of an ongoing narcotics investigation. Ibid. The warehouse was used for the indoor cultivation of marijuana. Ibid. Detectives discovered a sizable amount of vacuum-packed marijuana in large plastic jars for sale. Ibid. Detectives seized voluminous records, including "numerous sets of fictitious identification." Ibid. The seized records document the large amount of marijuana that was sold for $2,000 per case. Ibid. The records also detail the operational expenses of the marijuana distribution enterprise, including the salaries and Christmas bonuses paid to employees. Ibid. Detectives also found records regarding bank accounts, telephone services, mailbox drops, trucking and real estate rentals, and supply store accounts set up under false names and fictitious corporations. Ibid. Information in these records, corroborated by cooperating codefendants, confirmed defendant's role as the leader of this criminal enterprise. Ibid.

In April 1992, defendant was charged by indictment with first-degree leader of narcotics trafficking network, N.J.S.A. 2C:35-3; second-degree

conspiracy to possess marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(10) and N.J.S.A. 2C:5-2; second-degree possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(10); and fourth-degree possession of over fifty grams of marijuana, N.J.S.A. 2C:35-10(a)(3).

In June 1992, defendant was charged in another indictment with second-degree conspiracy to possess marijuana with intent to distribute, N.J.S.A. 2C:5-2.

In September 1993, defendant pled guilty to all four counts of the first indictment. He also entered a guilty plea to count two of the second indictment. In exchange for his guilty plea, the State agreed to recommend an aggregate sentence of life with a twenty-five-year period of parole ineligibility. The agreement provided that sentence could be reduced based on the extent of defendant's cooperation. See State v. Gerns, 145 N.J. 216 (1996). The plea agreement contemplated that defendant would provide information concerning the narcotics trafficking organization run by codefendant Howard Weinthal, which was believed to be a nationwide network. Under the terms of the cooperation agreement, defendant would be given consideration on his sentence each time he provided the Somerset County Prosecutor's Office (SCPO) with

information sufficient to obtain a warrant to search for large quantities of marijuana or to make arrests of any individuals involved in narcotics trafficking.

In the six months following defendant's guilty plea, the SCPO made several large seizures of marijuana relying on information defendant provided. However, investigators determined that information was fabricated. Defendant arranged for individuals—using disguises and fictitious identification provided by defendant—to put large quantities of marijuana in storage lockers. Further investigation revealed defendant placed marijuana in particular locations and then provided a tip on the locations to reduce his sentence.

On July 1, 1994, defendant was sentenced in accordance with the plea agreement to an aggregate prison term of life with a twenty-five-year period of parole ineligibility. The sentencing court also imposed a $500,000 fine and various penalties.

Also on July 1, 1994, defendant was arraigned under a new indictment charging offenses arising from his false cooperation. Specifically, he was charged with five counts of second-degree conspiracy to possess marijuana with intent to distribute, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(10); five counts of second-degree possession of marijuana with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(10); third-

degree hindering apprehension or prosecution of another, N.J.S.A. 2C:29-3(a); and third-degree hindering his own apprehension or prosecution, N.J.S.A. 2C:29-3(b).

On August 18, 1995, defendant pled guilty to all twelve counts charged in the new indictment. On September 9, 1995, he was sentenced to ten years in state prison, to be served concurrently with the sentences imposed on the earlier convictions.

In February 1996, we affirmed the convictions and sentences. See Kadonsky, 288 N.J. Super. at 48. The New Jersey Supreme Court denied defendant's petition for certification. See State v. Kadonsky, 144 N.J. 589 (1996).

In June 1996, defendant filed a petition for PCR and a motion to correct an illegal sentence. On November 21, 1996, the trial court denied defendant's application. We affirmed. See State v. Kadonsky, A-3753-96 (App. Div. July 30, 1998). In May 1999, the Supreme Court denied certification. See State v. Kadonsky, 160 N.J. 477 (1999).

Defendant filed a second PCR petition claiming prosecutorial misconduct and ineffective assistance of counsel. That petition was denied on May 8, 2007. In October 2009, we affirmed the denial of defendant's second PCR petition and

in March 2010, the Supreme Court denied certification. See State v. Kadonsky, 201 N.J. 440 (2010).

On December 5, 2013, the United States District Court for the District of New Jersey denied defendant's petition for a writ of habeas corpus. See Kadonsky v. Barkowski, CIV.A. 11-1250 AET (D.N.J. Dec. 5, 2013). In December 2015, the Third Circuit Court of Appeals denied defendant's request for a certificate of appealability. See Kadonsky v. Adm'r N.J. State Prison, 14-4309 (3d Cir. Dec. 9, 2015).

On February 22, 2021, the Legislature adopted CREAMMA, which our Supreme Court described as "a sweeping law that largely decriminalizes the simple possession of cannabis in New Jersey and redresses many lingering adverse consequences of certain previous marijuana offenses." State v. Gomes, 253 N.J. 6, 11 (2023). Importantly for purposes of this appeal, CREAMMA removed marijuana from the schedules of controlled dangerous substance (CDS).[2]

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[2] N.J.S.A. 24:21-5 was amended in CREAMMA to remove marijuana from Schedule I. The pertinent paragraph of that section provides:

> (10) Marihuana (sic); except that on and after the effective date of the "[CREAMMA]," P.L. 2021, c. 16 (C.24:6I-31 et al.), marihuana (sic) shall no longer be

The same day CREAMMA was enacted, the Attorney General issued the Directive, which instructs prosecutors "to dismiss pending marijuana-related charges in accordance with the guidance below." The Directive also provides instruction on how prosecutors are to handle marijuana cases that have already been resolved. The Directive provides in pertinent part:

> A. Cases for dismissal. Effective immediately, prosecutors shall seek dismissals of any pending charges listed in the following chart in any cases where a juvenile or adult's conduct occurred on or before February 22, 2021. Dismissals can be requested on an ad hoc basis as the cases are scheduled for a municipal or superior court proceeding. In cases involving multiple charges, only the charges listed in the chart are to be dismissed pursuant to this Directive; all other charges and pending matters should remain.
>
> 2C:35-5(b)(l2) Distribution of marijuana or hashish
>
> 2C:35-10(a)(3) Possession of marijuana or hashish
>
> 2C:35-10(a)(4) Possession of marijuana or hashish

> included in Schedule I, and shall not be designated or rescheduled and included in any other schedule by the director pursuant to the director's designation and rescheduling authority set forth in section 3 of P.L. 1970, c. 226 (C.24:21-3).
>
> [N.J.S.A. 24:21-5(e)(10).]

2C:35-l0(b) Under the influence—only when the individual was under the influence of marijuana or hashish

2C:35-10(c) Failure to properly dispose (CDS)—only when the individual fails to dispose of marijuana or hashish

2C:36-2 Possession of drug paraphernalia when the paraphernalia was used, or was possessed with intent to be used, to ingest, inhale or otherwise introduce marijuana or hashish into the body

2C:36A-l Any disorderly persons offense or petty disorderly persons offense subject to conditional discharge pursuant to this section

39:4-49.1 Possession of CDS in a vehicle—but only when the individual is in possession of marijuana or hashish in the vehicle

B. Cases already resolved. For those cases already resolved, pursuant to the new decriminalization laws, the Administrative Office of the Courts will vacate by operation of law any guilty verdict, plea, placement in a diversionary program, or other entry of guilt on a matter where the conduct occurred prior to February 22, 2021. Also vacated will be any conviction, remaining sentence, ongoing supervision, or unpaid court-ordered financial assessment of any person who is or will be serving a sentence of incarceration, probation, parole or other form of community supervision as of February 22, 2021 as a result of the person's conviction or adjudication of delinquency solely for the above listed charges.

> [Off. of the Att'y Gen., Law Enf't Directive No. 2021-1, Directive Governing Dismissals of Certain Pending Marijuana Charges 1-2 (Feb. 22, 2021).]

On July 15, 2021, defendant filed his third PCR petition—the matter presently before us—claiming the life sentence and $500,000 fine imposed on his Leader conviction is fundamentally unfair because the Leader offense can no longer be predicated on the distribution of marijuana.[3]

On March 6, 2023, Judge Marino denied defendant's PCR petition in part and granted defendant's request for a hearing on his ability to pay fines. Judge Marino concluded:

> While the [c]ourt agrees that this defendant is not procedurally barred from bringing this [PCR petition], the [c]ourt finds that defendant did not plead guilty to any of the enumerated charges in the Attorney General Directive or the statute, except for N.J.S.A. 2C:35-l0[(a)](3), [fourth-degree] [p]ossession of [m]arijuana, charged as [c]ount [f]our of Indictment No. 92-04-0210-I. Nonetheless, [c]ount [f]our was merged with another count. No separate or additional penalty was levied against the defendant for that conviction.
>
> The new statute specifically enumerates the charges which are to be dismissed, and it tells

[3] The Leader offense, N.J.S.A. 2C:35-3, pertains to certain specified substances—not including marijuana—or to a CDS "classified in Schedule I or II." At the time of his conviction, marijuana was classified as a Schedule I CDS. As a consequence of the declassification of marijuana in CREAMMA, see supra, note 2, a Leader prosecution can no longer be based solely on the distribution of marijuana.

> prosecutors to act expeditiously in accordance with the Attorney General Directive. Neither the [D]irective, nor the statute, provides for a retroactive dismissal of all marijuana charges. The law does apply retroactively to certain enumerated crimes. The crimes that defendant was charged with and pled guilty to are not among them.
>
> Regarding the $500,000 fine, the [c]ourt does find that there has been a change in circumstance in that (1) marijuana is now legal subject to restrictions and regulations, and (2) defendant has been released on parole after serving a lengthy period of incarceration. To determine if the fine is just given the new circumstances, the [c]ourt will grant the request for a hearing on the matter.

This appeal follows. Defendant raises the following contentions for our consideration:

> POINT I
>
> THE DOCTRINE OF FUND[A]MENTAL FAIRNESS REQUIRES DISMISSAL OF ALL COUNTS AGAINST DEFENDANT IN INDICTMENTS 92-04-0210-I, 92-08-0288-I, AND 94-06-0324-I, OR IN THE ALTERNATIVE, A REMAND OF HIS SENTENCE TO CONSIDER THE CONTINUED APPLICABILITY OF LIFE-TIME PAROLE.
>
> POINT II
>
> THE LEADER OF NARCOTICS TRAFF[I]CKING NETWORK CONVICTION MUST BE VACATED BECAUSE IT NO LONGER APPLIES TO CONVICTIONS SOLEY RELATED TO MARIJUANA AS MARIJUANA IS NO LONGER

CLASSIFIED AS A SCHEDULE I OR SCHEDULE II DRUG.

II.

We begin our analysis by acknowledging the legal principles governing this appeal. PCR "is New Jersey's analogue to the federal writ of habeas corpus." State v. Pierre, 223 N.J. 560, 576 (2015) (quoting State v. Preciose, 129 N.J. 451, 459 (1992)). PCR provides "a built-in 'safeguard that ensures that a defendant was not unjustly convicted.'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. McQuaid, 147 N.J. 464, 482 (1997)).

Appellate "review is necessarily deferential to a PCR court's factual findings based on its review of live witness testimony." Ibid. However, a PCR court's interpretation of the law is reviewed de novo. Id. at 540-41.

Grounds for a petition for PCR are limited and include: (1) deprivations of defendant's constitutional rights; (2) lack of jurisdiction by the trial court; (3) illegal sentences; (4) collateral attack by habeas corpus or other common-law or statutory remedy; and (5) ineffective assistance of counsel. R. 3:22-2. Issues that could have been raised in prior proceedings are generally barred from being brought in a PCR. R. 3:22-4(a).

The gravamen of defendant's argument is that continued punishment on his marijuana-based Leader conviction is fundamentally unfair. "The

fundamental fairness doctrine is an integral part of the due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution, which protects against arbitrary and unjust government action." State v. Njango, 247 N.J. 533, 537 (2021); see Doe v. Poritz, 142 N.J. 1, 108 (1995). "The 'one common denominator' in our fundamental fairness jurisprudence is 'that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.'" Id. at 548-49 (quoting Doe, 142 N.J. at 109). The doctrine "promotes the values of 'fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals.'" State v. Vega-Larregui, 246 N.J. 94, 132 (2021) (quoting State v. Saavedra, 222 N.J. 39, 68 (2015)).

Although we apply the fundamental fairness doctrine "'sparingly' and only where the 'interests involved are especially compelling,'" Saavedra, 222 N.J. at 67 (quoting Doe, 142 N.J. at 108), we are satisfied that defendant's latest petition raises one of the recognized grounds for PCR, that is, a deprivation of constitutional rights.

III.

The State contends defendant's fundamental fairness claim is procedurally barred because it was not properly preserved for appellate review. The State

argues, "[w]hile defendant presently devotes nine pages to the issue, his reliance on fundamental fairness below was fleeting and ancillary to his reliance on the recent changes in the laws governing marijuana." The State thus contends defendant's fundamental fairness claim should be deemed waived. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 ("It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court.").

We disagree. It is true that as a general proposition, a brief reference to an argument is not sufficient to present an issue for our review. See N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (citing Fantis Foods v. N. River Ins. Co., 332 N.J. Super. 250, 266-67 (App. Div. 2000)) (noting that an argument presented in a single sentence of the party's brief was insufficient); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2024). However, in this instance, we view defendant's fundamental fairness argument to be inextricably linked to, indeed part and parcel of his argument regarding the declassification of marijuana as a CDS and the claimed retrospective impact that declassification has on his Leader conviction. See supra, note 3. We therefore choose to address defendant's fundamental fairness

argument but do so in the context of his arguments regarding the retroactive application of CREAMMA and the declassification of marijuana as a CDS.

IV.

We next look to the text of CREAMMA and the Directive to determine what impact, if any, they have on defendant's thirty-year old Leader conviction. We begin with the statute. N.J.S.A. 2C:35-23.1(b)(2) provides in pertinent part:

> On the first day of the fifth month next following the effective date of P.L. 2021, c. 16 (C.24:6I-31 et al.), any conviction, remaining sentence, ongoing supervision, or unpaid court-ordered financial assessment as defined in section 8 of P.L. 2017, c. 244 (C.2C:52-23.1) of any person who, on that effective date, is or will be serving a sentence of incarceration, probation, parole or other form of community supervision as a result of the person's conviction or adjudication of delinquency solely for one or more crimes or offenses, or delinquent acts which if committed by an adult would constitute one or more crimes or offenses, enumerated in subsection a. of this section, shall have the conviction, remaining sentence, ongoing supervision, or unpaid court-ordered financial assessment vacated by operation of law.

Importantly, this provision by its literal terms applies only to crimes or offenses "enumerated in subsection a. of [N.J.S.A. 2C:35-23.1]."[4] Cf.

[4] Subsection a. lists:

DiProspero v. Penn, 183 N.J. 477, 495 (2005) ("'The canon of statutory construction, expressio unius est exclusio alterius—expression of one thing suggests the exclusion of another left unmentioned—sheds some light on the interpretative analysis.'") (quoting Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (2004)).

As Judge Marino aptly noted, of those specified crimes for which prior convictions must be vacated, only one applies to defendant: fourth-degree possession of marijuana, N.J.S.A. 2C:35-10(a)(3). Count four of the April 1992

> manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of paragraph (12) of subsection b. of N.J.S.2C:35-5, or obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of marijuana or hashish in violation of paragraph (3) or (4) of subsection a., or subsection b., or subsection c. of N.J.S.2C:35-10, or a violation involving marijuana or hashish as described herein and a violation of N.J.S.2C:36-2 for using or possessing with intent to use drug paraphernalia with that marijuana or hashish, alone or in combination with each other, or a violation involving marijuana or hashish and a violation of section 1 of P.L. 1964, c. 289 (C.39:4-49.1) for possession of a controlled dangerous substance while operating a motor vehicle, alone or in combination with each other, or any disorderly persons offense or petty disorderly persons offense subject to conditional discharge pursuant to N.J.S.2C:36A-1.

indictment charged that offense, and defendant pled guilty to it. That count, however, was merged with another count for sentencing purposes. As a result, no separate or additional penalty was levied against defendant for this conviction. Accordingly, N.J.S.A. 2C:35-23.1 provides no basis for granting the relief defendant seeks, which is to vacate his Leader conviction, or at least vacate the life term which is responsible for his lifetime parole supervision.

We draw the same conclusion from the text of the Directive, which closely tracks N.J.S.A. 2C:35-23.1. The section that addresses cases that have already been resolved makes clear that prior convictions for which a defendant is on parole are to be vacated, but only for specified offenses essentially tracking the offenses in N.J.S.A. 2C:35-23.1.

V.

We next address whether another provision of CREAMMA requires that defendant's Leader conviction/sentence be vacated notwithstanding that first-degree crime offense is not included in the list of offenses set forth in N.J.S.A. 2C:35-23.1. Defendant contends it is fundamentally unfair to continue to punish him as a leader of a narcotics trafficking network after the Legislature has effectively precluded a Leader conviction based solely on marijuana distribution by declassifying marijuana as a CDS. As we have noted, N.J.S.A. 2C:35-3

applies only to certain specified drugs and to any drug classified as a Schedule I or II CDS. Because marijuana is no longer a Schedule I CDS, were defendant's criminal enterprise to be operating today, he could not be charged with the Leader offense.

But defendant's argument presupposes the declassification of marijuana applies retroactively. It does not. As a general matter, "[o]ur courts 'have long followed a general rule of statutory construction that favors prospective application of statutes.'" State v. Lane, 251 N.J. 84, 94 (2022) (quoting Gibbons v. Gibbons, 86 N.J. 515, 521 (1981)). "To overcome the presumption of prospective application, we must find the 'Legislature clearly intended a retrospective application' of the statute through its use of words 'so clear, strong, and imperative that no . . . meaning can be ascribed to them' other than to apply the statute retroactively." State v. J.V., 242 N.J. 432, 443-44 (2020) (quoting Weinstein v. Inv'rs Sav. & Loan Ass'n, 154 N.J. Super. 164, 167 (App. Div. 1977)). Moreover, the New Jersey Supreme Court has "repeatedly construed language stating that a provision is to be effective immediately, or effective immediately on a given date, to signal prospective application." Lane, 251 N.J. at 96.

In State v. Cohen, for example, the Court addressed another provision in CREAMMA, N.J.S.A. 2C:35-10(c), which provides that "the odor of cannabis or burnt cannabis" shall not "constitute reasonable articulable suspicion of a crime." 254 N.J. 308, 328 (2023). The Court stated, "N.J.S.A. 2C:35-10(c) has no bearing on our present probable cause analysis because the search at issue predated the passage of CREAMMA." Ibid.

It is well-settled that when interpreting the meaning of a statute, to the extent possible, we look to the Legislature's plain language. See State v. Gandhi, 201 N.J. 161, 176-77 (2010); State v. Smith, 197 N.J. 325, 332-33 (2009). If a statute's language is unambiguous, then the "interpretive process is over." Gandhi, 201 N.J. at 177 (quotation Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007)). With respect to the specific feature that declassifies marijuana as a CDS, N.J.S.A. 24:21-5, we need not resort to principles of statutory construction. Nor do we need to rely on the effective date provision that appears at the end of the entire Act. In this instance, the plain text of N.J.S.A. 24:21-5 explicitly makes clear the declassification of marijuana applies prospectively, stating "except that on and after the effective date of the "[CREAMMA]," P.L. 2021, c. 16 (C.24:6I-31 et al.), marihuana (sic) shall no

longer be included in Schedule I, and shall not be designated or rescheduled and included in any other schedule . . . ."

Finally, we reject defendant's fundamental fairness argument there is no point in continuing to punish him "for conduct that is now recognized as legal." That argument rests on a faulty premise. It is not legal today to operate a large-scale unlicensed marijuana distribution network. Although the Leader offense no longer applies to marijuana-only trafficking networks as of January 22, 2021, defendant's conduct if committed today remains illegal. We note that any marijuana distribution offense involving twenty-five pounds or more is designated as a first-degree crime. See N.J.S.A. 2C:35-5(b)(10)(a).

We add the Legislature's declaration of findings make clear CREAMMA "is designed to eliminate the problems caused by the unregulated manufacturing, distribution, and use of illegal marijuana within New Jersey," and "[t]his act will divert funds from marihuana (sic) sales from going to illegal enterprises, gangs, and cartels." N.J.S.A. 24:6I-32(c), (d). Simply stated, the conduct that defendant admitted to when he pled guilty amply warrants continued parole supervision in light of CREAMMA. Such supervision is in no way fundamentally unfair.

To the extent we have not specifically addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.