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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-2638-03T42638-03T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

HERIBERTO SOTO,

Defendant-Appellant.

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Submitted October 12, 2005 - Decided May 4, 2006

Before Judges Kestin, R. B. Coleman and Seltzer.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, 02-09-1236.

Yvonne Smith Segars, Public Defender, attorney for appellant (Donald T. Thelander, Assistant Deputy Public Defender, of counsel and on the brief).

Peter C. Harvey, Attorney General, attorney for respondent (Robyn M. Mitchell, Deputy Attorney General, of counsel and on the brief).

The opinion of the court was delivered by

R. B. COLEMAN, J.A.D.

Defendant, Heriberto Soto, appeals from his sentence for fourth degree aggravated assault, [N.J.S.A. 2C:12-1b\(4\)](#). Defendant was sentenced, pursuant to a negotiated plea agreement respecting the charges in Passaic County Indictment No. 02-09-1236, to incarceration in prison for eighteen months, with an eighteen-month mandatory minimum term to be served consecutive to the sentence on Passaic County Indictment No. 02-03-0279, which defendant was serving at the time. Defendant has also challenged his sentence, following a plea of guilty to two counts of a seven-count indictment in Passaic County, Indictment No. 02-03-0279; that appeal was removed from the sentencing oral argument calendar in order that it could be fully briefed. It was listed for submission on the same date as this appeal. We have elected to address the issues raised in that matter in a separate opinion.

On this appeal defendant makes the following argument:

POINT ONE: THE IMPOSITION OF A MAXIMUM BASE TERM SENTENCE WITH A MAXIMUM BASE TERM PAROLE DISQUALIFIER OF 18 MONTHS TO BE SERVED CONSECUTIVELY TO THE SENTENCE DEFENDANT WAS THEN SERVING ON ANOTHER INDICTMENT WAS MANIFESTLY EXCESSIVE, UNDULY PUNITIVE AND NOT SUPPORTED BY THE RECORD BELOW.

We agree with defendant that the eighteen-month period of parole ineligibility exceeds the statutory authorization and is illegal. We remand for re-sentencing on that issue only.

On March 4, 2002, defendant was indicted under Passaic County Indictment No. 02-09-1236, which charged him in ten counts as follows: three counts of first degree robbery, [N.J.S.A. 2C:15-1](#) (counts one, two and three); second degree possession of handguns with the intent to use them unlawfully against others, [N.J.S.A. 2C:39-4a](#) (count four); third degree possession of handguns without having obtained a permit to carry the same, [N.J.S.A. 2C:39-5b](#) (count five); three counts of fourth degree aggravated assault by knowingly pointing a firearm at another under circumstances manifesting extreme indifference to the value of human life, [N.J.S.A. 2C:12-1b\(4\)](#) (counts six, seven and eight); third degree

theft by receiving stolen property, [N.J.S.A. 2C:20-7](#) (count nine); and fourth degree resisting arrest, [N.J.S.A. 2C:29-2a\(1\)](#) (count ten).

On June 30, 2003, defendant pled guilty to a single count of the indictment, count six, charging fourth degree aggravated assault. Pursuant to the plea agreement, the State agreed to recommend the maximum base sentence of eighteen months for the offense, with a period of parole ineligibility for the full eighteen months, and the dismissal of all remaining charges. The State's recommendation also contemplated that the sentence would be served consecutively to the aggregate eight-year sentence defendant had already started to serve for third degree possession of a controlled dangerous substance (CDS) with the intent to distribute within 1000 feet of a school, [N.J.S.A. 2C:35-7](#), and possession of a firearm while in the course of committing a narcotics offense, [N.J.S.A. 2C:39-4.1](#).

In furtherance of the plea agreement, defendant provided a factual basis of his guilt. He testified that he entered the victim's laundromat on March 4, 2002, took out a handgun, and pointed it at the victim's leg. Defendant also acknowledged the presence and aid of his accomplice in accordance with the plea agreement. The trial judge determined that defendant had the advice of competent counsel; that he had entered the guilty plea freely and voluntarily; and that he had adequately admitted a factual basis of the conviction of fourth degree aggravated assault, [N.J.S.A. 2C:12-1b\(4\)](#).

At the sentencing hearing on August 15, 2003, the State, as it had agreed, moved to dismiss the remaining nine charges against defendant and recommended the eighteen-month sentence, subject to the full eighteen-month parole disqualifier, to be served consecutively to the eight-year aggregate sentence defendant was then serving. The judge imposed sentence upon defendant in accordance with the State's recommendation and the parties' agreement. The judge found that the nature of the crime committed and the role of the defendant in this fourth degree offense was very serious. He noted that defendant had bound with duct tape three individuals, including the victim at whom he admitted he pointed the handgun, and he had terrorized them. In the judge's estimation, that incident would live with the victims

for the rest of their lives. For those reasons, as well as defendant's prior felony conviction, his background and dangerousness, the judge found aggravating factors (1), (3), (6), and (9) applied. [N.J.S.A. 2C:44-1\(a\)\(1\)](#), (3), (6) and (9). The judge found no mitigating factors.

Defendant contends the judge violated the [Sixth Amendment](#) by sentencing him, based on judicial factfinding, to a term greater than the maximum sentence authorized by defendant's admissions at a plea hearing. [Blakely v. Washington](#), [542 U.S. 296](#), [124 S. Ct. 2531](#), [159 L. Ed.2d 403](#) (2004). In [Blakely](#), the trial judge had "imposed an exceptional sentence of 90 months, [which was] 37 months beyond the standard maximum." [Id.](#) at 300, [124 S. Ct.](#) at 2535, [159 L. Ed. 2d](#) at 411. The imposition of such an extreme sentence was based on a finding that "[defendant] had acted with 'deliberate cruelty,' a statutorily enumerated ground for departure in domestic-violence cases." [Ibid.](#) The United States Supreme Court observed, however, that the facts the judge relied on to enhance the sentence were "neither admitted by [defendant] nor found by a jury." [Id.](#) at 303, [124 S. Ct.](#) at 2537, [159 L. Ed. 2d](#) at 413. Thus, the Court held defendant's sentence violated the [Sixth Amendment](#). [Id.](#) at 305, [124 S. Ct.](#) at 2538, [159 L. Ed. 2d](#) at 415. According to the Court, in criminal cases, "[w]hen a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." [Id.](#) at 310, [124 S. Ct.](#) at 2541, [159 L. Ed. 2d](#) at 417-18.

In [State v. Natale](#), [184 N.J. 458](#), 466 (2005), the New Jersey Supreme Court held that "a sentence above the presumptive statutory term based solely on a judicial finding of aggravating factors, other than a prior criminal conviction, violates a defendant's [Sixth Amendment](#) jury trial guarantee." In order to preserve the major sentencing elements of our sentencing code and to bring it into compliance with the [Sixth Amendment](#), the [Natale](#) Court eliminated the presumptive terms from the sentencing process. [Ibid.](#) The Court, thus, instructed that "[w]ithout presumptive terms, 'the statutory maximum' authorized by the jury verdict or the facts admitted by a defendant at his guilty plea is the top of the sentencing range for the crime charged, e.g., ten years for a second-degree offense, [N.J.S.A. 2C:43-6\(a\)\(2\)](#)." [Id.](#) at 487.

Judges are still empowered to identify and assess both the applicable mitigating and aggravating factors, but are simply not constrained by the "fixed point of a statutory presumptive" term. Id. at 488.

Consistent with Natale, "[a] judge is authorized to impose a sentence within the range allowed by the jury verdict or by the defendant's admissions at a guilty plea after waiving his right to jury trial." Id. at 481 (citing Blakely, supra, 542 U.S. at 301-02, 310, 124 S. Ct. at 2536-37, 2541, 159 L. Ed. 2d at 412-13, 417-18). The Natale Court, further recognized that although a defendant's guilty plea, standing alone, does not constitute implicit consent to judicial factfinding of aggravating factors to support a sentence above the presumptive term, if the defendant stipulates to relevant facts or consents to judicial factfinding, the sentencing court is authorized to exceed the statutory maximum. Natale, supra, 184 N.J. at 495 n.12. The Court stated:

State v. Anderson, 374 N.J. Super. 419, 421, 424 (App. Div. 2005), [certif. denied, 185 N.J. 266 (2005)] is an example in which a defendant implicitly agreed to judicial factfinding. In that case, the trial court indicated to the defendant the sentence that would be imposed if he pled guilty. Id. at 421; See also R. 3:9-3(c). The proposed sentence on one charge exceeded the presumptive term. Anderson, supra, 374 N.J. Super. at 421-22. Based on the court's representations, the defendant pled guilty. See id. at 421. As promised, the court imposed a sentence exceeding the presumptive term. Id. at 421-22. The Appellate Division upheld the defendant's sentence because the defendant implicitly agreed to judicial factfinding to support the sentence the court said it would impose. Id. at 424. That holding is consistent with Blakely, supra.

[Ibid.]

The court in Anderson distinguished its facts from the facts in Blakely. Anderson, supra, 374 N.J. Super. at 422-23. The court observed that in Blakely, defendant entered into a plea agreement with the State for the judge to impose a sentence within the standard range of forty-nine to fifty-three months, but instead the judge engaged in judicial factfinding to impose a sentence of ninety months, thirty-seven months longer than the negotiated standard range. Ibid. In contrast, the defendant in Anderson made an implicit waiver for the judge to find such aggravating factors to impose an otherwise excessive term of

imprisonment that defendant had "expressly acknowledged" and to which he had agreed in exchange for the dismissal of additional charges. Id. at 424.

Here, the presumptive term for a fourth degree aggravated assault conviction at the time of sentencing was nine months. N.J.S.A. 2C:44-1(f). The maximum term for a fourth degree offense was eighteen months. N.J.S.A. 2C:43-6(4). The judge imposed the maximum sentence of eighteen months in accordance with the plea agreement between the State and defendant and, likewise, imposed an eighteen-month period of parole ineligibility. The judge based defendant's sentence on aggravating factors (1), (3), (6), and (9). N.J.S.A. 2C:44-1(a)(1), (3), (6) and (9). The facts admitted by defendant were that he pointed a gun at another person's leg while his accomplice acted as a lookout. In finding aggravating factor (1) (nature and circumstance of the offense), the court took into account that the victim and two others were bound with duct tape and terrorized by defendant. These facts were contained in the victim's impact statement, but were not admitted by the defendant at his plea hearing. However, we are satisfied defendant impliedly authorized the judge to engage in such factfinding to impose the maximum sentence for the offense when defendant agreed to accept the terms of the plea agreement.

By agreeing to a plea agreement containing a sentencing recommendation of eighteen months with an equivalent parole disqualifier, rather than proceeding to trial, defendant waived any objection that the eighteen-month base sentence was excessive. The base sentence was within the statutory range for the offense, albeit the maximum of that range. If defendant had an objection to such a sentence, he should have raised it during negotiations with the State for the plea agreement or before the sentence was pronounced. Defendant cannot legitimately complain that the sentence was unexpected or that he received a sentence other than that for which he explicitly negotiated. Under such circumstances, Blakely does not apply.

Defendant also contends, however, that the eighteen-month period of parole ineligibility for his base sentence of eighteen-months is illegal. We agree with that aspect of his argument. In that regard, the

parties negotiated an illegal sentence. State v. Smith, [372 N.J. Super. 539](#), 542 (App. Div. 2004), certif. denied, [182 N.J. 428](#) (2005). Pursuant to the sentence, the entirety of the base sentence is to be served without eligibility for parole. Such a condition contravenes [N.J.S.A. 2C:43-6\(b\)](#), which provides:

As part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as set forth in subsections a. and b. of 2C:44-1, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a., or one-half of the term set pursuant to a maximum period of incarceration for a crime set forth in any statute other than this code, during which the defendant shall not be eligible for parole; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

Plainly, defendant's parole ineligibility may not exceed one-half of the term to which he was sentenced. Therefore, we remand the sentence to the Law Division for imposition of a parole disqualifier, pursuant to [N.J.S.A. 2C:43-6\(b\)](#), that does not exceed nine months.

Because we are remanding, we address one final contention by defendant. Defendant contends the trial judge did not properly use and assess the Yarbough factors in sentencing defendant to a consecutive term. The New Jersey Supreme Court in State v. Yarbough, [100 N.J. 627](#), 643-44 (1985), created the guidelines a trial court should consider when making its determination whether to impose a consecutive sentence.

In State v. Abdullah, the Court instructed that when trial courts impose "either a concurrent or consecutive sentence, '[t]he focus should be on the fairness of the overall sentence,' and [the trial courts] should articulate the reasons for their decisions with specific reference to the Yarbough factors." State v. Abdullah, [184 N.J. 497](#), 515 (2005) (quoting Miller, [108 N.J. 112](#), 122 (1987)) (first alteration in original). Failure to provide reasons for the imposition of a consecutive sentence may compel a remand for resentencing. Miller, supra, 108 N.J. at 122. According to the Court in Miller, "[a] statement of reasons is a necessary prerequisite for adequate appellate review of sentencing decisions . . . [in order to] determine whether the trial court's imposition of consecutive sentences was a valid exercise of

discretion." Ibid.

We recognize that we have the discretion to affirm a consecutive sentence without the reasons having been expressly stated where "the facts and circumstances leave little doubt as to the propriety of the sentences," and the sentences are not shown to be "clearly mistaken." State v. Jang, [359 N.J. Super. 85](#), 97-98 (App. Div.), certif. denied, [177 N.J. 492](#) (2003). Here, in accordance with the plea agreement, the judge imposed the eighteen-month base sentence consecutive to the eight-year sentence defendant was already serving. No explicit assessment of the Yarbough factors was made in support of imposition of a consecutive sentence, but the reasons are self evident. These were separate crimes committed on separate occasions and the plea agreement itself called for consecutive sentences. Therefore, we affirm the court's imposition of a consecutive sentence.

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Reversed and remanded for proceedings consistent with this opinion.

In the second appeal, defendant challenges the constitutionality of [N.J.S.A. 2C:39-4.1d](#). That statute prohibits merger of certain convictions for purposes of sentencing and directs that a sentence imposed for violation of section 4.1 be served consecutively to a violation of any of the sections of Chapter 35 or Chapter 16 referred to in that section.

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12

A-2638-03T4

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May 4, 2006

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