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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2072-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

TYJIER Q. SUMMERS,

Defendant-Appellant.

Submitted February 9, 2022 – Decided May 11, 2022

Before Judges Gilson, Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 18-05-0766.

Joseph E. Krakora, Public Defender, attorney for appellant (Michael Denny, Assistant Deputy Public Defender, of counsel and on the brief; John Boyle, on the brief).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Tyjier Summers pled guilty to three counts of first-degree armed robbery, N.J.S.A. 2C:15-1(a)(1). He was sentenced on each conviction to twelve years in prison with periods of parole ineligibility and parole supervision as prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. All the sentences were run concurrently.

Defendant appeals from his sentence, arguing (1) a provision in his plea agreement, under which the State increased its recommended sentence because defendant had failed to appear for his first sentencing, was against public policy as applied to someone of his age (defendant was twenty-two years old when he committed the robberies and twenty-three years old when he violated the agreement); (2) the trial court erred in enforcing the "no-show" provision in the plea agreement without holding a hearing; (3) the trial court erred in considering his youth as an aggravating factor; (4) his age should have been considered as a mitigating factor; and (5) he was entitled to additional jail credits.

We reject defendant's first four arguments and affirm his sentence. The trial court did not sentence defendant to twelve years solely because of his non-appearance in court. Instead, the trial court considered the appropriate aggravating and mitigating factors and in doing so did not consider his youth as an aggravating factor. Moreover, defendant was not a juvenile at the time he

committed the robberies; he was sentenced before mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), became effective, and that mitigating factor does not apply retroactively.

We remand this matter for a further hearing on the jail credits. The record establishes that defendant was held in jail before his sentence from May 14, 2019, to December 5, 2019, and he was not awarded jail credits for that time. The State contends that during that time he was being held because his parole for a prior juvenile delinquency adjudication had been revoked. Nothing in the record supports that position. Accordingly, if on remand the State cannot establish that defendant was being held on a juvenile parole violation, he is entitled to 206 additional days of jail credit.

I.

On January 28, 2018, defendant and a codefendant committed two armed robberies – one in East Brunswick and one in Piscataway. Three days later, defendant committed a third armed robbery in North Brunswick with two codefendants. During all three robberies, a knife was used to threaten the victims.

On February 21, 2018, defendant was arrested on the robbery charges. Following a hearing, he was detained pretrial in accordance with the Criminal

Justice Reform Act, N.J.S.A. 2A:162-15 to -26. Thereafter, defendant was indicted for nineteen crimes connected to the three armed robberies.

After being detained pretrial for more than a year, on March 29, 2019, defendant pled guilty to three counts of first-degree armed robbery under a negotiated plea agreement with the State. The plea agreement included a provision allowing defendant to be released for two weeks on home confinement prior to sentencing. The plea agreement explained that if defendant appeared after his two-week release and did not commit any further crimes, the State would recommend a sentence of eight years in prison. The plea agreement also stated that if defendant failed to return after two weeks, or otherwise violated the terms of his release, the State would recommend a twelve-year prison term subject to NERA.

At the same time defendant completed the plea form, he signed a supplemental form that explained that if he failed to appear for his scheduled sentencing date, the State had the right to ask the sentencing court "to impose any sentence allowed by statute for the offense[s] to which a guilty plea was entered, notwithstanding the sentencing recommendation in the plea agreement annexed hereto."

During the plea hearing, the court reviewed with defendant the terms of the plea agreement, including the provisions that allowed the State to ask for a higher sentence if defendant failed to comply with the conditions of his two-week release. Under oath, defendant told the court he understood the agreement and that he did not have any questions concerning it. Defendant then admitted he had committed three robberies and that his codefendants during those robberies had threatened the victims with a knife.

Defendant was released from pretrial detention on April 2, 2019, on the conditions that he remain in his home, be monitored, and turn himself in at the court two weeks later on April 16, 2019. Defendant failed to report on April 16, 2019, and a bench warrant for his arrest was issued that same day.

On May 14, 2019, defendant was arrested on the outstanding warrant and on a new, fourth robbery charge. Defendant was then held in jail from May 14, 2019, until he was sentenced on December 6, 2019.

Before his sentence, defendant moved to vacate his guilty plea, arguing his previous counsel had failed to fully investigate the robbery victims and should have moved to identify the victims. After hearing oral argument, the trial court denied that motion. Defendant has not appealed from that ruling.

On the same day that the court denied defendant's motion to withdraw his guilty plea, the court sentenced defendant. The court found two aggravating factors: factor three, the risk of re-offense, N.J.S.A. 2C:44-1(a)(3), and factor nine, the need to deter, N.J.S.A. 2C:44-1(a)(9). In finding those aggravating factors, the court noted that defendant had a significant juvenile record. The court found no mitigating factors, noting defendant had shown no remorse concerning his crimes. Moreover, defendant had not offered a valid reason for his failure to report to court on April 16, 2019.

Defense counsel argued for a sentence of seven or eight years subject to NERA. The State recommended the twelve-year sentence subject to NERA in accordance with the plea agreement. On each of the three armed robbery convictions, the court sentenced defendant to twelve years in prison subject to NERA. The three sentences were run concurrent to each other, and the remaining counts of the indictment were dismissed.

The court gave defendant 406 days of jail credit for the time from February 21, 2018 to April 2, 2019. The presentence report stated that defendant had been arrested in May 2019 based on the arrest warrant related to the robbery convictions and a juvenile parole warrant. The presentence report also stated that after defendant's arrest on May 14, 2019, defendant "was being held on a

juvenile parole violation as well as pending criminal complaints. Any jail credit awarded subsequent to [May 14, 2019] would be at the discretion of the court." The sentencing court did not give defendant jail credit from May 14, 2019, to December 5, 2019, "due to the juvenile parole violation." The judge explained that he would obtain the updated jail credit information and include the court's decision concerning jail credits in the judgment of conviction. The judgment of conviction stated the "court declines to award jail credit from 5/14/19 to 12/05/19 due to the juvenile parole violation." Defendant now appeals his sentence.

II.

On appeal, defendant presents five arguments for our consideration:

POINT I - THE PROVISION IN THE PLEA AGREEMENT PROVIDING FOR AN INCREASED SENTENCE FOR ANY VIOLATION OF PRESENTENCE RELEASE SHOULD NOT HAVE BEEN APPROVED OR ENFORCED AS IT WAS AGAINST PUBLIC POLICY WITH RESPECT TO THE TREATMENT OF YOUNG PEOPLE AND VIOLATIONS OF RELEASE.

A. 'No Show' Pleas that Heavily Penalize Young People with Long Periods of Incarceration for Presentence Release Violations are Inconsistent with Public Policy and the Underlying Scientific Developments Indicating that Young People Deserve Leniency in the Criminal Justice System.

B. No Show Pleas Imposing Lengthy Punitive Incarceration for a Young Person's Violation of a Release Condition or Non-Appearance in Court are Inconsistent with this State's "Progressive" Approach Regarding Release Violations.

POINT II – THE TRIAL JUDGE ERRED IN ENFORCING THE NO SHOW PROVISION WITHOUT HOLDING A SHAW HEARING,^[1] OR SPECIFICALLY CONSIDERING WHETHER THE AGGRAVATING AND MITIGATING FACTORS SUPPORTED THE ENHANCED SENTENCE.

POINT III – THE TRIAL COURT ERRED IN CONSIDERING [DEFENDANT'S] YOUTH AS AN AGGRAVATING FACTOR, AND [IN] ENTIRELY FAILING TO CONSIDER WHETHER YOUTH MIGHT REDUCE [DEFENDANT'S] CULPABILITY WITH RESPECT TO THE AGGRAVATING AND MITIGATING FACTORS.

POINT IV – THE LAW REQUIRING SENTENCING MITIGATION FOR YOUTHFUL DEFENDANTS DEMANDS RETROACTIVE APPLICATION BECAUSE THE [LEGISLATURE] INTENDED IT, THE NEW LAW IS AMELIORATIVE IN NATURE, THE SAVINGS [STATUTE] IS INAPPLICABLE, AND FUNDAMENTAL FAIRNESS REQUIRES RETROACTIVITY.

A. The Legislature Intended Retroactive Application.

¹ State v. Shaw, 131 N.J. 1 (1993).

B. The Savings Statute Does Not Preclude Retroactive Application of Ameliorative Legislative Changes, Like the One at Issue Here.

C. Retroactive Application of the Mitigating Factor Is Required as a Matter of Fundamental Fairness, and to Effectuate the Remedial Purpose of the Sentencing Commission's Efforts Regarding Juvenile Sentencing.

POINT V – THE TRIAL COURT MUST RECONSIDER ITS 'DISCRETIONARY' DENIAL OF PRESENTENCE JAIL CREDIT.

An appellate court's review of sentencing determinations is limited and governed by a deferential abuse of discretion standard. State v. Bolvito, 217 N.J. 221, 228 (2014); State v. A.T.C., 454 N.J. Super. 235, 254 (App. Div. 2018). We will "affirm the sentence of a trial court unless: (1) the sentencing guidelines were violated; (2) the findings of aggravating and mitigating factors were not 'based upon competent credible evidence in the record;' or (3) 'the application of the guidelines to the facts' of the case 'shock[s] the judicial conscience.'" Bolvito, 217 N.J. at 228 (alteration in original) (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)).

1. The Provision in the Plea Agreement.

Defendant argues that the provision in the plea agreement that allowed the State to increase its recommended sentence should not have been enforced

because the provision was against public policy. We reject this argument because the sentencing court did not automatically enforce the plea agreement. Instead, the court conducted an independent review and imposed a twelve-year NERA sentence in accordance with the governing law. Moreover, defendant's public-policy argument does not apply to defendant's sentence.

A trial court must sentence a defendant in accordance with the applicable sentencing provisions of the Code of Criminal Justice (Code), N.J.S.A. 2C:1-1 to -14. State v. Rivera, 249 N.J. 285, 298 (2021); Shaw, 131 N.J. at 16. A sentence is improper when it is "based upon a factor which is unrelated to the sentencing criteria set forth in the [Code]." State v. Wilson, 206 N.J. Super. 182, 184 (App. Div. 1985); see also State v. Liepe, 239 N.J. 359, 370-71 (2019).

The plea agreement is an agreement between the State and defendant. So long as the court imposes a sentence called for in the plea agreement, a defendant "cannot legitimately complain that the sentence was unexpected or that he [or she] received a sentence other than that for which he [or she] explicitly negotiated." State v. Soto, 385 N.J. Super. 247, 255 (App. Div. 2006). "Once a court accepts a negotiated plea, . . . it is 'bound by the specific terms and conditions of that negotiated agreement' for the purpose of imposing [a]

sentence." State v. Thomas, 392 N.J. Super. 169, 180 (App. Div. 2007) (quoting State v. Bridges, 131 N.J. 402, 409 (1993)).

A plea agreement that "provides for an increased sentence when a defendant fails to appear that is voluntarily and knowingly entered into between a defendant and the State does not offend public policy." State v. Subin, 222 N.J. Super. 227, 238-39 (App. Div. 1988). Accordingly, when the prosecutor has discretion to waive an otherwise mandatory minimum term of imprisonment, the prosecutor can include a provision in a plea agreement that withdraws that waiver if defendant fails to appear at his first scheduled sentencing. Shaw, 131 N.J. at 16. Including a "no-show" provision in a plea agreement is not arbitrary or an abusive exercise of a prosecutor's discretionary power. Ibid. "[S]o long as the sentencing court does not impose the sentence automatically by virtue of the defendant's non-appearance in court" and sentences a defendant "in accordance with the applicable sentencing provisions of the Code," a provision for an increased sentence when a defendant fails to appear is permissible. Subin, 222 N.J. Super. at 239.

The plea agreement defendant negotiated with the State was clear in its terms. The State agreed to recommend a sentence of eight years subject to NERA so long as defendant turned himself in after his two-week release. The

plea agreement went on to explain that if defendant failed to report to the court after two weeks or otherwise violated the conditions of his release, the State would recommend a twelve-year NERA sentence.

The sentencing court did not automatically impose the twelve-year sentence. Instead, the record establishes that the court complied with the applicable sentencing provisions of the Code. The sentencing range for a first-degree crime is between ten and twenty years in prison. N.J.S.A. 2C:43-6(a)(1). It is significant to note that if the State had recommended an eight-year sentence, that sentence would have been in the range of a sentence for a second-degree crime. N.J.S.A. 2C:43-6(a)(2). The twelve-year prison sentence imposed on defendant was within the range for a first-degree crime and, indeed, was in the lower end of that range.

The sentencing court also considered the aggravating and mitigating factors. The court found that there was a risk that defendant would commit another offense, N.J.S.A. 2C:44-1(a)(3), and a need to deter defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9). The court also considered all the relevant mitigating factors but found no facts supporting the application of a mitigating factor. Those findings are supported by the substantial credible evidence in the record.

The sentencing court did not treat defendant's failure to appear as an independent aggravating factor. See Wilson, 206 N.J. Super. at 184 (recognizing that a defendant's non-appearance for sentencing is not one of the criteria to be considered under the Code). Instead, the court properly considered defendant's non-appearance as allowing the State to recommend a sentence of twelve years. A sentencing court "can properly consider a defendant's failure to appear[,] together with other relevant mitigating and aggravating factors[,] in determining the appropriate sentence." Subin, 222 N.J. Super. at 240. Consequently, the sentencing court did not err when it considered defendant's failure to appear, together with the relevant aggravating factors and the lack of mitigating factors.

Defendant also argues that he was relatively young when he committed the crimes and when he violated the plea agreement. In that regard, he points out that he was twenty-two years of age when he committed the robberies, and he was twenty-three years old when he failed to appear. Defendant contends that the provision in his plea agreement is inconsistent with the public policy recognizing that younger people act impulsively.

In support of his arguments, defendant cites to Miller v. Alabama, 567 U.S. 460 (2012), and State v. Zuber, 227 N.J. 422 (2017). In Miller, the United

States Supreme Court held that it is a violation of the Eighth Amendment to impose mandatory life imprisonment, without parole, on a juvenile who was under the age of eighteen at the time he or she committed the crime. 567 U.S. at 465. In Zuber, our Supreme Court held that "sentencing judges should evaluate the Miller [juvenile] factors at [the time of sentencing] to 'take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'" 227 N.J. at 451 (quoting Miller, 567 U.S. at 480).

Miller and Zuber are not applicable to defendant. Defendant was not a juvenile when he committed the three robberies and violated the conditions of his two-week release. Moreover, there is nothing inconsistent with defendant's sentence and New Jersey's progressive approach regarding pretrial release violations. See State v. McCray, 243 N.J. 196, 201 (2020) (holding that the Criminal Justice Reform Act does not allow for criminal contempt charges when a defendant violates conditions of pretrial release); State v. Rolex, 329 N.J. Super. 220, 227 (App. Div. 2000) (stating that the Attorney General should address whether it is feasible to devise more specific guidelines for the inclusion of a no-appearance or a no-waiver provision in a plea offer). Defendant was not charged with criminal contempt for failing to appear for his sentencing nor was

the provision in his plea agreement against the public policy discussed in the cases he cites.

2. A Shaw Hearing.

Defendant contends that the sentencing court erred in enforcing the provision in the plea agreement without holding a hearing as called for by the New Jersey Supreme Court in Shaw. 131 N.J. at 16-17. In Shaw, the Court recognized that not every violation of a release condition would result in an automatic elimination of a waiver and the imposition of a mandatory sentence. Id. at 16. Instead, a sentencing court must hold a hearing or consider defendant's explanation for not appearing. Id. at 16-17. In that regard, the Court explained:

Not every violation of the waiver conditions by an accused defendant will result in automatic imposition of a mandatory sentence. The automatic imposition of enhanced punishment for a non-appearance without holding a hearing or considering an explanation would be unwarranted. The court must provide a fair hearing to determine whether the violation of the terms of the arrangement warrants its revocation. The process is deliberate, not perfunctory. The court will consider the explanation for the non-appearance in the context of all the circumstances The court will then determine whether in the circumstances the breach is material to the plea and therefore warrants revocation of the prosecutor's waiver of mandatory sentence.

[Id. at 16-17 (citation omitted).]

There is no dispute that defendant failed to appear and that he was arrested on May 14, 2019, on the bench warrant that was issued when he failed to appear and on a new robbery charge. Significantly, defendant did not ask for a separate hearing and did not provide an explanation for why he had not appeared in court on April 16, 2019. Instead, he made a motion to withdraw his plea. After the court considered and rejected that motion, the court proceeded to the sentencing hearing. Defense counsel did not ask for a separate Shaw hearing. Instead, defense counsel made arguments for the imposition of a seven-year sentence rather than a twelve-year sentence.

At the sentencing, defendant had the opportunity to explain his failure to appear. Moreover, defendant did not dispute that he had been arrested on a new robbery charge. Although defendant's fourth robbery charge was still pending at the time of his sentencing for the three previous robberies, defendant did not argue that his violation of that condition of release was trivial or explain why he had not turned himself in after the two-week period.

As already detailed, the sentencing court did not automatically impose the twelve-year sentence. Instead, the court heard defense counsel's arguments and allowed defendant to explain why his plea agreement should not be enforced. Consequently, the court provided defendant a fair hearing about whether it

should impose the eight-year or twelve-year sentences permitted under the plea agreement.

In short, the twelve-year sentence was a sentence defendant agreed to in the plea agreement if he failed to appear after the two-week release. Thus, the twelve-year sentence was permissible under the plea agreement, and we discern no abuse of discretion in the imposition of that sentence.

3. The Aggravating Factors.

Defendant also contends that the trial court improperly considered his young age as an aggravating factor. The record does not support that argument.

In determining an appropriate sentence to impose, the sentencing court must identify relevant aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) and explain the factual basis for the factors found. Rivera, 249 N.J. at 298. A defendant's young age cannot be considered as an aggravating factor. Id. at 303-04.

The sentencing court did not consider defendant's youth as an aggravating factor. Instead, in evaluating the aggravating factors, the sentencing court noted that defendant had a significant juvenile record. A sentencing court can appropriately consider criminal records, including juvenile records. The court did not find a separate aggravating factor based on defendant's age.

4. Mitigating Factor Fourteen.

Defendant argues that mitigating factor fourteen, N.J.S.A. 2C:44-1(b)(14), which added a new mitigating factor for crimes committed by persons under the age of twenty-six, should be applied retroactively and he should be resentenced. We disagree.

On October 19, 2020, the Legislature passed, and the Governor signed into law, several recommendations of the Criminal Sentencing and Disposition Commission. See L. 2020 c. 106; L. 2020, c. 109; L. 2020, c. 110. One of the new laws added mitigating factor fourteen so that a court "may properly consider" the mitigating circumstances that "defendant was under 26 years of age at the time of the commission of the offense." L. 2020, c. 110; N.J.S.A. 2C:44-1(b)(14).

The Legislature did not express an intent for mitigating factor fourteen to be applied retroactively. Instead, the Legislature stated that mitigating factor fourteen was to "take effect immediately." L. 2020, c. 110. Our Supreme Court has held that statutes that have an immediate or future effective date evidence the Legislature's intent to afford prospective application only. See Pisack v. B & C Towing, Inc., 240 N.J. 360, 370 (2020); State v. J.V., 242 N.J. 432, 435 (2020).

To date, no published decision has held that mitigating factor fourteen applies retroactively. Instead, the Supreme Court and our court have held that mitigating factor fourteen will be applied only if there is an independent basis to remand for resentencing. See Rivera, 249 N.J. at 303; State v. Bellamy, 468 N.J. Super. 29, 47-48 (App. Div. 2021); State v. Tormasi, 466 N.J. Super. 51, 67 (App. Div. 2021).

We are mindful that the Court has granted certification in State v. Rahee Lane, A-17-21, 248 N.J. 534 (2021) (certification granted Oct. 18, 2021), in which the pure legal question before the Court is whether, and if so, to what extent, mitigating factor fourteen applies retroactively. Unless and until the time when the Court rules to the contrary in Lane, we hold that mitigating factor fourteen does not apply retroactively to defendant's sentence, which was imposed in December 2019.

5. Jail Credits.

Defendant maintains that he is entitled to jail credits for the time that he was incarcerated from May 14, 2019, to December 5, 2019, the day before he was sentenced. The trial court declined to award jail credits for that time, reasoning that it had discretion to deny credit because defendant was being held for a parole violation on a prior juvenile delinquency adjudication. The record,

however, does not establish that defendant was on parole on a juvenile delinquency matter in 2019 or that defendant's juvenile parole had been revoked.

The determination of a defendant's eligibility for jail credits, which in effect reduces the time to be served on a sentence, is governed by Rule 3:21-8. That rule directs that a "defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence." R. 3:21-8. Jail credits "are applied to the 'front end' of a defendant's sentence, meaning that he or she is entitled to credit against the sentence for every day . . . held in custody for that offense prior to sentencing." State v. Hernandez, 208 N.J. 24, 37 (2011). A defendant who is held in custody on multiple charges is entitled to jail credits on all charges until the first sentence is imposed. Id. at 50. After the first sentence is imposed, "a defendant awaiting imposition of another sentence accrues no more jail credit under Rule 3:21-8." Ibid. A defendant receives gap-time credit when he or she is given two separate sentences on two different dates and is given "credit toward the second sentence for the time spent in custody since he or she began serving the first sentence." Id. at 38.

After reviewing this record and noting that there was no information concerning the juvenile parole violation, we directed counsel to provide us with

the material concerning the parole violation. Neither the State nor defense counsel provided any evidence of a juvenile parole violation. Accordingly, we remand this matter for reconsideration of the jail credit. If the State cannot present evidence that defendant was being held on a juvenile parole violation, as well as evidence of when that parole violation was adjudicated and whether it would have resulted in his incarceration, defendant is entitled to an award of 206 additional days of jail credit from the time of his arrest on May 14, 2019, to the day before he was sentenced in this matter on December 6, 2019. Should the State present evidence that defendant was being held on a violation of juvenile parole, and the sentencing court continues to believe that jail credit is not warranted, the trial court should determine if defendant is entitled to gap-time credit. See State v. Franklin, 175 N.J. 456, 471-72 (2003); State v. Hunt, 272 N.J. Super. 182, 185 (App. Div. 1994).

In summary, defendant's conviction and sentence are affirmed. The matter is remanded for consideration of whether defendant is entitled to additional jail credit or gap-time credit.

Affirmed and remanded in part. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION