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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0404-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRYAN A. GIBBS,
a/k/a BRIAN GIBBS,

Defendant-Appellant.

Submitted April 14, 2021 – Decided April 26, 2022

Before Judges Accurso and Enright.

On appeal from the Superior Court of New Jersey,
Law Division, Somerset County, Accusation No. 17-
02-0049.

Joseph E. Krakora, Public Defender, attorney for
appellant (John J. Bannan, Designated Counsel, on the
brief).

Michael H. Robertson, Somerset County Prosecutor,
attorney for respondent (Natacha Despinos Peavey,
Assistant Prosecutor, of counsel and on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

Defendant Bryan A. Gibbs appeals from the denial of his petition for post-conviction relief (PCR), contending he established a prima facie case of ineffective assistance of counsel requiring an evidentiary hearing. Because the trial judge correctly determined the evidence insufficient to sustain defendant's burden, we affirm.

Defendant's underlying conviction for first-degree carjacking stems from an incident in Bridgewater on July 18, 2016. The victim was sitting alone in his car, a white Toyota Corolla, in a parking garage when two young men ran toward him. One of the men tapped on his window and ordered him out of the car at gunpoint. The driver cooperated and, after the pair fled, he ran to a nearby building to ask someone to call the police.

The driver described one of the men as being a thin African-American, about 5'8," twenty to twenty-five years old, and the other as white or Hispanic about the same age and height. In a canvass of the area, police found defendant and his co-defendant, Cody Masiello nearby. Believing them to match the description provided by the driver, police took them to the parking garage for a showup. The driver told police they were not the men who car-jacked him, so no arrest was made.

Five days later, defendant was pulled over in Seaside Heights for running a stop sign in the stolen Toyota. Masiello was also in the car, along with two other passengers. Defendant and Masiello provided conflicting accounts of how they came to be in possession of the stolen car, and all four occupants were taken to police headquarters.

At police headquarters, defendant and Masiello were read their Miranda¹ rights, and denied any involvement in the theft of the Toyota. A few weeks later, Masiello spoke with police again, inculcating defendant and explaining he was "tired of lying." A search warrant for defendant's residence turned up the driver's house keys, and a communication data warrant for defendant's cell phone records revealed text messages to his friend the day of the carjacking, indicating he had "wheels" but that the car was "hot."

Two weeks after the incident, defendant, a few days shy of his eighteenth birthday, was charged with first-degree carjacking in the Family Part. Masiello, who was eighteen, was charged with the same offense as an adult. Six months later, defendant, through counsel, consented to be waived up to the Law Division in connection with his negotiated guilty plea to a to-be-filed accusation to first-degree carjacking. In return, the State agreed to

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

recommend defendant be sentenced as a second-degree offender to a seven-year prison term subject to the periods of parole ineligibility and supervision required by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

During defendant's plea colloquy a week later, defendant responded affirmatively to the court's questions as to whether he'd "had an adequate opportunity to discuss [his guilty plea] with [counsel] so that . . . [he was] comfortable and confident that [he] ha[d] enough information on which to base this decision" to plead guilty and whether he understood all of the questions on the plea form and if his answers were truthful.

The judge reminded defendant that "but for this plea agreement [he] would have been exposed to up to 30 years in the State Prison. Instead [he was] . . . exposed to a maximum of seven years, 85 percent of which [he would] have to serve before [he] would be eligible for parole, and [he would] have to give truthful testimony against [Masiello]." Judge Reed confirmed defendant understood he was waiving his right to indictment and a jury trial, stating "you understand that instead of pleading guilty . . . a grand jury would have considered whether to indict you — that is charge you with this crime. And if the grand jury did so, you would have had a right to a trial by a jury. Do you understand that?" Defendant assured the judge he did understand.

Defense counsel elicited the facts underlying the guilty plea, with defendant answering "yes" or "no" to most questions. Counsel asked what defendant and Masiello were doing right before they approached the car that was later stolen. Defendant responded, "I was plott'n — we were smoking a cigarette." When counsel started to inquire into the make and model of the car, defendant interjected, "Toyota Corolla, white[,] " before the question was complete.

Counsel asked if defendant saw the driver get into the vehicle and defendant explained, "I saw him sitting in the vehicle." Counsel asked whether defendant "had a hoodie or a turtleneck" that he "pull[ed] . . . up over [his] face[,] " and defendant answered affirmatively. When asked what he said to the driver after approaching the car, defendant responded: "Get the fuck out of the car." Defendant claimed the gun, which was never recovered, "was not a real gun," and explained he'd had it for a "week and s[o]me change." Before resting, defense counsel asked defendant whether he was "pleading guilty because you are in fact guilty?" to which defendant answered: "yes."

Six months after the plea hearing, the parties appeared on defendant's Slater² motion to withdraw his guilty plea. After reviewing the submissions of both parties and hearing oral argument, the judge denied defendant's motion and sentenced him, in accordance with the plea agreement, to a seven-year NERA term. Defendant appealed his sentence, which we affirmed on a sentencing calendar, R. 2:9-11.

In his PCR petition, defendant argued he was denied effective assistance of counsel by defense counsel's failure to conduct an adequate pre-trial investigation of his case, including "failing to challenge the State's proofs by failing to request a Wade³ hearing to challenge the victim's out of court identification and description of the perpetrator." He also claimed defense counsel failed to adequately communicate with him, effectively forcing him into a guilty plea, and that he was entitled to an evidentiary hearing on his claims.

After hearing argument by assigned counsel, the judge issued a written opinion denying the petition without an evidentiary hearing, finding defendant had failed to establish a prima facie claim for relief. See State v. Preciose, 129

² State v. Slater, 198 N.J. 145, 157-58 (2009).

³ United States v. Wade, 388 U.S. 218 (1967).

N.J. 451, 462-64 (1992). The judge found no reason for counsel to have requested a Wade hearing when there was no out of court identification of defendant by the driver and deemed defendant's claim of being forced into a guilty plea as based only on "bald assertions without any analysis of the factual background and overwhelming evidence against him."

The judge catalogued the extensive evidence against defendant, including his being found in the carjacked driver's car five days after the carjacking, his co-defendant Masiello giving a post-Miranda statement that defendant robbed the driver at gunpoint, the driver's keys found in defendant's room, and text messages on his phone indicating the car he was driving on the day of the carjacking was stolen — none of which defendant attempted to account for in claiming his counsel was ineffective in negotiating a seven-year NERA term to a charge of first-degree carjacking.

The judge also noted the thorough plea colloquy in which defendant assured the judge he'd had "ample opportunity to discuss his case with [defense] counsel," and that he was "comfortable and confident" and had enough information on which to base a decision to plead guilty. Measuring defendant's claims against the Strickland⁴ standard, the judge was satisfied

⁴ Strickland v. Washington, 466 U.S. 668, 693-94 (1984).

defendant had failed to establish either that "counsel's representation fell below an objective standard of reasonableness" or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-88, 694.

Defendant appeals, reprising his arguments to the trial court and claiming it erred in denying relief without an evidentiary hearing. He further argues in a point not raised previously, that defense counsel was ineffective for consenting to waive jurisdiction to adult court. Defendant "maintains that he is innocent," but, in arguing that "waiver to adult court would not have occurred . . . if defense counsel had contested waiver," asserts the carjacking showed he lacked "criminal sophistication" and "was high on marijuana and Xanax at the time."

Our review of the record convinces us defendant failed to demonstrate the performance of his counsel was substandard or that, but for the alleged errors, he would not have pleaded guilty and instead would have insisted on going to trial, see State v. Nunez-Valdez, 200 N.J. 129, 142 (2009). His arguments to the contrary do not merit any extended discussion in a written opinion. See R. 2:11-3(e)(2).

Defendant's argument — "that defense counsel was ineffective for failing to challenge the State's proofs by failing to request a Wade hearing to challenge the victim's out of court identification and description of the perpetrators" — is misplaced. A Wade hearing is only warranted when a defendant has evidence of suggestiveness in the circumstances surrounding his pretrial identification. See Pressler & Verniero, Current N.J. Court Rules, cmt. 2 on R. 3:11 (2022). Here, there was no out of court identification. There was an opportunity for an out-of-court identification at the showup shortly after the carjacking. But the driver was adamant defendant was not the man who took his car at gunpoint. Defense counsel could not have been ineffective for failing to challenge an identification the driver never made.

Defendant's argument that "counsel pressured him into accepting the plea" by failing to communicate with him and telling him "not to go to trial, because he would get the maximum sentence" is likewise without support in the record.

To the extent defense counsel underscored the maximum exposure defendant faced, this was not unreasonable. See State v. Gaitan, 209 N.J. 339, 350-51 (2012). The judge did as much during the plea colloquy, advising defendant that "but for this plea agreement you would have been exposed to up

to thirty years in the State Prison." The colloquy makes clear defendant was thoroughly questioned about the voluntariness of his plea and provided ample opportunity to raise any concerns he had with his counsel or the plea.

Defendant doesn't explain what an adequate investigation would have revealed, see State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999), or why it would have been reasonable for him to turn down the plea deal in light of the significant evidence against him and the State's generous sentence recommendation, see Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Defendant now argues, for the first time, that defense counsel was ineffective for "waiv[ing] jurisdiction from juvenile court to adult court without a contest . . . because the maximum sentence exposure in juvenile [court] was only [four] years." Defendant contends that had he "remained in juvenile court, he would have been sentenced to at least three years less time in prison or even no time in prison," and argues "[t]he fact that defense counsel waived jurisdiction up to adult court shows that defense counsel did not communicate with [him] during the course of plea discussions in order for [him] to determine what was in his best interest[,]" as "[c]learly, waiving up to adult court was not in [his] best interest."

This argument is not properly before us as it was not raised in defendant's amended PCR petition nor presented to the trial court. See State v. Robinson, 200 N.J. 1, 20 (2009); State v. Arthur, 184 N.J. 307, 327 (2005) (recognizing that an appellate court ordinarily will not consider issues that were not presented to the trial court). The State, of course, may seek waiver of jurisdiction to adult court without the consent of the minor as long as it files a motion accompanied by a written statement of reasons. See N.J.S.A. 2A:4A-26.1(a). "If a juvenile is over the age of fifteen and there is probable cause that he or she committed one of the various enumerated offenses[,] " including carjacking, N.J.S.A. 2A:4A-26.1(c)(2)(d), "waiver is presumptively appropriate unless other factors set forth in N.J.S.A. 2A:4A-26.1(c)(3)(a) through (k) weigh against it." State in Interest of E.S., 470 N.J. Super. 9, 18-19 (App. Div. 2021).

Defendant has not provided us a record on which we could assess the claim that "there is a reasonable likelihood . . . waiver to adult court would not have occurred, if defense counsel had contested waiver and presented statutorily relevant evidence at a waiver hearing." We note, however, that defendant was only two weeks shy of his eighteenth birthday when he carjacked the Toyota, and the prosecutor would appear to have had no

difficulty in establishing a basis for waiver under N.J.S.A. 2A:4A-26.1(c). Defendant makes no specific objection to the State's reasons for seeking waiver and has not explained how the prosecutor abused his discretion in doing so.

While defendant has focused on his maximum exposure if convicted of carjacking in the Law Division, we note the minimum sentence defendant could have received on conviction was ten years. Defendant's negotiated plea, which called for him not to oppose the State's motion for waiver and to plead guilty to an accusation to be filed charging first-degree carjacking, in return for which the State would recommend he be sentenced in the second-degree range to a seven-year NERA term, limited his exposure significantly.

Of course, to succeed on a claim of ineffective assistance, defendant must establish, first, that "counsel's representation fell below an objective standard of reasonableness" and, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 688, 694. In the context of a guilty plea, a defendant must demonstrate counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." State v. DiFrisco, 137 N.J. 434, 457 (1994) (quoting Tollett v. Henderson, 411 U.S.

258, 266 (1973)). The second prong of Strickland — the prejudice requirement — "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59. In other words, whether "there is a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." Ibid.

Measured by that standard, we agree with the trial judge that defendant has not established he received ineffective assistance from his trial counsel. His arguments amount to no more than bald assertions insufficient to establish a prima facie case of ineffective assistance of counsel entitling him to an evidentiary hearing. See State v. Cummings, 321 N.J. Super. at 170 (noting a petitioner must do more than make bald assertions in order to establish a prima facie claim of ineffective assistance of counsel). See also State v. Jones, 219 N.J. 298, 311-12 (2014).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION