SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2256-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEON K. LEWIS, a/k/a JONES KASHIF, JONES NASIR, LEWIS KASHIF, JONES TYSHON, LEWIS LAMAR,

Defendant-Appellant.

Submitted June 1, 2022 – Decided June 10, 2022

Before Judges Fisher and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 15-01-0048.

Joseph E. Krakora, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, on the brief).

William A. Daniel, Union County Prosecutor, attorney for respondent (Milton S. Leibowitz, Assistant Prosecutor, of counsel and on the letter brief).

PER CURIAM

Defendant and two others devised a scheme by which they would list a vehicle for sale and then rob interested purchasers at gunpoint. On September 16, 2014, three individuals drove from New York to Elizabeth to consider buying the advertised vehicle. When they arrived, they were robbed by defendant and the others; in the process, defendant shot and killed one of the victims. Defendant was indicted and charged with first-degree murder and other offenses. Pursuant to a negotiated agreement, defendant pleaded guilty to first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a)(1), in exchange for the State's agreement to dismiss the other charges and recommend a prison term no greater than twenty-seven years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

At the conclusion of a September 8, 2017 sentencing hearing, during which a sentence in conformity with the negotiated plea agreement was imposed, the judge advised defendant he had forty-five days to exercise his right to appeal and that if he could not afford an attorney, one would be appointed for him.

Defendant did not file a direct appeal.

In August 2019, defendant filed a post-conviction relief (PCR) petition, arguing, among other things,[1] that his trial attorney was ineffective for failing to file a direct appeal of the judgment of conviction. On December 3, 2020, Judge Robert Kirsch conducted an evidentiary hearing during which defendant's trial attorney testified that defendant never said he wanted to file an appeal. The judge found defendant's trial attorney to be "highly credible, with [a] clear and distinct memory of the facts of the case."

Defendant did not assert in his PCR petition that he told his trial attorney he wanted to pursue an appeal. He did not testify at the hearing and made no attempt to contradict his trial attorney's testimony. The judge made a fact finding that defendant never asked that an appeal be filed on his behalf and denied defendant's PCR petition for the reasons expressed in a thorough and well-reasoned written decision.

Defendant appeals, arguing:

> I. REGARDLESS OF A SPECIFIC REQUEST TO APPEAL, AN INDIGENT DEFENDANT'S CONSTITUTIONAL RIGHT TO APPELLATE REVIEW IS INFRINGED WHERE ASSIGNED TRIAL COUNSEL DOES NOT PROVIDE THE CLIENT WITH THE MEANS NECESSARY TO PROSECUTE A FIRST APPEAL AS OF RIGHT.

[1] Defendant asserted other unrelated claims in his pro se PCR petition that have not been pursued here.

II. IN CONSTITUTIONAL INEFFECTIVENESS CLAIMS WHERE COUNSEL'S PERFORMANCE LEADS TO A FORFEITURE OF THE PROCEEDING ITSELF, PREJUDICE IS PRESUMED.

III. THE FAILURE TO COMPLETE THE APPEAL TRANSMITTAL FORM CAUSED DEFENDANT TO FORFEIT HIS CONSTITUTIONAL RIGHT TO APPELLATE REVIEW.

We find insufficient merit in these arguments to warrant further discussion in a written opinion, R. 2:11-3(e)(2), adding only the following few comments.

In asserting a claim of attorney ineffectiveness, defendant was required to present a prima facie case that his attorney failed to meet professional norms and he was prejudiced as a result. See Strickland v. Washington, 466 U.S. 668, 687 (1984).[2] As the PCR judge correctly observed, an attorney's failure to appeal a judgment of conviction – when requested by a criminal defendant – would be professionally unreasonable and would carry with it a presumption of prejudice. See Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000); State v. Carson, 227 N.J. 353, 354 (2016); State v. Jones, 446 N.J. Super. 28, 32 (App. Div. 2016). But a defendant is still required to prove that he asked his attorney to file the unfiled appeal.

[2] We apply these same principles when considering ineffectiveness arguments based on the state constitution. State v. Fritz, 105 N.J. 42, 58 (1987).

After considering the evidence presented at the PCR hearing, the judge found that defendant never asked his attorney to file an appeal. That finding is both entitled to our deference, State v. Pierre, 223 N.J. 560, 576 (2015), and compels a determination that defendant was not entitled to post-conviction relief. An attorney cannot be found ineffective for failing to file an appeal never requested by the client.

Affirmed.