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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0475-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DWAYNE WILSON,

Defendant-Appellant.

Submitted January 31, 2017 – Decided August 4, 2017

Before Judges Leone and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 07-04-0720.

Joseph E. Krakora, Public Defender, attorney for appellant (William Welaj, Designated Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Lillian Kayed, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Dwayne Wilson appeals an order denying his post-conviction relief (PCR) petition without an evidentiary hearing. We affirm.

The criminal charges in this matter arose out of the stabbing deaths of defendant's sister and two of her children, and the stabbing of defendant's sister's other child, who survived. Defendant's sister was stabbed twenty-one times. The children who died were stabbed eleven and twelve times respectively. The surviving child was stabbed ten times.

Defendant was charged in a 2007 indictment with: three counts of first-degree murder, N.J.S.A. 2C:11-3(a)(1) or (2) (counts one, two and three); three counts of first-degree felony murder, N.J.S.A. 2C:11-3(a)(3) (counts five, six and seven); first-degree attempted murder, N.J.S.A. 2C:11—3 and N.J.S.A. 2C:5-1 (count four); first-degree robbery, N.J.S.A. 2C:15-1 (count eight); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d) (count nine); third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d) (count ten); and third-degree possession of a controlled dangerous substance, N.J.S.A. 2C:35-10(a)(1) (count eleven).

Defendant pleaded guilty to counts one, two and three as amended to charge first-degree aggravated manslaughter, N.J.S.A. 2C:11-4(a), and to count four as amended to charge second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1).

At sentencing, the court found the following aggravating factors: one, the nature and circumstances of the offense,

defendant's role in it, and that it was committed in an especially heinous, cruel or depraved manner, N.J.S.A. 2C:44-1(a)(1); two, the gravity and seriousness of the harm inflicted on the victims, including that defendant knew the victims were particularly vulnerable or incapable of resistance due to extreme youth, N.J.S.A. 2C:44-1(a)(2); three, the risk that defendant will commit another offense, N.J.S.A. 2C:44-1(a)(3); and six, the nature and extent of defendant's prior record, N.J.S.A. 2C:44-1(a)(6). The court did not find any mitigating factors and determined the aggravating factors "far outweigh[ed]" the non-existent mitigating factors.

In accordance with the terms of defendant's plea agreement and for the reasons set forth by the court, defendant was sentenced to concurrent thirty-year custodial terms on the aggravated manslaughter convictions, and a consecutive ten-year sentence on the aggravated assault conviction. Each of the sentences was subject to the requirements of the No Early Release Act, N.J.S.A. 2C:43-7.2. The remaining charges were dismissed.

Defendant appealed. His appeal was heard on this court's excessive sentencing calendar and affirmed. State v. Dwayne Wilson, No. A-4177-10 (App. Div. Nov. 16, 2011).

In September 2014, defendant filed a pro se PCR petition. After the assignment of counsel, defendant made the following arguments in support of his petition:

> POINT I
>
> THE SENTENCE IMPOSED BY THE TRIAL COURT WAS IMPROPER, ILLEGAL AND/OR OTHERWISE UNCONSTITUTIONAL.
>
> POINT II
>
> DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.
>
> POINT III
>
> DFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.
>
> POINT IV
>
> AN EVIDENTIARY HEARING IS REQUIRED WITH REGARD TO THE ALLEGATIONS OF DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF.
>
> POINT V
>
> THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF SHOULD NOT BE BARRED BY PROCEDURAL CONSIDERATION[S].

Following argument on defendant's PCR petition, the court issued a written decision rejecting each of defendant's arguments. The judge entered an order denying defendant's petition. This appeal followed.

On appeal, defendant makes the following argument:

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF SINCE HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL.

Defendant argues on appeal that the PCR court erred by rejecting his contention that his trial counsel provided ineffective assistance of counsel during defendant's sentencing proceeding. More particularly, defendant asserts that his trial counsel's performance was deficient because counsel failed to refute the State's assertion that the court should find three of the aggravating factors under N.J.S.A. 2C:44-1(a) that the court relied upon in imposing sentence. Defendant also argues his counsel failed to challenge at sentencing the State's reliance on an uncharged offense against defendant. Last, defendant argues his counsel was ineffective by failing to "correct the trial court when it found no mitigating factors were applicable."

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee that a defendant in a criminal proceeding has the right to the assistance of counsel in his or her defense. State v. Nash, 212 N.J. 518, 541 (2013). The right to counsel includes "the right to the effective assistance of counsel." Ibid. (quoting Strickland

v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984)).

In Strickland, the Court established a two-part test, later adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), to determine whether a defendant has been deprived of the effective assistance of counsel. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; Fritz, supra, 105 N.J. at 58. Under the first prong of the Strickland standard, a petitioner must show that counsel's performance was deficient. It must be demonstrated that counsel's handling of the matter "fell below an objective standard of reasonableness" and that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, supra, 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Under the second prong of the Strickland standard, a defendant "must show that the deficient performance prejudiced the defense." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. There must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A petitioner must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose

result is reliable." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. "The error committed must be so serious as to undermine the court's confidence in the jury's verdict or result reached." State v. Chew, 179 N.J. 186, 204 (2004).

"With respect to both prongs of the Strickland test, a defendant asserting ineffective assistance of counsel on PCR bears the burden of proving his or her right to relief by a preponderance of the evidence." State v. Gaitan, 209 N.J. 339, 350 (2012), cert. denied, ___ U.S. ___, 133 S. Ct. 1454, 185 L. Ed. 2d 361 (2013). A failure to satisfy either prong of the Strickland standard requires the denial of a petition for PCR. Strickland, supra, 466 U.S. at 700, 104 S. Ct. at 2071, 80 L. Ed. 2d at 702; Nash, supra, 212 N.J. at 542; Fritz, supra, 105 N.J. at 52.

We review the legal conclusions of a PCR court de novo. State v. Harris, 181 N.J. 391, 419 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). The de novo standard of review applies to mixed questions of fact and law. Id. at 420. Where an evidentiary hearing has not been held, it is within our authority "to conduct a de novo review of both the factual findings and legal conclusions of the PCR court." Id. at 421. We apply that standard here.

A court engages in impermissible double-counting when it considers "facts that establish the elements of the relevant

offense" in its finding of aggravating factors at sentencing. State v. Fuentes, 217 N.J. 57, 75 (2014). Defendant claims his counsel's performance was deficient because she did not challenge the State's request that the court find aggravating factor one, N.J.S.A. 2C:44-1(a)(1), and thereby permitted the court to engage in the impermissible double-counting of the deaths of the three victims in its sentencing determination.

Defendant contends a court may only find aggravating factor one without engaging in double-counting by demonstrating the extreme brutality of the offense or that defendant's conduct extended to the extreme reaches of the prohibited behavior. See Fuentes, supra, 217 N.J. at 75. Defendant argues that since neither of the circumstances that would permit a finding of aggravating factor one without impermissible double-counting was present here, defendant's counsel should have objected to the State's request that the court find the aggravating factor.

Defendant similarly argues his counsel failed to object to the State's request that the court find aggravating factor two, N.J.S.A. 2C:44-1(a)(2). He asserts that because the injuries to the victims were a necessary element of the crimes for which he was convicted, the court could not find aggravating factor two without engaging in impermissible double-counting.

We reject defendant's claim that counsel's performance was deficient by failing to object to the State's request that the court find aggravating factors one and two because it is contradicted by the record. In trial counsel's detailed sentencing memorandum to the court, she made the precise argument defendant now claims she failed to make. She argued the court could not properly find aggravating factors one and two because to do so would constitute impermissible double-counting.

Defendant also claims trial counsel's performance was deficient because she did not address aggravating factor nine, the need to deter the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9), at sentencing. More particularly, he claims counsel should have challenged the State's request that the court find aggravating factor nine by distinguishing between general deterrence and specific deterrence, and arguing to the sentencing court there was no basis for finding a need for specific deterrence here.

Defendant's argument ignores that he was convicted of three separate counts of aggravated manslaughter and a separate charge of aggravated assault. He violently and brutally caused his sister's death and the death of two of her children, and inflicted life threatening injuries on his sister's surviving child. The record supported a finding of both a general and specific need for

deterrence under aggravating factor nine, and counsel's performance was not deficient by failing to argue otherwise. A counsel's performance is not deficient by failing to make a meritless legal argument.[1] See State v. Worlock, 117 N.J. 596, 625 (1990) ("The failure to raise unsuccessful legal arguments does not constitute ineffective assistance of counsel.").

Defendant also argues counsel's performance was deficient because she failed to correct the court when it found no mitigating factors. Again, defendant ignores the record. In her sentencing memorandum to the court, counsel argued the court should find mitigating factors two, that defendant did not contemplate that his conduct would cause or threaten serious harm, N.J.S.A. 2C:44-1(b)(2), four, that based on his mental illness there were grounds

[1] We also observe that the court did not find aggravating factor nine at the sentencing proceeding. Thus, even assuming counsel's performance was deficient by failing to address aggravating factor nine at sentencing, defendant cannot establish that but for his counsel's error there is a reasonable probability the result of his sentencing proceeding would have been different. Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. We are aware the judgment of conviction states that the court found aggravating factor nine, but that is not supported by the sentencing record. See State v. Walker, 322 N.J. Super. 535, 556 (App. Div.) (finding that where there is a conflict between the sentencing transcript and judgment of conviction, the sentencing transcripts controls), certif. denied, 162 N.J. 487 (1999). In any event, defendant's sentence was affirmed on direct appeal and the accuracy of the judgment of conviction is not an issue before us. Any request for an amendment of the judgment of conviction should be first made to the trial court.

tending to excuse his conduct, N.J.S.A. 2C:44-1(b)(4), and eight, defendant's conduct was the result of circumstances unlikely to recur, N.J.S.A. 2C:44-1(b)(8). The fact that the court rejected defendant's arguments did not render counsel's performance deficient.

Defendant last argues counsel's performance was deficient because she failed to object to the assistant prosecutor's reliance at sentencing on "no billed cases to the [g]rand [j]ury" as evidence of defendant's assaultive behavior. The argument lacks merit because even assuming counsel should have objected, there is no evidence the court relied on any prior "no billed" cases in its sentencing determination. Thus, defendant failed to demonstrate that but for counsel's alleged error, there is a reasonable probability the result of the sentencing proceeding would have been different. See Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

To the extent we discern any additional arguments made on defendant's behalf, they are without merit sufficient to warrant discussion in a written opinion. Rule 2:11-3(e)(2).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION