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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0683-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MALIK FLOWERS, a/k/a
NATHANIEL SANDERS,

Defendant-Appellant.

Submitted May 24, 2017 – Decided August 8, 2017

Before Judges Fuentes, Simonelli and
Farrington.

On appeal from the Superior Court of New
Jersey, Law Division, Hudson County,
Indictment No. 07-09-1501.

Joseph E. Krakora, Public Defender, attorney
for appellant (Lee March Grayson, Designated
Counsel, on the brief).

Esther Suarez, Hudson County Prosecutor,
attorney for respondent (Kerry J. Salkin,
Assistant Prosecutor, on the brief).

PER CURIAM

Defendant Malik Flowers appeals from a May 28, 2015 order,
denying his petition for post-conviction relief (PCR) without an

evidentiary hearing. Having reviewed the record in light of the applicable legal principles, we affirm.

Defendant was convicted by a jury of robbery, N.J.S.A. 2C:15-1, first degree; possession of a firearm for unlawful purposes, N.J.S.A. 2C:39-4(a), second degree; aggravated assault by pointing a firearm, N.J.S.A. 2C:12-1(b)(4), fourth degree; unlawful possession of a handgun, N.J.S.A. 2C:39-5(a), third degree; and certain persons not to have weapons, N.J.S.A. 2C:39-7(b), second degree.

Defendant's conviction and sentence were affirmed on direct appeal, State v. Flowers, No. A-2401-09 (App. Div. Aug. 5, 2013), and the Supreme Court thereafter denied his petition for certification, State v. Flowers, 217 N.J. 588 (2014). On June 12, 2014, defendant filed a pro se PCR petition alleging "ineffective assistance of counsel" without providing specific facts to support his claim. Following court assignment of PCR counsel, defendant filed an amended petition supported by his certification.

We incorporate by reference the procedural and factual history of the case and summarize the relevant facts drawn from our opinion on direct appeal. Flowers, supra (slip op. at 2-5). On April 17, 2007, a man later identified as defendant entered a deli in Jersey City at about 10 p.m. Armed with a handgun, he pulled the storefront gate halfway down and put on a mask. Then

a second man, unmasked and later identified as co-defendant Aleem Mallard, entered and pulled the gate completely shut. Defendant brandished the gun at the three deli employees and demanded money. He struck an employee named Pedro¹ on the head with his gun and took Pedro's money and cell phone. After taking employee Tareek Ali's wallet, chain, and money, the gunman removed about \$1200 from the cash register. Then the two men exited through the front door of the store. The incident lasted approximately fifteen minutes.

Around the same time as the robbery, Francisco Fernandez was looking out his third-floor apartment window approximately thirty to fifty feet from the deli. He noticed two "suspicious" men near a green Dodge. Both were African-American, around six feet three inches tall, weighing around 220 to 240 pounds. Fernandez noted that the man closer to his window was crouching down and signaling to the other man down the block, pointing in the direction of the store. The man nearer to the store appeared to be in his late twenties or early thirties, wearing a red shirt. The other man, who appeared older, wore a black shirt and dark jeans.

After observing for a few minutes, Fernandez witnessed the two men get into the Dodge and drive away. He noted the license

¹ Pedro's last name does not appear in the record.

plate number when the car's lights were turned on and called the police. Shortly thereafter, he saw the police arrive at the deli and learned of the robbery. Fernandez never saw defendant or Mallard enter or exit the deli. In court, he identified defendant as the older man and Mallard as the man closer to the deli.

Based upon the license plate number provided by Fernandez, Detective Joseph Walsh drove Fernandez to an address on Fulton Street. En route, they saw the Dodge with the same license plate drive past them, and Walsh pursued the vehicle. During the chase, the Dodge crashed into a metal pole and the driver and passenger exited the car. Fernandez identified them to the police as the suspicious men he viewed from his apartment.

The police immediately arrested both defendant and Mallard. The police recovered a loaded handgun from the trunk, \$511 from Mallard's clothing, \$831 from defendant's pants pocket, and five of Ali's credit cards from defendant's boots.

In his PCR petition, defendant certified that he was denied effective assistance of both trial and appellate counsel. According to defendant, trial counsel gave him "misinformation and ill-advise[d assistance]." He further certified trial counsel failed to file necessary motions, argue "appropriate things at sentence," and failed to "consider all defenses and failed to

investigate defenses that existed in the case, and failed to utilize an investigator on his behalf."

Specifically, defendant alleged his attorney did not investigate the background of Fernandez, and as a result failed to discover Fernandez's prior arrests, convictions, and pending charges. Defendant certified his attorney failed to "explain to me that bias was something that could be used to cross-examine [sic] a witness." He further alleged that trial counsel failed to object to certain unspecified jury instructions which resulted in the enhanced standard of "plain error" on appeal.

Defendant also alleged appellate counsel was ineffective because his:

substantive issues focused only upon the jury instructions and failed to include the motion to suppress that was litigated by my trial attorney. This prevented the Appellate Division from considering both the motion to suppress, the physical evidence found in the car, as well as the show up identification performed by the police after I was arrested.

In rejecting defendant's ineffective assistance of counsel claims, the PCR court, citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and State v. Fritz, 105 N.J. 42 (1987), found defendant failed to establish a prima facie case with regard to trial counsel's failure to cross-examine Fernandez on his disorderly persons conviction. The court found

that in 2007, the time the identification and statement were made, the conviction for the offense did not exist and the offense had not been committed. Therefore, Fernandez could not have benefitted from lenient treatment given in return for his statement and identification. Judge Martha T. Royster further noted at the time of the trial Fernandez had already been sentenced to a one-year probationary term. She noted pursuant to State v. Rowe, 57 N.J. 293 (1970) and N.J.R.E. 609 that cross-examination of Fernandez on a conviction of a disorderly persons offense was prohibited.

Turning to defendant's contention that trial counsel was ineffective for failing to object to the accomplice liability and identification jury instruction, the PCR judge, referring to our earlier decision, noted we had failed to find prejudicial error, instead finding only that the last part of the instruction had been poorly worded. In light of this court's determination, the PCR judge found defendant failed to meet the second prong of the Strickland/Fritz analysis as the application of either the plain error or harmless error standards would result in the same outcome.

The PCR court next considered whether defendant's appellate counsel was ineffective for failing to raise on appeal deficiencies in the motion to suppress and the denial of the Wade² motion without

² U.S. v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

an evidentiary hearing. Citing to the findings of the motion judge, the PCR judge noted that, in deciding the motion to suppress, the motion court based its findings on the credibility of the officers who testified. Based upon that testimony, the motion judge found the show-up identifications were not tainted by suggestiveness, and the trunk of the Dodge was open after the vehicle crashed into the pole and the hand gun was in plain view. The motion judge further found the testimony of the expert called on behalf of the defense to be unconvincing. Judge Royster referred to the transcript of the motion hearing and quoted the motion judge, Judge Peter J. Vasquez, who in response to defense counsel's argument that Fernandez did not make the identification independently and his purported identification was tainted by police suggestiveness, said:

I just don't follow that argument.

. . . .

It's not important to my decision because as far as I can tell there's been no testimony or anything in writing put before me other than [that] you don't believe the police officer . . . would show any indication of any -- of the State's involvement in any way in the identification.

The PCR judge found that because the motion judge's decision was based on credibility determinations defendant "fail[ed] to

demonstrate that counsel's representation fell below an objective standard of reasonableness."

Judge Royster found that even if she were to accept that the first prong of Strickland/Fritz was satisfied, and found that it would have been objectively reasonable for appellate counsel to raise the show-up on appeal, there was nothing in the record or in petitioner's current submission in terms of specific, adequate facts which demonstrated that the identification was in fact unreliable, and that, had the issue been raised, the results of the proceeding would have been different.

This appeal followed. On appeal, defendant raises the following points and sub-points for our consideration:

POINT I

THE ORDER DENYING [PCR] SHOULD BE REVERSED AND THE CASE REMANDED FOR A FULL EVIDENTIARY HEARING BECAUSE THE DEFENDANT MADE A *PRIMA FACIE* SHOWING OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE *STRICKLAND/FRITZ* TEST.

- A. TRIAL COUNSEL WAS DEFICIENT BECAUSE HE DID NOT CROSS-EXAMINE THE STATE'S WITNESS, [], ABOUT HIS PRIOR RECORD AND PENDING CHARGES.
- B. TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO OBJECT TO CERTAIN IMPROPER JURY INSTRUCTIONS AT TRIAL THAT WERE RAISED IN THE DIRECT APPEAL.
- C. DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHO FAILED TO RAISE THE ISSUES OF THE TRIAL

COURT'S DENIAL OF HIS MOTION TO SUPPRESS
EVIDENCE AND SHOW-UP IDENTIFICATION.

1. APPELLATE COUNSEL WAS INEFFECTIVE
BY NOT CHALLENGING THE TRIAL
COURT'S DENIAL OF THE SUPPRESSION
MOTION TO BAR EVIDENCE OF THE GUN
THAT WAS ALLEGEDLY FOUND IN THE
TRUNK OF THE CAR.
2. APPELLATE COUNSEL WAS INEFFECTIVE
BY NOT CHALLENGING THE TRIAL
COURT'S DENIAL OF THE WADE
MOTION WITHOUT AN EVIDENTIARY
HEARING.

POINT II

THE PCR COURT ERRED BY NOT GRANTING AN
EVIDENTIARY HEARING.

"Post-conviction relief is New Jersey's analogue to the federal writ of habeas corpus." State v. Preciose, 129 N.J. 451, 459 (1992). Under Rule 3:22-2(a), a criminal defendant is entitled to post-conviction relief if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey[.]" "A petitioner must establish the right to such relief by a preponderance of the credible evidence." Preciose, supra, 129 N.J. at 459 (citations omitted). "To sustain that burden, specific facts" that "provide the court with an adequate basis on which to rest its decision" must be articulated. State v. Mitchell, 126 N.J. 565, 579 (1992).

We review the PCR court's findings of fact under a clear error standard and conclusions of law under a de novo standard. See State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). However, where, as in this case, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge].'" State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011).

Defendant argues an evidentiary hearing was warranted because he presented a prima facie case for PCR based on material disputed facts contained outside the record. The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1991), certif. denied, 162 N.J. 199 (1999). Rather, trial courts should grant evidentiary hearings only if the defendant has presented a prima facie claim of ineffective assistance, material issues of disputed fact lie outside the record, and resolution of the issues necessitate a hearing. R. 3:22-10(b); State v. Porter, 216 N.J. 343, 355 (2013). "Rule 3:22-10 recognizes judicial discretion to conduct such hearings." Preciose, supra, 129 N.J. at 462.

A PCR court deciding whether to grant an evidentiary hearing "should view the facts in the light most favorable to a defendant

to determine whether a defendant has established a prima facie claim." Id. at 463. To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate the reasonable likelihood of succeeding under the test set forth in Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698, and United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which our Supreme Court adopted in Fritz, supra, 105 N.J. at 58. Preciose, supra, 129 N.J. at 463.

Under the Strickland standard, a petitioner must show counsel's performance was both deficient and prejudicial. State v. Martini, 160 N.J. 248, 264 (1999). The performance of counsel is "deficient" if it falls "below an objective standard of reasonableness" measured by "prevailing professional norms." Strickland, supra, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94.

This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

[Fritz, supra, 105 N.J. at 52 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693).]

In determining whether defense counsel's representation was deficient, "[j]udicial scrutiny . . . must be highly deferential,' and must avoid viewing the performance under the 'distorting effects of hindsight.'" State v. Norman, 151 N.J. 5, 37 (1997) (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694). Because of the inherent difficulties in evaluating a defense counsel's tactical decisions from his or her perspective during trial, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95.

In determining whether defense counsel's alleged deficient performance prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697. Rather, defendant bears the burden of showing "that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; see also Harris, supra 181 N.J. at 432.

Judged by these standards, we are convinced that defendant failed to make a prima facie showing of ineffective assistance of trial counsel within the Strickland/Fritz test warranting an evidentiary hearing.

The PCR judge correctly found defendant failed to set forth a prima facie case that trial counsel's performance was both deficient and prejudicial. It is well established that "[i]n matters of trial strategy, we accord great deference to the decisions of counsel[.]" State v. Biegenwald, 126 N.J. 1, 56 (1991). We agree with the PCR court that trial counsel's conduct falls within the wide range of reasonable professional assistance and sound trial strategy.

With regard to defense counsel's failure to cross-examine Fernandez regarding his prior record and pending charges, defendant states:

While it appears the guilty plea [to the contempt charge] was to a disorderly persons offense, the record is unclear as to whether this contempt charge originated as a fourth-degree crime.

. . . .

In addition, the record indicates that between July 2008 and February 2009, Fernandez engaged in a pattern of misbehavior that resulted in three arrests.

. . . .

[D]efendant believes [contrary to the evidence and Rules of Evidence] that Fernandez obtained the benefit of a twelve-month probationary term instead of a conviction for a fourth-degree crime . . . and . . . [t]hus, the use of Fernandez's recent conviction was necessary to attack his credibility and show bias.

As pointed out by the PCR judge, N.J.R.E. 609 provides, "[f]or the purpose of affecting the credibility of any witness, the witness's conviction of a crime . . . must be admitted unless excluded by the judge" as remote or for other causes. N.J.R.E. 609(a)(1). The Legislature has defined conviction of a crime as an offense "for which a sentence of imprisonment in excess of [six] months is authorized." N.J.S.A. 2C:1-4(a). Disorderly person offenses are not crimes and cannot be used for impeachment purposes. Rowe, supra, 57 N.J. at 302. There is no evidence that Fernandez was ever convicted of a crime. His "pattern of misbehavior resulting in three arrests" is of no consequence. Further, as Judge Royster noted,

[h]owever, in reviewing everything in the totality of the circumstances, a few things are clear to the court which impact its decision.

First, at the time the identification and statement to the police was made by this witness that particular charge did not exist. So, if we take into question the veracity of the identification and statement of the witness at the time that it was originally made back in 2007, near April, the -- the witness had not yet been charged with this contempt charge. So, the actual[] identification and statement to the police, there's been nothing [im]proper to the court to suggest that the original statement or identification was in any way done for the purposes of reaping benefit or favor from the prosecutors as that charge had not yet existed.

Speculative deficiencies in representation are insufficient to support a claim of ineffective assistance of counsel. Fritz, supra, 105 N.J. at 64. Defendant's claims regarding possible benefits to Fernandez are mere speculation. Further, his claims that trial counsel failed to cross-examine Fernandez on his alleged history of arrests, ordinance violations, and disorderly persons conviction is contrary to law and the Rules of Evidence.

We consider next defendant's claim that trial counsel was ineffective because he failed to object to accomplice liability and identification jury charges, which was raised in defendant's direct appeal. Defendant cannot raise as grounds for PCR an issue that was raised in decided on direct appeal. R. 3:22-5. Defendant also argues that appellate counsel rendered ineffective assistance by failing to challenge the denial of his motion to suppress the

gun that was found in the trunk of his car in plain view, and the denial of his Wade motion without an evidentiary hearing. We reject this argument substantially for the reasons expressed by the PCR Judge.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION