SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0796-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SHAKEEM S. YOUNG,

Defendant-Appellant.

Submitted May 9, 2016 – Decided March 8, 2017

Before Judges Lihotz and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment Nos. 10-10-2376, 11-02-0519, and 12-02-0021.

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

James P. McClain, Atlantic County Prosecutor, attorney for respondent (Brett Yore, Assistant Prosecutor, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Shakeem S. Young appeals from a September 5, 2014 order denying his petition for post-conviction relief (PCR). Defendant argues:

> POINT I
>
> THE DEFENDANT WAS ENTITLED TO POST-CONVICTION RELIEF BECAUSE THE SENTENCE IMPOSED WAS ILLEGAL AND HAS RESULTED IN FUNDAMENTAL INJUSTICE (Partially Raised Below).
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> POINT II
>
> THE ORDER DENYING POST-CONVICTION RELIEF SHOULD BE REVERSED AND THE CASE REMANDED FOR A FULL EVIDENTIARY HEARING BECAUSE THE DEFENDANT MADE A PRIMA FACIE SHOWING OF INEFFECTIVENESS OF COUNSEL UNDER R. 3:22 POST-CONVICTION RELIEF CRITERIA.
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> A. APPELLATE COUNSEL WAS INEFFECTIVE BY NOT MOVING TO BRIEF THE ILLEGAL SENTENCE ISSUE IN THE DIRECT APPEAL AND BY THE LIMITED TREATMENT OF THOSE ISSUES AT THE CONCLUSION OF ORAL ARGUMENT DURING EXCESSIVE SENTENCE ORAL ARGUMENT (ESOA) BEFORE THE APPELLATE DIVISION. (Partially Raised Below).
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> B. TRIAL COUNSEL WAS INEFFECTIVE, IN PART, BY (1) NOT CHALLENGING THE NO SHOW/NO RECOMMENDATION CONDITION; AND (2) NOT REQUESTING A HEARING ON THE ISSUE OF THE DEFENDANT'S FAILURE TO APPEAR ON THE RESCHEDULED SENTENCING DATE.
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> C. TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT FILE MOTIONS TO SUPPRESS EVIDENCE FROM WARRANTLESS SEARCHES IN INDICTMENT NUMBERS 11-02-0519E AND 10-01-0021E.

Defendant also filed a pro se supplemental brief, arguing:

THE PCR COURT'S RULING DENYING DEFENDANT'S CLAIMS THAT HE WAS SUBJECTED TO THE DEPRIVATION OF HIS SIXTH AMENDMENT CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND APPELLATE COUNSEL IS NOT SUPPORTED BY SUFFICIENT, CREDIBLE EVIDENCE IN THE RECORD, THEREFORE, THE PCR COURT'S RULING SHOULD BE VACATED AND DEFENDANT'S CONVICTION SHOULD BE REVERSED.

Following our review of these arguments, we affirm.

On December 15, 2011, as the jury was ready to be selected to try defendant on the thirteen-count Indictment No. 10-10-2376, defendant and the State entered into a negotiated open plea agreement. Defendant pled guilty to first-degree possession of a controlled dangerous substance (cocaine) with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1); and second-degree possession of a weapon while in possession of cocaine with intent to distribute, N.J.S.A. 2C:39-4.1. The State agreed to dismiss the remaining eleven charges.

The judge informed defendant he was exposed to a thirty-year sentence with a fifteen-year minimum period of parole ineligibility, but the judge had discretion to consider defendant's cooperation. Further, the judge explained he could impose an aggregate sentence of fifteen years with an eight-year parole ineligibility period based upon defendant's cooperation. The judge explained the plea was open and the agreement between

defendant and the State could not restrict judicial discretion to impose an appropriate sentence.

After defendant's plea was accepted, the State requested the judge revoke bail, noting defendant awaited disposition on two additional indictments charging weapons offenses, Indictment No. 11-02-0519 and Indictment No. 12-02-0021. Defense counsel opposed the State's request and argued defendant should be released on conditions. The court agreed to allow defendant to remain free on bail until sentencing. The judge informed defendant his continued release on bail was conditioned, among other things, on continuous GPS monitoring, home confinement, and attendance at all court appearances. Finally, the judge imposed a "no show/no recommendation," which he explained to mean, if defendant failed to appear at sentencing the judge's comments regarding a likely sentence were no longer applicable and he would impose sentence up to the maximum permitted "in accordance with the law and [defendant's] record."

On January 13, 2012, defendant appeared for the scheduled hearing on Indictments No. 11-02-0519 and No. 12-02-0021. He entered guilty pleas to a single count charging the same offense in each indictment: second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b)(1). The State agreed to dismiss the remaining eleven charges in the indictments and to recommend five-year

sentences to run concurrent with each other, and with the sentence to be imposed on Indictment 10-10-2376.

Defendant again was released pending comprehensive sentencing on the three indictments. The judge stated all prior conditions of release remained in place, specifically advising defendant:

> All conditions of his bail continue, and if I haven't added it already, I'll add it now, Mr. Young, it's no show/no rec, okay, so if you want this recommended outcome, show up. If not[,] you'll be sentenced in my discretion.

A sentencing date was set.

Defendant did not appear for sentencing on January 27, 2012. The judge issued a bench warrant for defendant's arrest. Defendant was taken into custody by authorities in Brigantine and a new sentencing date was scheduled for February 17, 2012.

Prior to sentencing, defendant explained why he failed to appear. He received death threats and believed he needed to act. He called the GPS monitoring service, which he stated would not take him into physical custody, so he removed his GPS device, violated home confinement, and left New Jersey. Defendant stated he maintained contact with the bail bondsman and his attorney. His mother's comments confirmed defendant received threatening phone calls while on house arrest. She stated she and her younger son were also threatened. Finally, counsel stated defendant had called after he violated house arrest.

On the charges from the three indictments, the judge imposed an aggregate sentence of thirty-five years in prison with an eighteen-year period of parole ineligibility, along with applicable fines and penalties.[1]

Defendant's direct appeal was reviewed on July 31, 2012, during an Excessive Sentencing Oral Argument calendar, R. 2:9-11. This court's order, issued on August 1, 2012, affirmed the conviction and sentence; certification was denied. State v. Young, No. A-3845-11 (App. Div. Aug. 1, 2012), certif. denied, 213 N.J. 536 (2013).

Defendant filed a petition seeking PCR. Following a hearing held on July 24, 2014, the PCR judge denied relief in an order dated September 5, 2014. Defendant appeals from that order.

Defendant argues his sentence was illegal and must be vacated. He suggests the length of the sentence was manifestly unjust and contends the judge "improperly injected the no show/no recommendation condition as part of the global plea resolution." Defendant concludes the sentence imposed was not based on the

[1] Under Indictment No. 10-10-2376, the judge imposed twenty years for first-degree possession with intent to distribute and a consecutive minimum term of ten years for the weapons offense, requiring fifteen years be served prior to being parole eligible. Defendant was sentenced under Indictment Nos. 11-02-0519 and 12-02-0021 to concurrent five-year sentences, with a three-year parole ineligibility period, to be served consecutive to Indictment 10-10-2376.

offense, but upon his failure to appear for the initial sentencing date, which is a challenge subject to review on post-conviction relief. R. 3:22-2(c). We are not persuaded.

On direct appeal, defendant raised this argument. Following our review of the sentencing transcript, we concluded the sentences imposed were not illegal, "not manifestly excessive or unduly punitive and did not constitute an abuse of discretion" or shock the conscience.[2] Rule 3:22-5 states an adjudication of an issue on the merits is conclusive and precludes further review of the matter in a PCR proceeding.

Despite the procedural bar, we provide this evaluation of the merits of defendant's claims. Again defendant maintains the imposed sentence must be vacated because it was greater than the

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[2] Our review follows the Court's direction set forth in State v. Roth, 95 N.J. 334 (1984):

> In sum, then, appellate review of a sentencing decision calls for us to determine, first, whether the correct sentencing guidelines, or in this case, presumptions, have been followed; second, whether there is substantial evidence in the record to support the findings of fact upon which the sentencing court based the application of those guidelines; and third, whether in applying those guidelines to the relevant facts the trial court clearly erred by reaching a conclusion that could not have reasonably been made upon a weighing of the relevant factors.
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> [Roth, supra, 95 N.J. at 365-66.]

sentence sought by the State and the length was improperly increased because of his failure to appear, and not based on the offenses. We are not persuaded.

The facts show: defendant entered an open plea; he had a prior Graves Act conviction, making him subject to a mandatory extended term sentence, N.J.S.A. 2C:43-6(c); he was fully informed, more than once, the judge would impose the sentence in his discretion, and could impose up to the maximum sentence permitted by law. See State v. Hess, 207 N.J. 123, 151 (2011) (holding the judge retains discretion to impose an appropriate sentence despite a recommendation in a plea agreement). Following argument, including statements by counsel, defendant, and his mother, the judge evaluated the facts. He weighed applicable aggravating factors against nonexistent mitigating factors, which included defendant's extensive juvenile and adult criminal record, that he was on parole when he committed the subject offenses, and the need to deter defendant and others. The sentences imposed fell within the permitted ranges set forth for the offenses.

Also, defendant's failure to appear was properly considered as relevant to the application of aggravating factors, including the risk defendant will commit another offense and the need for deterrence. See State v. Subin, 222 N.J. Super. 227, 240 (App. Div.), certif. denied, 111 N.J. 580 (1988). The judge chose to

impose the lowest sentence in the range for the weapons charges after considering his explanation for his failure to appear.

This analysis shows the sentence imposed was based on the facts of record, as required by law governing sentencing proceedings; it was not imposed because defendant failed to appear.

Defendant next maintains he should have been permitted to withdraw his plea when the judge imposed a sentence greater than the sentence sought by the State. This claim lacks merit. The plea was open, with no recommendation from the State. Therefore, defendant knew he was exposed to the maximum sentence on Indictment No. 10-10-2376 of thirty years imprisonment with a fifteen-year period of parole ineligibility, and the maximum sentence on Indictment Nos. 11-02-0519 and 12-02-0021, of twenty years with a ten-year period of parole ineligibility. The judge informed defendant the prosecutor's sentencing recommendation on the latter two indictments would be set aside if defendant violated the conditions of release. Specifically, the court stated it would impose a sentence allowed by law. Defendant accepted this provision as governing his release.

We reject defendant's other claims to support his position PCR was erroneously denied. Defendant asserts trial and appellate counsel provided ineffective assistance, which required an evidentiary hearing. Specifically, defendant argues trial counsel

should have opposed the "no show/no recommendation" condition of release, should have been more vigorous in showing defendant was justified in missing his initial sentencing date because his life was at risk, and should have moved to suppress the guns found in warrantless searches, resulting in the charges set forth in Indictments No. 11-02-0519 and No. 12-02-0021. Defendant also asserts appellate counsel was ineffective by not briefing the illegal sentence issue and limiting oral argument on the issue.

A defendant's right to effective counsel is violated where "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test formulated in Strickland and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). The Strickland standard applies to grounds for post-conviction relief, R. 3:22-2(a), and includes two elements: substandard professional assistance and ultimate prejudice to the defendant by reason therefrom, Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 3:22-2 (2016).

A defendant must show "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." 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). Also, a defendant must show prejudice because of counsel's deficient performance. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. That is, a defendant must show a "reasonable probability" the deficient performance affected the outcome, Fritz, supra, 105 N.J. at 58.

Defendant's arguments, suggesting trial counsel was ineffective, actually attack the sentence imposed, and are rejected. Not only was the issue reviewed and rejected on appeal, we reviewed the merits and found the arguments unpersuasive. We conclude these same claims, which restate the issue challenging the length of the sentence imposed, are not cognizable as a basis for PCR.

Defendant also alleges trial counsel was ineffective because he failed to request a separate hearing on the "failure to appear" issue. However, he fails to explain what evidence would be presented at such a hearing and offers no legal authority establishing a separate hearing was required. The relevant facts on why defendant did not attend the scheduled sentencing were extensively presented by defendant, his mother and counsel, prior to imposition if sentence. This claim advanced to justify PCR lacks merit.

Next, we consider trial counsel's alleged failure to file motions to suppress weapons found in searches incident to arrest following motor vehicle stops.[3] Defendant was a passenger in each car and argues no exigent circumstances were present; therefore, police should have obtained a warrant. Arguing trial counsel should have filed suppression motions, defendant provides no factual support for this assertion. Without facts supporting the basis of defendant's claims, we are unable agree PCR, or even an evidentiary hearing, was necessary to consider this issue. As we observed in State v. Cummings, 321 N.J. Super. 154, 170 (App. Div.), certif. denied, 162 N.J. 199 (1999), a defendant must do more than present bland generalizations or bald assertions. Instead, he must "assert the facts" that would have been established his right to PCR.

We also find no basis to reverse the denial of PCR regarding claims challenging appellate counsel's performance. "The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal." State v. O'Neil, 219 N.J. 598, 610-11 (2014) (citing Evitts v. Lucey, 469 U.S. 387, 396, 105 S. Ct. 830, 836, 83 L. Ed. 2d 821, 830 (1985)

[3] In his PCR petition defendant also argued trial counsel failed to challenge the probable cause stated as the basis for the search warrant obtained for the charges in Indictment No. 10-10-2376. The argument was not presented on appeal.

("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."); State v. Guzman, 313 N.J. Super. 363, 374 (App. Div.) (holding the Strickland test applies to claims of ineffective assistance at trial level and on appeal), certif. denied, 156 N.J. 424, 719 (1998).

Defendant claims appellate counsel should have requested the case be placed on this court's plenary calendar and the oral argument presented during the summary proceeding was "woefully inadequate." Our opinion has addressed the bases for rejecting defendant's position his sentence was illegal. We conclude the sentence should not be vacated. In this light, we must also reject a claim suggesting appellate counsel's presentation challenging the sentence was lacking.

We conclude with a determination the PCR court did not err in declining to conduct an evidentiary hearing on the basis of these contentions. See State v. Preciose, 129 N.J. 451, 459-60 (1992) (requiring evidentiary hearing when facts must be discerned to review defendant's prima facie case of ineffective assistance of counsel). Evidentiary hearings are not required in all PCR proceedings. State v. Marshall, 148 N.J. 89, 157-58, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). Whether to conduct an evidentiary hearing rests in the discretion of the

court, R. 3:22–10, and is necessary only when it would "aid the court's analysis of whether the defendant is entitled to post-conviction relief or that the defendant's allegations are too vague, conclusory, or speculative to warrant an evidentiary hearing, . . . then an evidentiary hearing need not be granted." Marshall, supra, 148 N.J. at 158 (citations omitted). "The [defendant] must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." Ibid. This standard was not met.

Affirmed.