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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1426-14T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN M. KING, a/k/a JOHNATHAN BLAKNEY,
MARCUS KING, MARCUIS KING, JOHN
MONTRELL KING and JONATHAN BLAKNE,

Defendant-Appellant.

Submitted May 25, 2017 — Decided August 2, 2017

Before Judges Hoffman and Mawla.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Indictment No.
98-05-0955.

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

Gurbir S. Grewal, Bergen County Prosecutor,
attorney for respondent (Elizabeth R. Rebein,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant John King appeals from the Law Division order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. He argues his trial counsel provided

ineffective assistance because he failed to investigate the credibility of Sergeant Gary Griffith's account of his arrest. Defendant presented the PCR court with a report directly contradicting Sergeant Griffith's account of how and why he pulled defendant over. If the trial court had found Sergeant Griffith not credible, the State would not have met its burden to admit defendant's cocaine and his admission it belonged to him. We therefore vacate the order denying PCR and remand for an evidentiary hearing.

I.

We have based the following description of defendant's arrest on testimony from the suppression hearing because his appeal focuses on his legal representation during this hearing. On November 23, 1997, Sergeant Griffith of the Port Authority Police worked the 3 p.m. to 11 p.m. shift, assigned to the post at the Palisades Parkway Toll Plaza near the George Washington Bridge. During his shift, he periodically patrolled the bridge. At approximately 9:30 p.m., Sergeant Griffith started driving to New Jersey from the New York side of the bridge. Traveling in the rightmost lane, he noticed another vehicle 300 yards ahead passing others at a "higher rate of speed." He approached the vehicle about midway over the bridge and matched his speed with the vehicle's for approximately three-tenths of a mile. His

speedometer read fifty-eight miles per hour, thirteen miles per hour over the speed limit.

On cross-examination at the suppression hearing, defense counsel asked Sergeant Griffith how he caught up to the vehicle at the midway point of a 3,000 foot bridge if he started 900 feet behind it. Asked if he was going "about 90, 100 miles an hour to catch up to" the vehicle, Sergeant Griffith responded, "I — I don't — don't think so." Defense counsel then asked, "[Y]ou saw that . . . at 9:30 at night on a November night, you saw a car 900 feet ahead of you, you could see that he was passing cars at a high rate of speed." Sergeant Griffith replied, "That's correct." Defense counsel then asked, "900 feet away . . . the length of the Intrepid, you could see a beige Toyota passing other cars at a high rate of speed, right?" Sergeant Griffith responded, "I didn't know what kind of car it was until I pulled the vehicle over;" nevertheless, he maintained his claim he saw the subject vehicle passing cars at a high rate of speed from 900 feet away.

After pacing the subject vehicle for approximately three-tenths of a mile, Sergeant Griffith signaled for the driver to pull over. The vehicle stopped under a nearby overpass. Sergeant Griffith stopped his car behind the vehicle and noticed two people in the car, one in the driver's seat and one in the front passenger's seat. He approached the driver's side from behind and

asked the driver for his license, registration, and insurance card. The driver produced his New Jersey driver's license and a rental agreement. During this exchange, Sergeant Griffith used his flashlight to illuminate the vehicle and the driver. He noticed the driver's "eyes were dilated," and his "pupils were very, very sluggish." Sergeant Griffith did not smell any alcohol, but based on his training and experience, the driver "was possibly under some type of narcotic."

Sergeant Griffith asked the driver to exit the vehicle because he "wanted to see if he had any other disabilities." As the driver exited the vehicle, he was "very unsteady [on] his feet, . . . swaying a little bit, sagging his knees." Sergeant Griffith concluded the driver was "under the influence of some kind of controlled substance." He consequently told him that he was under arrest and read his Miranda rights to him. He then handcuffed him, frisked him for weapons, and placed him in his patrol car.

Sergeant Griffith approached defendant, seated in the front-passenger seat. From his experience, "if you have one or two people in the vehicle[,] there's always a possibility of finding narcotics or another person being under the influence of narcotics." He asked defendant "his name[] and where he was coming from." Defendant said his name was "Jonathan Blakeney," and he was "coming from the [c]ity." Sergeant Griffith asked for

identification, but defendant said he did not have any. Sergeant Griffith did not smell any alcohol; when he used his flashlight to illuminate defendant's face, he noticed his pupils were very dilated and "sluggish" to react to the light. Sergeant Griffith described defendant as "very hyper, talked very fast[,] and then he started to open his pants," while saying, "I ain't got nothing on me." Sergeant Griffith told him to stop; based on his training and experience, he believed defendant was trying to divert his attention from something.

As a result, Sergeant Griffith asked defendant to exit the vehicle. When he got out of the vehicle, defendant "was very unsteady on his feet, swaying, sagging." Sergeant Griffith "believed that he was under the influence of a controlled dangerous substance," and therefore arrested him and read him his Miranda rights. When Sergeant Griffith patted down defendant for weapons, he felt something "right behind his belt buckle in his back inside his shirt area." Sergeant Griffith consequently removed the object from behind his belt buckle and found a brown paper bag containing "a couple of clear plastic bags with white rock and . . . off-white rock." He believed the rocks were cocaine and crack cocaine and told defendant he was under arrest for possession of a controlled substance.

At the police station, the driver and defendant produced a urine sample upon request. Defendant's sample did not show any controlled dangerous substances. The white rocks tested positive for cocaine and weighed 8.85 ounces. Sergeant Griffith reread defendant his Miranda rights, and defendant admitted the cocaine belonged to him.

A grand jury returned an indictment charging defendant with first-degree possession of cocaine with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(1) (count one), and third-degree possession of cocaine, N.J.S.A. 2C:35-10(a)(1) (count two). Defendant filed a motion to suppress the cocaine and his admission. The trial court denied the motion.

At trial, the State presented two witnesses, Sergeant Griffith and a police detective, who provided expert testimony regarding intent to distribute the cocaine. The jury found defendant guilty of both charges. The trial court sentenced defendant to an extended prison term of twenty-five years, with a ten-year period of parole ineligibility.

Defendant appealed his conviction and we affirmed. State v. King, No. A-4512-04 (App. Div. Feb. 6, 2007). The New Jersey Supreme Court denied his petition for certification. State v. King, 192 N.J. 70 (2007).

On December 20, 2007, defendant filed the petition under review. PCR counsel retained a private investigator to determine whether Sergeant Griffith could have seen a vehicle 900 feet away on the bridge and then caught up to it before the middle of the bridge. The investigator previously worked as a police officer for four years and as an investigator for twenty-four years. According to the investigator, the bridge is "4,760 feet long or approximately [nine-tenths] of a mile." Retracing Sergeant Griffith's path returning to New Jersey on the bridge, and "[g]iven the relative position of the vehicles and the slope of the bridge," the investigator was "unable to see anything 300 yards forward of [his] position and conclude[d] that it is not possible to do so."

Defendant also obtained an email from an ophthalmologist. The email stated:

There are many causes of pupillary dilation with the vast majority of causes from pharmacologic agents. Over the counter cold medications, decongestants and appetite suppressants are perhaps the most common causes. There are also many prescription medications that can cause pupillary dilation. Illicit drugs such as amphetamines and cocaine can cause dilation in addition to various dilating drops used in our clinical practice. From an external examination using direct illumination, it would be extremely difficult to determine the actual cause of dilation (over the counter medications versus illicit drugs) without formal laboratory investigation.

Defense counsel also filed a supplemental brief in support of defendant's petition. On March 8, 2011, without hearing oral argument, the PCR court issued a written opinion, denying defendant's petition without an evidentiary hearing. On November 12, 2014, defendant filed a motion to file notice of appeal as within time; we granted defendant's motion on December 9, 2014.

Defendant presents the following arguments for our consideration:

POINT ONE

THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING DESPITE THE FACT THAT [DEFENDANT] PRESENTED A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL.

A. Trial Counsel Was Ineffective In Failing To Conduct A Thorough Investigation Into The Facts of The Case.

B. Trial And Appellate Counsel Were Ineffective In Failing To Present The Argument That The Stop of the Vehicle Was A Case of Racial Profiling.

POINT TWO

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF AS TRIAL AND APPELLATE COUNSEL FAILED TO ARGUE AT TRIAL AND ON APPEAL THAT [DEFENDANT'S] ARREST WAS WITHOUT PROBABLE CAUSE AND IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

POINT THREE

THE PCR COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR POST-CONVICTION RELIEF AS TRIAL

COUNSEL'S PERFORMANCE AT TRIAL WAS DEFICIENT
AND PREJUDICED [DEFENDANT'S] RIGHT TO A FAIR
TRIAL.

POINT FOUR

THE PCR COURT ERRED IN DENYING [DEFENDANT'S]
PETITION FOR POST-CONVICTION RELIEF WITHOUT
AFFORDING PCR COUNSEL THE OPPORTUNITY TO
PRESENT ORAL ARGUMENT.

II.

Because the PCR court did not conduct an evidentiary hearing, we "conduct a de novo review." State v. Harris, 181 N.J. 391, 421 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). To show ineffective assistance of counsel, a defendant must satisfy the two-pronged test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted in State v. Fritz, 105 N.J. 42 (1987). "The defendant must demonstrate first that counsel's performance was deficient, i.e., that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" State v. Parker, 212 N.J. 269, 279 (2012) (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693). The defendant must overcome a "strong presumption that counsel rendered reasonable professional assistance." Ibid. (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694). Second, "a defendant must also establish that the ineffectiveness of his attorney prejudiced his defense.

'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 279-80 (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

The United States and New Jersey Constitutions permit a brief investigative stop of a vehicle based on reasonable suspicion "that an offense, including a minor traffic offense, has been or is being committed." State v. Amelio, 197 N.J. 207, 211 (2008) (quoting State v. Carty, 170 N.J. 632, 639-40, modified by 174 N.J. 351 (2002)), cert. denied, 556 U.S. 1237, 129 S. Ct. 2402, 173 L. Ed. 2d 1297 (2009). An investigatory stop "is valid if it is based on specific and articulable facts which, taken together with rational inferences from those facts, give rise to a reasonable suspicion of criminal activity." State v. Mann, 203 N.J. 328, 338 (2010) (quoting State v. Pineiro, 181 N.J. 13, 20 (2004)). "The burden is on the State to demonstrate by a preponderance of the evidence that it possessed sufficient information to give rise to the required level of suspicion." Amelio, supra, 197 N.J. at 211.

Reasonable suspicion of "[a] motor vehicular violation, no matter how minor, justifies a stop [even] without any reasonable suspicion that the motorist has committed a crime or other unlawful

act." State v. Bernokeits, 423 N.J. Super. 365, 370 (App. Div. 2011). "To satisfy the articulable and reasonable suspicion standard, the State is not required to prove that the suspected motor-vehicle violation occurred." State v. Locurto, 157 N.J. 463, 470 (1999). That is, "the State need prove only that the police lawfully stopped the car, not that it could convict the driver of the motor-vehicle offense." State v. Heisler, 422 N.J. Super. 399, 413 (App. Div. 2011) (quoting State v. Williamson, 138 N.J. 302, 304 (1994)). Also, the State must show an officer had an objectively reasonable belief a traffic violation occurred. State v. Puzio, 379 N.J. Super. 378, 383 (App. Div. 2005). However, the "fact that information an officer considers is ultimately determined to be inaccurate . . . does not invalidate a seizure." State v. Pitcher, 379 N.J. Super. 308, 318 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006).

A PCR court need not grant an evidentiary hearing unless "a defendant has presented a prima facie [case] in support of post-conviction relief." State v. Marshall, 148 N.J. 89, 158 (alteration in original) (quoting State v. Preciose, 129 N.J. 451, 462 (1992)), cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). "To establish such a [prima facie] case, the defendant must demonstrate a reasonable likelihood that his or her claim will ultimately succeed on the merits." Ibid. The court

must view the facts "in the light most favorable to defendant." Ibid. (quoting Preciose, supra, 129 N.J. at 462-63); accord R. 3:22-10(b).

Defendant argues his "trial counsel failed to adequately investigate the case." He explains, "[A]ny meaningful investigation would have demonstrated that what Officer Griffith testified to was improbable, if not impossible." Considering the private investigator's report "in the light most favorable to defendant," Ibid. (quoting Preciose, supra, 129 N.J. at 462-63), we agree and remand for an evidentiary hearing.

The private investigator's report directly contradicts Sergeant Griffith's suppression hearing testimony at the suppression hearing. In order to admit the cocaine and defendant's confession into evidence, the trial court had to find Sergeant Griffith had a reasonable suspicion the vehicle violated a motor vehicle law or the occupants had violated some other law, before he pulled over the vehicle. See Bernokeits, supra, 423 N.J. Super. at 370. Considering Sergeant Griffith's explanation of the circumstances causing him to stop the vehicle and the report of defendant's investigator, the record shows "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Parker,

supra, 212 N.J. at 279-80 (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

Assuming the truth of the private investigator's report, trial counsel's failure to investigate the credibility of Sergeant Griffith's basis for pulling over the vehicle was unreasonable, because any reasonable jury would convict defendant once the trial court admitted the cocaine and his confession. Defendant's defense centered on the suppression of the drugs and defendant's confession. Without investigating the credibility of Sergeant Griffith's account of why and how Sergeant Griffith arrested him, his counsel was not functioning as the "'counsel' guaranteed the defendant by the Sixth Amendment." Parker, supra, 212 N.J. at 279 (quoting Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693).

Defendant also argues the PCR court should have considered the email from the ophthalmologist. We disagree. N.J.R.E. 702 and 703 frame this court's analysis for determining the admissibility of expert testimony. N.J.R.E. 702 identifies when expert testimony is permissible and requires the experts to be qualified in their respective fields. N.J.R.E. 703 addresses the foundation for expert testimony. Expert opinions must "be grounded in 'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data

relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)).

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Id. at 53-54 (alteration in original) (quoting Polzo, supra, 196 N.J. at 583). Therefore, an expert is required to "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). The net opinion rule directs "that experts 'be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.'" Id. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In short, the net opinion rule is "a prohibition against speculative testimony." Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997), certif. denied, 154 N.J. 607 (1998)). The email lacks any reference to the facts of this case, so it is a "net opinion." Townsend, supra, 221 N.J. 36, 53-54 (quoting Polzo, supra, 196 N.J. at 583).

Defendant further argues the email shows Sergeant Griffith lacked probable cause to arrest defendant "based solely on the appearance of dil[a]ted pupils when a flashlight was flashed at their eyes." The record does not support defendant's argument because Sergeant Griffith arrested him only after he asked him to exit the vehicle and saw he "was very unsteady on his feet, swaying, sagging."

Defendant next argues, "[B]oth his trial and appellate counsel were ineffective in failing to argue that the stop of the vehicle . . . was a result of racial profiling." We disagree. Nothing in the trial or appellate record supports an argument that Sergeant Griffith was racially motivated to pull the vehicle over, so defendant's trial and appellate counsel reasonably declined to raise the argument. See Parker, supra, 212 N.J. at 279 (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

Defendant contends his trial and appellate counsel should have argued Sergeant Griffith arrested him without probable cause that he was under the influence of a controlled dangerous substance. Again, we disagree. N.J.S.A. 2C:35-10(b) states, "Any person who uses or who is under the influence of any controlled dangerous substance, or its analog, for a purpose other than the

treatment of sickness or injury as lawfully prescribed or administered by a physician is a disorderly person."

Sergeant Griffith observed defendant had dilated pupils that reacted slowly to light. Based on his training and experience, this was consistent with the use of controlled dangerous substances. Sergeant Griffith also noticed defendant was "very, very . . . hyper," and defendant then inexplicably began to open his pants. When Sergeant Griffith asked defendant to exit the vehicle, he observed defendant "very unsteady on his feet, swaying, sagging" after he exited the vehicle. Sergeant Griffith's training and experience told him that defendant's behavior was consistent with the use of controlled dangerous substances. Defendant's actions gave Sergeant Griffith probable cause to believe he was under the influence of a controlled dangerous substance, contrary to N.J.S.A. 2C:35-10(b). Defendant's trial and appellate counsel reasonably declined to raise this argument. See Parker, supra, 212 N.J. at 279 (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694).

Defendant's third point simply restates his first two in general terms. He writes, "[T]rial counsel inadequately investigated and prepared for trial. In particular, . . . trial counsel was ineffective in failing to prepare a meaningful attack on the credibility of the arresting officer." We agree with

defendant insofar as the PCR court should have held an evidentiary hearing to determine whether defendant's trial counsel should have investigated whether Sergeant Griffith had reasonable suspicion to pull over the vehicle, as the private investigator's report disputes. After the trial court admitted the cocaine and defendant's admission, any attack on Sergeant Griffith's credibility would not have had a reasonable probability of changing the result of the trial. See Parker, supra, 212 N.J. at 279-80 (quoting Strickland, supra, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). We decline to adopt defendant's broader argument.

Defendant's final point asserts the PCR court erred by denying his petition without affording PCR counsel the opportunity to present oral argument. We agree. As we previously noted in State v. Mayron, 344 N.J. Super. 382, 385-87 (App. Div. 2001), "[w]hether oral argument before the [PCR] court is necessary and appropriate is currently left to the sound discretion of that court[;]" however, "that discretion should be generally exercised in favor of oral argument." In Parker, supra, 212 N.J. at 283, our Supreme Court noted its "agreement with the statement in Mayron . . . , that there is a strong presumption in favor of oral argument in connection with an initial petition for post-conviction relief."

Vacated and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION