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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1892-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAVID ARISTE, a/k/a D-BRIM,

Defendant-Appellant.

Submitted March 21, 2017 – Decided April 12, 2017

Before Judges Yannotti and Sapp-Peterson.

On appeal from Superior Court of New Jersey,
Law Division, Passaic County, Indictment No.
06-01-0072.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Tom Dominic Osadnik,
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant David Ariste appeals from an order filed by the Law Division on October 5, 2015, denying his petition for post-conviction relief (PCR). We affirm.

I.

Defendant was charged under Passaic County Indictment No. 06-01-0072, with first-degree murder of Garry Williams, N.J.S.A. 2C:11-3(a)(1), N.J.S.A. 2C:11-3(a)(2) (count one); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b) (count two); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts three and five); and first-degree attempted murder of William Hogges, N.J.S.A. 2C:5-1, N.J.S.A. 2C:11-3 (count four). Defendant was tried before a jury.

At trial, the State presented evidence showing that on August 25, 2005, Garry Williams and his cousin William Hogges were at a location in the City of Paterson, with co-defendants Burnell Scott and his brother Burchanti Scott. Defendant also was present. Around midnight, Williams and Burnell got into an argument and they engaged in a fistfight. Burchanti attempted to assist his brother, but Hogges pushed him away.

A short time later, Williams and Hogges drove by the Scott home, which was located about a block from the place where the fight had occurred. Burchanti and Hogges got into a heated argument. Burchanti pulled out a handgun, but when they heard

police sirens, Hogges and Williams drove off in Hogges's van. Burnell retrieved a rusted shotgun from his garage. He testified that he was still mad at Williams and went to look for him, but since police were in the area, he left the shotgun on the lawn near the curb and returned home.

Shortly thereafter, Burnell encountered Williams and Hogges at a nearby liquor store. Burnell and Williams spoke and agreed to put aside their differences. Burnell then entered the liquor store with his girlfriend to purchase something to drink. Hogges and Williams left in Hogges's van, along with two other acquaintances. They drove to the Scott residence. Defendant and Burchanti were outside the residence.

Hogges exited the van and asked Burchanti why he had pulled a gun on him earlier. A fistfight between Hogges and Burchanti ensued. During the fight, Hogges heard Williams say, "don't point the gun at me." Hogges then saw defendant shoot a gun in the air, as defendant said, "back up." Hogges and Williams began to flee. Hogges heard shots being fired, and he saw Williams fall to the ground. Hogges asked defendant what he was doing, and defendant shot him in the shoulder.

Williams and Hogges ran. They got into a car that had pulled up alongside of them. Hogges told the driver to take them to the hospital. As the car turned the corner, Hogges noticed that

Williams had fallen out of the car. The driver took Hogges to the hospital, and the others attempted to assist Williams as he lay in the street.

An eyewitness testified that she saw Hogges and Burchanti arguing in front of the Scott residence. She said Williams exited the van and approached them in an attempt to break up the fight. The eyewitness stated that defendant was standing in the driveway, and he fired several shots at Williams. The eyewitness recalled that Williams "buckled" and fell to the ground. She began to run away and heard several more gunshots.

Burnell also heard gunshots as he exited the liquor store. Burnell headed home because the shots sounded as if they came from the location of his house. He saw Williams lying in the street, and police officers closing off the area with yellow tape. Burnell called Burchanti and arranged to meet him at the hospital where Hogges had been taken. Later, defendant picked up Burnell. Burchanti, his girlfriend, and Burnell's girlfriend were with them.

During the ride, defendant admitted he shot Williams. He told Burnell that Williams and Hogges had been beating up Burchanti. He said he could not do anything with his hands, so he went and retrieved a gun. Defendant said he told Williams and Hogges to "get off him" and then he started shooting. He also stated, "mother

fuckers better know that I ain't playing. Shit don't happen like that in Newark."

At around 4:00 a.m., the group stopped at a motel in South Hackensack. Burnell and his girlfriend stayed there, while defendant, Burchanti, and Burchanti's girlfriend went to another motel in Little Ferry. Footage recorded by the motel's security camera showed defendant paying for the room at 4:22 a.m.

The following morning at 11:19 a.m., a security camera at the Little Ferry motel recorded defendant as he removed his black T-shirt and discarded it in a garbage can. Shortly thereafter, defendant, Burchanti, and Burchanti's girlfriend picked up Burnell and his girlfriend at the South Hackensack motel. They then traveled to New York City.

Two days later, Burnell turned himself in to the Paterson police. He admitted that he had been involved in the fistfight, and that he had possession of a shotgun. Burnell testified that he felt responsible. The incident started because he had been arguing with Williams. The police then attempted to locate defendant. They went to his father's home and left instructions for defendant to contact the police, but he did not do so. On July 29, 2006, defendant was arrested in Brooklyn.

An autopsy revealed that Williams died from a fatal gunshot wound to the right side of his chest, which perforated his liver,

lungs, and aorta. Williams also suffered a gunshot wound to his arm. Ballistic tests of the three bullets and six shell casings recovered from the scene revealed that they had been fired from the same nine-millimeter gun.

The jury found defendant guilty on all counts. The trial court merged count three with count one, and count five with count four. For the murder, the court sentenced defendant to a fifty-year term of incarceration, with a period of parole ineligibility prescribed by the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. For the attempted murder, the court imposed a consecutive eighteen-year prison term, with a NERA period of parole ineligibility. The court also imposed a concurrent four-year term for the unlawful possession of a weapon, and ordered defendant to pay \$5000 in restitution.

II.

Defendant appealed and, through counsel, raised the following arguments:

I. TRIAL COURT ERRED IN NOT STRIKING CERTAIN TESTIMONY OF BURNELL SCOTT FROM THE RECORD. (Not raised below).

II. THE IMPROPER USE OF THE STATEMENT OF BURNELL SCOTT AT TRIAL DENIED DEFENDANT A FAIR TRIAL. (Not raised below).

III. IMPROPER CONDUCT BY THE PROSECUTOR DURING THE TRIAL AND CERTAIN COMMENTS DURING SUMMATION WERE GROSSLY PREJUDICIAL AND DENIED

THE DEFENDANT A FAIR TRIAL. (Partially raised below).

IV. THE ADMISSION OF IMPROPER HEARSAY EVIDENCE DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT OF CONFRONTATION.

V. THE TESTIMONY OF INVESTIGATOR FULCO REGARDING TRAJECTORY OF THE BULLETS WAS IMPROPER EXPERT TESTIMONY. (Not raised below).

VI. THE COURT'S CHARGE TO THE JURY WAS ERRONEOUS AND MANDATES REVERSAL OF DEFENDANT'S CONVICTION.

VII. THE RESTITUTION ORDER ENTERED BY THE COURT MUST BE VACATED. (Not raised below).

VIII. THE [SIXTY-EIGHT] YEAR SENTENCE IMPOSED UPON [DEFENDANT] MUST BE MODIFIED AND REDUCED. (Not raised below).

IX. THE AGGREGATE ERRORS DENIED DEFENDANT A FAIR TRIAL[.] (Not raised below).

In addition, defendant filed a pro se supplemental brief in which he argued:

I. IT WAS ERROR FOR THE COURT TO FAIL TO CHARGE THE JURY ON ACCOMPLICE TESTIMONY.

II. THE ADMISSION OF GRUESOME PHOTOGRAPHS INTO EVIDENCE WAS ERROR.

III. THE COURT ERRED BY NOT ALLOWING DEFENDANT TO QUESTION MR. HOGGES REGARDING HIS ORIGINAL STATEMENT TO POLICE THAT AN UNKNOWN MAN SHOT HIM.

We rejected these arguments and affirmed defendant's conviction and sentence in an unpublished opinion. State v. Ariste, No. A-3318-09 (App. Div. June 16, 2011). Thereafter, the Supreme

Court denied defendant's petition for certification. State v. Ariste, 208 N.J. 599 (2011).

On December 13, 2011, defendant filed a pro se petition for PCR, alleging ineffective assistance of counsel. The court appointed counsel to represent defendant, and counsel filed a brief in support of the petition, along with several certifications.

The PCR court heard oral argument on November 21, 2014, and filed an opinion dated January 16, 2015, in which it concluded that PCR should be denied. It appears that the court's order was dated January 16, 2015, but apparently the order was not filed until sometime later. This appeal followed.

On this appeal, defendant argues:

POINT I:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WIHTOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL, AS A RESULT OF TRIAL COUNSEL'S FAILURE TO THOROUGHLY AND COMPREHENSIVELY REVIEW ALL ASPECTS OF A PROPOSED PLEA AGREEMENT WITH HIM AS WELL AS THE RELATIVE STRENGTH OF THE STATE'S PROOFS, AS A RESULT OF WHICH HE REJECTED THE PLEA AGREEMENT OFFERED BY THE STATE AND INSTEAD PROCEEDED TO TRIAL, SUBSEQUENTLY RECEIVING A SENTENCE SIGNIFICANTLY GREATER THAN THAT EMBODIED IN THE PLEA AGREEMENT.

POINT II:

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF, IN PART, ON PROCEDURAL GROUNDS PURSUANT TO RULE 3:22-4.

III.

As noted, defendant argues that the PCR court erred by denying his request for an evidentiary hearing on his petition. Defendant argues that a hearing was necessary so that the court could fully address his claim that he was denied the effective assistance of counsel.

A hearing on a PCR petition is only required when a defendant establishes "a prima facie case in support of [PCR]," the court determines that there are disputed issues of material fact "that cannot be resolved by reference to the existing record," and the court finds that "an evidentiary hearing is necessary to resolve the claims for relief." R. 3:22-10(b); see also State v. Porter, 216 N.J. 343, 355 (2013) (noting that under Rule 3:22-10(b), an evidentiary hearing on a PCR petition is only required when a defendant presents a prima facie case for relief).

Here, defendant raised a claim of ineffective assistance of counsel. To prevail on such a claim, a defendant must meet the test established by Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987).

The first prong of the Strickland test requires a defendant to show that his attorney's performance was deficient. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. To do so, a defendant must establish that counsel's alleged acts or omissions "were outside the wide range of professionally competent assistance." Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. This requires a showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

To satisfy the second prong of Strickland, the defendant "must show that the deficient performance prejudiced the defense." Ibid. The defendant must establish "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.

On appeal, defendant argues that his trial attorney failed to thoroughly and comprehensively review the State's proposed plea agreement with him, as well as the relative strength of the State's evidence. He contends that, as a result, he rejected the State's offer, went to trial, was convicted, and was sentenced to a term of incarceration substantially longer than the term proposed by

the State in the plea offer. The PCR court correctly found that the record does not support defendant's allegations.

The record shows that on June 11, 2007, defendant was present in court with his attorney for a status conference. Defendant's attorney told the judge that he had explained the State's plea offer to defendant, which would require defendant to plead guilty to an amended charge of aggravated manslaughter, as well as attempted murder. Counsel noted that if defendant accepted the plea offer, the State would recommend a twenty-five-year prison term, subject to NERA.

Another status conference took place on March 9, 2009, and defendant was present. Defense counsel noted that defendant also had federal charges pending, and he spent "an exhaustive lunch" explaining to defendant what the state and federal prosecutors were offering. Defendant had urged his attorney to seek more time to consider the offers.

The assistant prosecutor noted that she had been with defense counsel when he told defendant's father of another case, in which the defendant had rejected the plea offer of a sentence of about twenty years, went to trial, was convicted, and sentenced to sixty years of incarceration, subject to NERA. The prosecutor stated that if defendant did not take the plea being offered by the State and the federal prosecutors, the matter would go to trial.

The assistant prosecutor added that in this case, defendant was facing a charge of first-degree murder, which carried a sentence of thirty years to life, as well as a charge of attempted murder. Defendant could be subject to consecutive sentences if found guilty of both offenses, and the sentences could be consecutive to any sentence imposed on the federal charges. The prosecutor noted that defense counsel was "trying so hard" to get defendant to understand "how good this plea offer is."

The assistant prosecutor stated that it was up to defendant to decide what he wanted to do. The prosecutor commented that the State was willing to consider a twenty-two-year prison term, subject to NERA. In addition, the judge had indicated that a twenty-one-year term could be imposed, if defendant accepted the State's offer. Defense counsel asked the court for additional time so that defendant could attempt to resolve the federal charges.

The court conducted another status conference on March 13, 2009. At that proceeding, the assistant prosecutor told defendant that if the matter went to trial, the State would be seeking an instruction on flight, and asked the court's permission to review the State's proofs with defendant before he made his decision on whether to accept or reject the plea offer. The prosecutor noted that, under the circumstances, the court would probably give the flight charge. The prosecutor stated:

I just want to make sure that the record is clear so if the defendant does get convicted by a jury, and he does get an obviously much greater sentence than what we were offering at the time of his plea, he can't later say he was unaware that the [S]tate had all that evidence against him.

Defendant's attorney then stated that the assistant prosecutor had explained the flight evidence to defendant, and what the flight instruction would entail. Defense counsel noted that evidence of flight had proven to be "difficult" in other matters in which he had been involved. He told the judge that he had discussed this aspect of the case with defendant, and defendant's attorney in the federal case had done so as well. Counsel added that defendant's federal counsel had assisted him in discussions with defendant "relative to consideration of the [S]tate's plea offer" and they had discussed "some evidentiary concerns" in both the state and federal cases.

Defendant's attorney also stated the possible adverse consequences of rejecting the State's plea offer. He stated that he and defendant's federal counsel had spent many hours discussing the matters with defendant. Counsel commented:

It was incumbent upon legal counsel, . . . legally and ethically to fulfill the responsibility to make sure that the client understood what the plea potential meant universally in the context of both cases from an evidentiary standpoint of both cases, and conceivably what he would be looking at.

And based upon that, we . . . had a recommendation for the client . . . [of] which the client has been apprised. I hope that gives some sort of context in terms of what we're doing. We spent an exhaustive amount of time going back and forth trying to explain not only both cases, the evidence in both cases, but what this deal means, and why we felt that the defendant should seriously consider the deal that's presented to him.

And . . . I don't want my client to think in some way I'm trying to badger, bully, or . . . coerce him into a plea. As the Court is aware, that one of the questions on a plea form is . . . whether or not [there are] any other promises or anyone coerced you, or forced you to take a deal.

My position is I educate the client, I advocate for the client, I meet with the client, I made a recommendation. I don't tell the client what to do even though in my heart of hearts I may have a different opinion depending upon what the case is, and what the facts are.

But I felt it incumbent upon me recognizing what was before my client, and all things considered, to try to get the best possible resolution so that he could consider that in lieu of going to trial.

The judge then asked defendant's attorney if he was satisfied that, given the time he had spent with defendant and his father, that defendant fully understood the "specific ramifications" of rejecting the State's plea offer. Defense counsel said he was satisfied. The judge then told defendant that if he was convicted

of murder and attempted murder, there was a "high likelihood" he would receive consecutive sentences.

The judge also questioned defendant about the pre-trial memorandum. The judge told defendant he had an open mind and would consider a sentence "as low as" twenty-one years if defendant accepted the State's plea offer. The judge noted, however, that defendant had rejected the offer so it was off the table. Defendant agreed.

The record also indicates that defense counsel had discussed and explained various legal concepts with defendant, such as the presumption of incarceration and the extended term. Defense counsel also discussed the length of potential sentences with defendant. In response to questions from his attorney, defendant acknowledged that his attorney had discussed these issues with him.

As the PCR court determined, the record does not support defendant's claim that his attorney did not properly advise him concerning the State's plea offer, or the consequences of rejecting the offer and proceeding to trial on the charges. Indeed, the record shows that defendant's attorney repeatedly explained the State's offer, discussed the strengths of the State's case with defendant and his father, and pointed out the sentences to which defendant would be exposed if he went to trial and was convicted

of murder and attempted murder. Defendant's claim to the contrary rests on bald assertions, unsupported by any evidence in the record.

The PCR court also correctly found that an evidentiary hearing was not required on defendant's petition. Defendant had not presented a prima facie case for relief, there were no disputed issues of fact that could not be resolved by reference to the existing record, and a hearing was not required to address the claims. Porter, supra, 216 N.J. at 355 (citing R. 3:22-10(b)).

In view of our decision, we need not address defendant's argument that the PCR court erred by finding that defendant's claims were barred by Rule 3:22-4.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION