SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2215-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MIRLE LOPEZ,

Defendant-Appellant.

Submitted May 10, 2017 – Decided July 18, 2017

Before Judges Alvarez and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 94-12-1412.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Christopher W. Hsieh, Chief Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Mirle Lopez appeals the November 9, 2015 decision denying his petition for post-conviction relief (PCR) after an evidentiary hearing on remand by the Supreme Court. We now affirm.

Tried by a jury, defendant was convicted of two counts of first-degree armed robbery, N.J.S.A. 2C:15-1; second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5; and two counts of fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4). He was sentenced on December 1, 1995, to an extended term, and as a second-time offender under the Graves Act, to a presumptive fifty years imprisonment subject to twenty-five years of parole ineligibility. The charges stemmed from a convenience store robbery. The juveniles involved in the crime testified against defendant.

Defendant, who had a juvenile history, had been previously convicted of four indictable offenses, including armed robbery. Defendant's presentence report included information about his suicide attempts, psychiatric hospitalization, and drug use. Defendant told the author of the presentence report that he left school in the 7th grade.

During the sentence proceeding, defendant vigorously objected to his attorney's representation, claiming he was innocent and his attorney was ineffective. On the record in defendant's presence, his trial attorney said defendant had instructed him not to speak. Defendant spoke at some length on his own behalf. He said, among other things: "Most of the defendants that come into this

courtroom are people that society do not want; victims of the ghetto, the slum parts of Paterson, people who can be saved and rehabilitated. Yet, they have no chance for survival for your lawyers don't grant them the opportunity." When the prosecutor made his presentation during the sentence hearing, defendant literally turned his back on him. Before the judge completed handing down the sentence, defendant asked to be removed from the courtroom.

Defendant's direct appeal was denied. State v. Lopez, (Lopez I) No. A-2950-95 (App. Div. May 2, 1997). On appeal, defendant raised as a point of error his attorney's allegedly ineffective assistance, including his alleged "abandon[ment] [of] his client at sentencing, fail[ure] to present any mitigating factors and allow[ing] the defendant to be sentenced arbitrarily." We deferred resolution of that claim to a later PCR petition. Id. at 5.

With regard to the claim of excessive sentence, however, we said that:

> The sentence was proper. The conviction of armed robbery was the defendant's second conviction under the Graves Act. See N.J.S.A. 2C:43-6(c). Defendant's accomplices used a gun at the robbery and the defendant was aware of that fact. See State v. White, 98 N.J. 122, 131 (1984). A BB gun is a firearm within the meaning of the Graves Act. See N.J.S.A. 2C:39-1(f); State v. Mieles, 199 N.J. Super. 29, 37 (App. Div.), certif. denied, 101 N.J. 265 (1985).

> Defendant received a presumptive term of fifty years. See N.J.S.A. 2C:44-1(f)(1); see also N.J.S.A. 2C:43-6(c); N.J.S.A. 2C:43-7(c); N.J.S.A. 2C:44-3(d). The judge properly found and applied the aggravating factors; he found no mitigating factors. The sentence was not excessive. See State v. Roth, 95 N.J. 334, 363-64 (1984).
>
> [Ibid.]

The Supreme Court denied defendant's petition for certification. 151 N.J. 465 (1997).

Defendant's first PCR petition was denied on June 23, 2000. In his written statement of reasons, the late Judge Edward V. Gannon found, among other things, that trial counsel had not been ineffective during the trial. Counsel throughout the trial made certain strategic decisions which were stated for the record, without objection from defendant. The judge also noted that defendant had been previously represented by the same attorney, and that in the prior matter defendant had been acquitted. On appeal, we affirmed the denial of PCR. State v. Lopez (Lopez II), No. A-0247-00 (App. Div. Mar. 4, 2002). The Supreme Court again denied defendant's petition for certification. 174 N.J. 41 (2002).

Defendant then filed unsuccessful habeas corpus proceedings in the federal courts which were ultimately denied by the Supreme Court in 2005. Lopez v. Ortiz, Adm'r, E. Jersey State Prison, 546 U.S. 845, 126 S. Ct. 369, 163 L. Ed. 2d 111 (2005).

Defendant's second PCR petition was denied in the Law Division on November 17, 2009. The court denied relief on the basis that the expert report defendant had by then obtained regarding his mental condition could have been produced at the first PCR hearing. Defendant's expert report stated that he was borderline mentally retarded, has a learning disability, and a history of depression with psychotic feature and had been a drug user.

The judge opined that given the nature of the offense, an armed robbery from a convenience store, there was "enough severity in the crime and in the record to more than justify the sentence that was given." The judge also relied on the fact defendant told his attorney to say nothing at sentencing, and that defendant insisted he just wanted to end the sentence hearing as quickly as possible.

On October 26, 2011, we denied defendant's appeal. State v. Lopez (Lopez III), No. A-4955-09 (App. Div. Oct. 26, 2011). We concluded that the petition was procedurally barred under Rule 3:22-4, as the claims regarding defendant's mental health issues could have been raised in defendant's first petition. Id. at 4. We further found defendant's second petition to be grossly out of time, see R. 3:22-12, even when viewed within the time limitations in effect when the first PCR petition was filed. Lopez III, supra, slip op. at 4. Lastly, we stated that having silenced his

attorney, defendant could not now be heard to complain. Id. at 4-5.

On April 9, 2012, the Court summarily remanded the matter for an evidentiary hearing. 212 N.J. 572 (2012). On remand, the expert actually testified, as did defendant's trial attorney. The attorney stated that although he had no independent memory of the case, it was clear his client instructed him not to say anything at the sentence hearing and that he would "typically acquiesce to the instruction of my client."

On November 9, 2015, the Law Division judge, in a twelve-page written opinion, denied PCR relief. By way of preface the judge stated that the delay between the remand and the hearing was occasioned by difficulties in compiling the "underlying pleadings and submissions" in order to assemble a complete file. The judge noted that during the PCR hearing, defendant had been disruptive, "reminiscent of the very type of behavior he demonstrated during the original sentencing proceeding. . . ." The judge found based on his review of the transcript that

> [d]efendant emphatically attempted to control the course of proceedings and insisted that his trial counsel not speak on his behalf at sentencing. It would be unjust to now allow defendant's recalcitrance to work to his advantage by prevailing on an ineffective assistance argument he was solely responsible for potentially precipitating. Further, as was established during oral argument, there

> was reference to defendant's mental state in the presentence report.

The judge observed that the sentencing judge could well have considered the evidence found in the presentence report in mitigation, even in the absence of an expert report, but did not. He therefore concluded that the expert's report would not have affected the outcome because it would not have been the basis for mitigating factors. The sentencing judge had the same or similar information available via the presentence report but did not consider it a basis for the grant of any mitigating factors. Thus the presumptive sentence would not have been modified. This appeal followed.

Defendant now raises the following points of error for our consideration:

> POINT I
> DUE TO THE ESTABLISHED INEFFECTIVENESS OF COUNSEL AT SENTENCING, THE LOWER COURT ERRED IN NOT GRANTING MIRLE LOPEZ'[S] PETITION FOR POST CONVICTION RELIEF.
>
> POINT II
> THE COURT ERRED IN IGNORING THE OBVIOUS PRESENCE OF MENTAL RETARDATION AND OTHER MENTAL ISSUES OF THE DEFENDANT AND FINDING THERE WERE NO POSSIBLE SENTENCING MITIGATING FACTORS.

Defendant formulated his theory of ineffective assistance of counsel in the sentencing as far back as at least the direct appeal

decision in 1997. He failed to raise the issue, clearly having the opportunity to do so, on his first PCR in 2000.

Furthermore, defendant's 2006 petition was inexplicably out of time. Having filed a first petition for PCR, defendant offered no explanation for his six-year delay in filing the second, and a more than ten-year delay in bringing the matter forward by way of PCR petition.

Most significantly, however, defendant cannot now be heard to object to his attorney's manner of representation if he silenced him at the trial, choosing instead to speak for himself. At the very least, it implicates the doctrine of invited error, because defendant openly controlled the presentation of information to the judge before the sentencing decision, and now complains that it was mistaken. See State v. Munafo, 222 N.J. 480, 487 (2015) (internal quotation marks and citation omitted) ("Under the invited error doctrine, trial errors that were induced, encouraged or acquiesced in or consented to by [defendant] ordinarily are not a basis for reversal on appeal.").

We have previously held that defendants should not benefit from calculated misconduct. In State v. Montgomery, 427 N.J. Super. 403, 405 (App. Div. 2012), certif. denied, 213 N.J. 387 (2013), a defendant assaulted his attorney and then requested a mistrial. On appeal, the defendant argued that the mistrial should

have been granted. Id. at 406. We concurred with the Law Division judge's decision to deny a mistrial. Ibid. Although the facts in Montgomery are dissimilar, the holding applies. Here, as in Montgomery, we conclude the defendant should not benefit from his own misconduct. Having told his attorney to say nothing, this defendant should not now be heard to complain because his attorney stood mute.

In order to establish ineffective assistance of counsel, a defendant must demonstrate substandard professional assistance and ultimate prejudice to the outcome as a result thereof. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 683 (1984). Defendant in this case fails to meet that standard, were he entitled, which he is not, to have us reach the issue on the merits. He received the presumptive term of incarceration, a favorable sentence, given that he was a second-time Graves Act offender and received an extended term, despite the absence of factors in mitigation. The judge had available, by way of the presentence report, the information that defendant had significant mental health and substance abuse problems, and was at least academically limited. The judge could have, even if not specifically asked to do so, used this information in sentencing defendant. That he elected not to do

so appears to us to be logical given that none of the information constituted the basis for a specific statutory mitigating factor.

Trial counsel's acquiescence to his client's instruction does not fall outside the range of competent representation. See RPC 1.2(a) ("A lawyer shall abide by a client's decisions concerning the scope and objectives of representation[.]"). It is not clear that the information in the expert's report would have made a difference in the sentencing process since it did not fit into any mitigating factor per se. Defendant received the presumptive term even though the aggravating factors stood alone. Thus defendant fails to meet either prong of the Strickland test.

Affirmed.