SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2555-15T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RASON LEACH,

Defendant-Appellant.

Submitted May 16, 2017 – Decided June 27, 2017

Before Judges Vernoia and Moynihan.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 09-08-1900.

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

Damon G. Tyner, Atlantic County Prosecutor, attorney for respondent (Mario C. Formica, Chief Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

On the day defendant's trial was to begin, he agreed to plead guilty to four counts of the indictment: first-degree robbery,

N.J.S.A. 2C:15-1 (count one); second-degree assault while eluding, N.J.S.A. 2C:12-1b(6) (count eight); and two counts of second-degree distribution of a controlled dangerous substance, N.J.S.A. 2C:35-5a(1) and N.J.S.A. 2C:35-5b(2)(counts twelve and fifteen). The following sentence was to be imposed pursuant to the plea deal: count one - ten years subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2; count eight - five years subject to NERA, concurrent to count one; count twelve - a mandatory extended term, N.J.S.A. 2C:43-6f, of eight years with four years of parole ineligibility, consecutive to count one; count fifteen - five years with two years of parole ineligibility, concurrent to count one. The court represented if the bargained sentence was not imposed, defendant would be allowed to withdraw his plea.

Defendant agreed to the plea terms. During the court's colloquy with defendant regarding the robbery count, defendant testified he delivered soap instead of cocaine during an arranged sale of the drug on July 11, 2007; defendant received $1800 "and some change" from the buyer. The buyer, unbeknownst to defendant at the time of the sale, was a detective employed by the Atlantic County Prosecutor's Office, who was working undercover. The detective realized he was being duped. Defendant admitted he threatened the detective with a "strap" – a handgun – in order to keep the money the detective had paid. The judge asked, "So under

the circumstances, do you agree and admit that you are guilty of robbery by purposely putting [the buyer] in fear of bodily injury immediately by threatening the use of a handgun?" Defendant answered, "Yes."

Defendant was sentenced on April 16, 2010, in accordance with the plea agreement. He received an aggregate sentence of eighteen years in state prison; he was ineligible for parole, under NERA, for approximately eight and one-half years on count one, and for four years on count four.

Defendant's first appeal related only to the sentence imposed so the matter was heard on our sentencing (ESOA) calendar; we affirmed the trial court's sentence. See R. 2:9-11. A pro se petition for post-conviction relief (PCR) was filed on May 6, 2014. The court heard argument on the petition and entered a November 10, 2015 order, denying the petition without an evidentiary hearing.

On appeal, defendant raises the following argument:

> THIS COURT MUST REVERSE THE PCR COURT'S NOVEMBER 10, 2015 ORDER, VACATE THE DEFENDANT'S CONVICTIONS AND SENTENCE, AND REMAND THE CASE BACK TO THE TRIAL COURT FOR A NEW TRIAL AS THE TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE INCORRECTLY ADVISED THE DEFENDANT THAT THE BASIS FOR HIS PLEA AGREEMENT WAS SUFFICIENT FOR A FIRST-DEGREE ROBBERY CONVICTION.

We disagree and affirm the PCR court's denial of defendant's petition.

Since the PCR court did not conduct an evidentiary hearing, our review of the factual inferences drawn by the court from the record is de novo. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citations omitted). Likewise, we review de novo the PCR court's legal conclusions. Ibid.

In order to establish a case of ineffective assistance of counsel, defendant must demonstrate a reasonable likelihood of success under the two-pronged test established by Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must show: (1) that counsel was deficient or made egregious errors, so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment of the United States Constitution, and (2) the deficient performance actually prejudiced the accused's defense. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; see also Fritz, supra, 105 N.J. at 52.

In State v. DiFrisco, our Supreme Court held a defendant who seeks to vacate a guilty plea because of ineffective assistance of counsel must prove:

> (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases' and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'
>
> [State v. DiFrisco, 137 N.J. 434, 457 (1994) (citations omitted) (alteration in original), cert. denied, DiFrisco v. New Jersey, 516 U.S. 1129, 116 S. Ct. 949, 133 L. Ed. 2d 873 (1996).]

A defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." State v. O'Donnell, 435 N.J. Super. 351, 371 (App. Div. 2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 372, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284, 297 (2010)).

Defendant initially argues that the factual basis for the plea to the robbery count was inadequate because "he only admitted he threatened the police officer after he obtained the money . . . ." Defendant did not make this argument to the PCR court. In his brief to the PCR court in support of his petition, defendant claimed, "[t]here was neither a weapon nor a simulated weapon; there was only a verbal threat on the part of the defendant." No mention was made of the timing of the threat. We will not consider an argument on appeal that defendant did not pose to the PCR court. State v. Jones, 179 N.J. 377, 404 (2004). Moreover, the adequacy of the factual basis for the plea should have been raised on direct

appeal, and is barred from consideration here. R. 3:22-4; State v. Mitchell, 126 N.J. 565, 583-584 (1992).

Defendant also contends the factual basis for the plea did not contain an admission that he brandished a handgun or made an overt gesture that would lead the detective to believe defendant had a handgun. He claims counsel was ineffective because he informed defendant "that the police officer's subjective belief that the defendant had a weapon was enough to sustain a first-degree robbery." Defendant avers he would not have pleaded guilty but for this erroneous advice.

This issue was first raised at sentencing when defense counsel told the court:

> [T]he problem with this thing is—and I've tried to explain it to [defendant] a number of times—his contention was he never had a gun, although the police officer said he did, but he said he never had a gun and he couldn't understand how he could be guilty of the first-degree robbery, armed robbery, without a gun. But I did explain to him it's a—basically a subjective test what the . . . victim has original belief and believing that he is armed or not [sic]. And I think based on the facts of this case . . . that was pretty evident even from what Mr. Leach said. . . . [B]ut he said he never did have a gun.

As the PCR court noted, counsel was not incorrect. Our Supreme Court held in State v. Williams, 218 N.J. 576 (2014), certif. denied, 221 N.J. 566 (2015), a first-degree robbery

conviction will stand if the victim possessed an actual and reasonable subjective belief, under the totality of the circumstances, that the perpetrator was armed with a real or simulated deadly weapon. See also State v. Dekowski, 218 N.J. 596 (2014).

Defendant's counsel correctly observed that, under the facts of this case, the detective had a reasonable belief that defendant was armed with a handgun, a belief validated by defendant's admission during the plea colloquy that he threatened the detective with a "strap" in order to retain the money.[1]

Accepting, arguendo, defendant's contention that he was not in possession of a handgun, the totality of the circumstances justified the detective's reasonable belief that defendant was armed with a gun during the robbery. The plea transcript reveals that defendant sold drugs to the detective on two occasions prior to July 11, 2007. On May 24, 2007 he sold "[a] little over half ounce" of cocaine for $500; and on June 14, 2007 he sold over one-half ounce of cocaine for approximately $1300. The detective, therefore, knew defendant was a distributor of significant quantities of drugs. Drug dealers often carry guns. State v.

[1] When given the opportunity to address the court at sentencing, defendant declined. He did not address counsel's comment that, contrary to defendant's admission during the plea, defendant said he never had a gun.

Samuels, 189 N.J. 236, 257 (2007) (Albin, J., dissenting). The threat by defendant, even without an overt gesture suggesting he was armed, was, therefore, sufficient under these circumstances to justify a reasonable belief that he was armed with a deadly weapon.

Counsel did not err if he advised defendant that, under the totality of the circumstances, the detective's subjective belief that defendant was armed was sufficient to establish defendant's guilt on the robbery charge. Defendant fails to meet the first prong of the Fritz/Strickland standard.

Defendant also fails to establish a reasonable probability that, but for counsel's advice, he would not have pleaded guilty. Only the detective and defendant were involved in this transaction. The detective alleged, as defendant admitted during his plea colloquy, that defendant had a gun, and actually threatened the detective with it during the theft of the money. If defendant testified, he faced possible impeachment with nine sanitized indictable convictions, decreasing the likelihood that any testimony contrary to the detective's allegations would be believed. If convicted, he faced both discretionary and mandatory extended terms. As the PCR judge noted, defendant faced possible life imprisonment if an extended term was imposed on the first-degree robbery. We agree with the PCR judge that it is unlikely

defendant would have gone to trial in light of the court's promise of an aggregate sentence of eighteen years with over twelve years[2] of parole ineligibility.

Affirmed.

[2] The parole ineligibility period would likely have been twelve and one-half years: eighty five percent of the ten year sentence for robbery (approximately eight and one-half years) and four years for distribution.