SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2692-15T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FEDELE GODUTO a/k/a
FREDERICK DEMAIO, FREDRICK GODUTO,
FEDELE MODUTO and JOHN FOSTER.

Defendant-Appellant.

Submitted March 15, 2017 – Decided August 4, 2017

Before Judges Fuentes and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Indictment No. 09-02-0203.

Joseph E. Krakora, Public Defender, attorney for appellant (Alison Stanton Perrone, Designated Counsel, on the brief).

Fredric M. Knapp, Morris County Prosecutor, attorney for respondent (Erin S. Wisloff, Supervising Assistant Prosecutor, of counsel; Paula C. Jordano, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant appeals from the trial court's November 12, 2015 order denying his petition for post-conviction relief (PCR) without granting an evidentiary hearing. We affirm.

On November 30, 2009, defendant entered a negotiated guilty plea to count one of Morris County Indictment No. 09-02-0203, charging first-degree attempted murder, N.J.S.A. 2C:5-1(a) and N.J.S.A. 2C:11-3(a)(1), and a related motor vehicle summons charging driving while license suspended, N.J.S.A. 39:3-40. In exchange, the State agreed to recommend the dismissal of the remaining ten counts of the indictment as well as the dismissal of Morris County Indictment No. 08-12-1404 in its entirety and the dismissal of ten related motor vehicle summonses. The State also agreed to recommend a twelve-year term of imprisonment, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, on the attempted murder charge, to run consecutive to a sentence defendant was already serving, and the mandatory minimum fines and period of driver's license suspension on the motor vehicle summons.

The charges stemmed from defendant's purposeful attempt to strike a police officer with his vehicle in the course of eluding police in a high-speed chase to avoid a motor vehicle stop following a suspected drug transaction. Although the officer jumped out of the way to avoid impact with defendant's

vehicle, he still sustained injuries as a result. During his plea allocution, defendant acknowledged that hitting the officer with his vehicle could have caused the officer's death and defendant admitted being aware that his driver's license was suspended at the time.

On February 5, 2010, defendant was sentenced in accordance with the terms of the plea agreement. In imposing sentence, the sentencing court found the following aggravating factors: nature and circumstances of offense, N.J.S.A. 2C:44-1(a)(1);[1] gravity and seriousness of harm inflicted on victim, N.J.S.A. 2C:44-1(a)(2); risk of re-offending, N.J.S.A. 2C:44-1(a)(3); extent of prior criminal record, N.J.S.A. 2C:44-1(a)(6); offense committed against police officer, N.J.S.A. 2C:44-1(a)(8); and need for deterrence, N.J.S.A. 2C:44-1(a)(9). The court also found as a mitigating factor that imprisonment would entail hardship to defendant, N.J.S.A. 2C:44-1(b)(11).

Defendant filed an appeal challenging his sentence only. On December 15, 2010, we heard the appeal on an excessive

[1] Although the judgment of conviction did not record aggravating factor one, the sentencing court found that factor in his oral pronouncement of defendant's sentence. See State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956) (holding that "where there is a conflict between the oral sentence and the written commitment," the oral sentence "will control if clearly stated and adequately shown, since it is the true source of the sentence[.]").

sentence oral argument (ESOA) calendar. See R. 2:9-11. During oral argument, defendant was represented by a staff attorney from the Office of the Public Defender. Appellate counsel advised the ESOA panel that when the case was prosecuted in Morris County, he was employed by the Morris County Prosecutor's Office as the "[E]xecutive [A]ssistant" and exercised supervisory authority over "plea approval for all cases[.]" However, he represented to the panel that he had "no knowledge" or "involvement in this case[,]" and was satisfied that there was no conflict.

Appellate counsel then argued that defendant's sentence was excessive because the sentencing court did not properly consider defendant's numerous medical ailments as a hardship and improperly considered aggravating factors one and two. Further, appellate counsel argued that the sentencing court did not articulate a reason for imposing a consecutive sentence. Following the State's concession on the impropriety of considering aggravating factor two, the case was remanded by the ESOA panel for resentencing "without consideration of aggravating factor two[.]"

While preparing for the resentence, the prosecuting attorney notified us that appellate counsel should have been disqualified from representing defendant because he approved

defendant's plea offer in his capacity as Executive Assistant Prosecutor of the Morris County Prosecutor's Office.[2] We advised the parties that "[a]s an appellate court, we are not in a position to make any determination concerning [appellate counsel's role] or participation in the decisions leading up to the original plea offer." Although we directed that "the possible conflict of interest . . . be addressed before the trial court at the . . . resentencing[,]" the issue was neither raised nor addressed.

At the resentencing hearing conducted on May 27, 2011, defendant was represented by his original plea counsel and the same sentence was imposed. Although the court did not find aggravating factors one or two, the court determined that the remaining aggravating factors "significantly, and substantially, and clearly outweigh[ed]" the sole mitigating factor. The court also imposed a consecutive sentence after analyzing the factors articulated in State v. Yarbough, 100 N.J. 627, 643-44 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

[2] The prosecuting attorney attributed the oversight to the volume of cases handled by appellate counsel in his supervisory capacity rather than a lack of good faith on his part.

On February 10, 2015, defendant filed a pro se PCR petition alleging "[i]neffective assistance of [appellate] counsel"[3] based on a "conflict of interest" and an "excessive sentence" predicated on his "ongoing medical issues[.]" Defendant was assigned counsel who subsequently filed an amended petition and supporting brief along with PCR counsel's certification dated June 12, 2015, and defendant's supplemental certification dated September 21, 2015. In his brief, defendant argued that he was entitled to PCR because he "was represented on appeal by an attorney who was under an impermissible conflict of interest" pursuant to R.P.C. 1.7,[4] 1.9[5] and 1.11,[6] and was thereby "per se ineffective."

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[3] Appellate counsel died in August 2015 of health-related issues.

[4] R.P.C. 1.7 provides in pertinent part that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one . . . client[] will be materially limited by the lawyer's responsibilities to . . . a former client" unless "each affected client gives informed consent . . . provided, however, that a public entity cannot consent . . . ;" "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;" "the representation is not prohibited by law;" and "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." R.P.C. 1.7(a)(2); R.P.C. 1.7(b).

Defendant argued further that appellate counsel's performance was deficient because he failed to confer with him during his representation to allow defendant to participate in his defense in order to make a thorough and complete presentation to the ESOA panel. Instead, according to defendant, appellate counsel made a "vacuous argument" to the

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(continued)

[5] R.P.C. 1.9, addressing conflicts of interest with respect to former clients, provides that a lawyer who has represented a client may not later "represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing." R.P.C. 1.9(a). Further, subsection (b) provides "[a] lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client, (1) whose interests are materially adverse to that person; and (2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing." R.P.C. 1.9(b).

[6] R.P.C. 1.11(a) provides "[e]xcept as law may otherwise permit, and subject to [R.P.C.] 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter: (1) in which the lawyer participated personally and substantially as a public officer or employee, or (2) for which the lawyer had substantial responsibility as a public officer or employee; or (3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer." R.P.C. 1.11(a)(1)-(3).

ESOA panel. Defendant also argued that his sentence constituted cruel and unusual punishment given the erroneous analysis of the applicable "aggravating and mitigating factors" and the dearth of reasons to support the imposition of a consecutive sentence.

In his supporting certification, defendant averred that he was unaware of appellate counsel's conflict of interest and would have objected had he known. Defendant certified further that appellate counsel did not confer or communicate with him to discuss what issues to present on appeal or to assess his deteriorating medical condition.[7]

The PCR court conducted oral argument on October 27, 2015, and denied defendant's application from the bench. In a written statement of reasons filed November 12, 2015, the PCR court determined that defendant was procedurally barred because he did not raise these arguments at the re-sentencing hearing or on direct appeal from the re-sentence as required by Rule 3:22-4.

[7] Defendant also asserted that he was entitled to a reduction of sentence pursuant to Rule 3:21-10 and certified that he suffered from a number of medical ailments, including hypertension, COPD, hypermetropia, presbyopia, diabetes mellitus (type 2), hepatitis C, and osteoarthritis. He also certified that while incarcerated, he had suffered heart and breathing attacks and had received a catheterization. According to defendant, he was informed that he would require a heart transplant and a lung transplant, neither of which were available to him in the prison system. However, PCR counsel withdrew this argument pending the submission of an expert report.

The court found further that precluding defendant's claim would not result in a fundamental injustice or otherwise "run afoul of [Rule] 3:22-4" since defendant's attorney was aware at the re-sentencing hearing of appellate counsel's conflict of interest, having been copied on the prosecuting attorney's notification to the ESOA panel as well as the ESOA panel's response.

Nonetheless, the court considered substantively defendant's claims that his "conflicted attorney [was] presumed to be ineffective" and that "a lack of communication between [d]efendant and his appellate counsel" was indicative of deficient performance. The court determined that although "there was [a] clear conflict of interest . . . . defendant has not demonstrated any prejudice from the aforementioned conflict or inaction, as is required under the law." On the contrary, the court found that appellate counsel "had advocated diligently, aggressively, and effectively for . . . [d]efendant[,]" resulting in a remand for resentencing which was a favorable outcome for defendant. The court also rejected defendant's challenges to his sentence because they were adequately addressed at the resentencing.

This appeal followed. On appeal, defendant raises a single argument for our consideration:

POINT ONE

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL. THE PCR COURT'S DECISION DENYING HIS PETITION FOR POST-CONVICTION RELIEF MUST THEREFORE BE REVERSED.

For the reasons set forth below, we are unpersuaded by this argument and affirm.

Generally, we review the PCR court's findings of fact under a clear error standard, and conclusions of law under a de novo standard. State v. Harris, 181 N.J. 391, 420-21 (2004), cert. denied, 545 U.S. 1145, 125 S. Ct. 2973, 162 L. Ed. 2d 898 (2005). However, where, as in this case, "no evidentiary hearing has been held, we 'may exercise de novo review over the factual inferences drawn from the documentary record by the [PCR judge]." State v. Reevey, 417 N.J. Super. 134, 146-47 (App. Div. 2010) (alteration in original) (quoting Harris, supra, 181 N.J. at 421), certif. denied, 206 N.J. 64 (2011).

"A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief[.]" R. 3:22-10(b). "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." State v. Marshall, 148 N.J. 89, 158, cert. denied, 522 U.S. 850, 118 S. Ct. 140, 139 L. Ed. 2d 88 (1997). The court

must view the facts "'in the light most favorable to defendant.'" Ibid. (citation omitted).

To establish a prima facie case of 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), 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.

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). "These standards apply to claims of ineffective assistance at both the trial level and on appeal." State v. Guzman, 313 N.J. Super. 363, 374 (App. Div. 1998) (citing State

v. Morrison, 215 N.J. Super. 540, 545-46 (App. Div.), certif. denied, 107 N.J. 642 (1987)).

Defendant argues that the PCR court should have found a per se conflict and presumed both ineffectiveness and prejudice based on appellate counsel's conflict of interest. Defendant argues further that even if prejudice is not presumed, appellate counsel's "lackluster representation of defendant on appeal satisfies the prejudice prong." In support, defendant asserts that appellate counsel's arguments were "cursory" and "gave short shrift to defendant's significant, documented health conditions[.]" We disagree.

When "analyzing whether a conflict of interest has deprived a defendant of his state constitutional right to the effective assistance of counsel," we "adhere[] to a two-tiered approach." State v. Cottle, 194 N.J. 449, 467 (2008). "In those cases in which we have found a per se conflict, prejudice is presumed in the absence of a valid waiver, and the reversal of a conviction is mandated." Ibid. See State v. Bellucci, 81 N.J. 531, 543 (1980).

However, courts "have limited the per se conflict on constitutional grounds to cases in which 'a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of codefendants,'" or "both he

and his client are simultaneously under indictment in the same county and being prosecuted by the same prosecutor's office." Cottle, supra, 194 N.J. at 452, 467 (citation omitted). "In all other cases, 'the potential or actual conflict of interest must be evaluated and, if significant, a great likelihood of prejudice must be shown in that particular case to establish constitutionally defective representation of counsel.'" Id. at 467-68 (citation omitted).

Clearly, this case does not fall within the two limited circumstances that generate a per se conflict. Moreover, this case is a far cry from Cottle, where the attorney was "contemporaneously under indictment in the same county as his client, and being prosecuted by the same prosecutor's office[.]" Id. at 473. "In such circumstances, it is not difficult to imagine that [the attorney] might not have had the zeal to engage in a bruising battle with the very prosecutor's office that would be weighing his fate." Id. at 464-65. Thus, the attorney had "a reason to curry some personal favor with the prosecutor's office at the expense of his client." Id. at 464. That created "a 'significant risk' that [the attorney's] representation of defendant was 'materially limited' by his 'personal interest[.]'" Id. at 466 (quoting R.P.C. 1.7(a)(2)).

By contrast, as the PCR court noted here:

> It's hard for me to imagine a more aggressive argument that . . . could have been made or articulated on . . . behalf of [defendant] than the ones that [appellate counsel] made . . . .
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> I think he did a pretty good job.
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> He was not intimidated at all . . . . I gather [appellate counsel] was not a timid or recalcitrant advocate, no matter who he was representing.
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> He was not a . . . wallflower . . . or somebody who faded into the wallpaper. And [appellate counsel] is, I would use the . . . expression "in rare form" except that this is probably, I gather, by what little I know of [appellate counsel's] reputation, not rare form for [appellate counsel] to articulate himself in this fashion, which is probably a good thing for his clients.
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> . . . .
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> [Appellate counsel] did a fine and professional job on behalf of [defendant]. And ultimately the matter was remanded back to the . . . trial court for sentencing.

In these circumstances, while we acknowledge a significant conflict of interest, defendant has failed to demonstrate the "great likelihood of prejudice" required "to establish constitutionally defective representation of counsel." Cottle, supra, 194 N.J. at 467-68.

In any event, we agree with the PCR court that Rule 3:22-4(a) bars defendant's argument because it could have been raised in defendant's resentencing hearing or in a direct appeal from

his resentence. A PCR petition is not "a substitute for appeal." R. 3:22-3. A defendant "is generally barred from presenting a claim on PCR that could have been raised . . . on direct appeal." State v. Nash, 212 N.J. 518, 546 (2013) (citing R. 3:22-4(a)). The bar does not apply if "(1) . . . the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (2) [the] enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice[.]" R. 3:22-4(a).

Here, defendant reasonably could have raised this issue at his resentencing or in a direct appeal from his resentence. Moreover, "[t]o succeed on a fundamental-injustice claim" defendant "must make some showing that an error or violation played a role in the determination of guilt." Nash, supra, 212 N.J. at 547 (quotation and citation omitted); see also R. 3:22-4(a)(2). Here, defendant has made no such showing.

Affirmed.