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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4608-12T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARCELIN FAISON,

Defendant-Appellant.

Argued October 18, 2016 – Decided March 30, 2017

Before Judges Yannotti and Kennedy.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No. 12-
06-1619.

Joshua D. Sanders, Assistant Deputy Public
Defender, argued the cause for appellant
(Joseph E. Krakora, Public Defender, attorney;
Mr. Sanders, of counsel and on the brief).

Frank J. Ducoat, Special Deputy Attorney
General/Acting Assistant Prosecutor, argued
the cause for respondent (Carolyn A. Murray,
Acting Essex County Prosecutor, attorney; Mr.
Ducoat, of counsel and on the brief).

PER CURIAM

Defendant pled guilty to fourth-degree violation of firearms regulations, contrary to N.J.S.A. 2C:39-10, and the court ordered defendant to pay certain penalties and assessments. Defendant appeals from the judgment of conviction dated March 8, 2013, and argues that the court erred by affirming the denial of his admission to Pre-Trial Intervention (PTI). We affirm.

I.

On December 23, 2011, defendant returned to New Jersey from Georgia, where he had been residing. On January 11, 2012, a New Jersey State Trooper stopped defendant's vehicle in Newark. The vehicle had Georgia license plates, but appeared to have a suspended registration. When the Trooper approached the vehicle, he observed the handle of a handgun in plain view near the driver's seat. In addition to the handgun, the Trooper recovered two magazines holding sixteen full metal jacket (also known as "hollow-nosed") bullets. Defendant told the Trooper that he legally purchased the weapon and that it was lawful for him to possess the weapon in Georgia.

Defendant was arrested and charged with unlawful possession of a handgun. On June 14, 2012, an Essex County grand jury returned an indictment and charged defendant with second-degree unlawful possession of a handgun, contrary to N.J.S.A. 2C:39-5(b). Defendant then filed an application for admission to PTI. In August

2012, the Essex County Criminal Division Manager denied defendant's PTI application, and that month, the Essex County Prosecutor's Office (ECPO) informed defendant that it would not consent to his admission into PTI.

On August 20, 2012, defendant pled guilty to an amended charge of violating a regulatory provision related to firearms, contrary to N.J.S.A. 2C:39-10, a fourth-degree offense. He reserved the right to challenge the denial of his admission to PTI. The State agreed to recommend a non-custodial sentence and the imposition of a \$500 fine.

On August 27, 2012, defendant appealed the ECPO's decision denying PTI admission to the Law Division. After hearing oral argument on the appeal, the Law Division judge remanded the matter to the ECPO for reconsideration. On November 20, 2012, the ECPO again denied the application. Thereafter, the judge heard oral argument on the appeal, and found that the ECPO's decision to deny defendant's admission to PTI was not a patent and gross abuse of discretion.

On March 8, 2013, the judge sentenced defendant to a \$500 fine and \$155 in penalties. The judge also referred defendant to a Veterans Assistance Program. The judge entered a judgment of conviction dated March 8, 2013. Defendant thereafter filed a notice of appeal.

In November 2014, we remanded the matter to the trial court for reconsideration of defendant's appeal from the denial of his PTI application in light of the Attorney General's September 24, 2014 clarification of a 2008 Directive regarding offenses committed by out-of-state visitors from states where their gun-possession conduct would have been lawful.

On May 15, 2015, the judge heard oral argument by counsel and considered the submissions of the parties. Defendant was not present at the oral argument. On July 1, 2015, the judge filed a written opinion, again finding that the ECPO's denial of defendant's application for admission to PTI was not a gross or patent abuse of discretion. The judge entered an order dated July 1, 2015, denying defendant's motion for reconsideration of its decision on his PTI appeal.

On appeal, defendant raises the following arguments:

POINT I

MR. FAISON WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS WHEN THE COURT CONDUCTED THE REMAND HEARING IN ABSENTIA. U.S. CONST. AMENDS. VI, XIV; N.J. CONST. (1947), ART. I, PARS. 1, 9 AND 10.

POINT II

REVERSAL IS REQUIRED BECAUSE DEFENSE COUNSEL'S FAILURE TO COMMUNICATE WITH HIS CLIENT WAS PER SE INEFFECTIVE ASSISTANCE OF COUNSEL. U.S. CONST. AMENDS VI, XIV AND N.J. CONST. (1947), ART. I, PARS. 1, 9 AND 10.

POINT III

EXCLUDING MR. FAISON FROM THE REMAND PROCEEDINGS RESULTED IN A FATALLY DEFICIENT RECORD NECESSITATING THAT THE TRIAL COURT'S DECISION BE VACATED AND THE MATTER REMANDED FOR A PROPER HEARING.

II.

Defendant first argues that he did not receive notice of the remand proceeding. He contends his rights under the United States Constitution and the New Jersey Constitution to a fair trial and due process were violated because the trial court conducted the remand proceeding in his absence. We disagree.

A criminal defendant has a constitutional right to be present at every stage of his criminal trial; however, the right is not absolute. State v. Smith, 29 N.J. 561, 578 (1959) (finding that the right to be present does not necessarily extend to every post-conviction hearing). A defendant has the right to be present in the courtroom during every "critical stage" of the trial, "if his presence would contribute to the fairness of the procedure." State v. Zenquis, 251 N.J. Super. 358, 363-64 (App. Div. 1991), aff'd, 131 N.J. 84 (1993).

The remand proceeding in this matter occurred after defendant's guilty plea and sentencing. We remanded to the trial court so that it could reconsider its prior decision upholding the denial of defendant's PTI application in light of the Attorney

General's 2014 clarification. The purpose of the remand proceeding was not to give the ECPO an opportunity to supplement the record or give defendant an opportunity to testify.

Under these circumstances, defendant did not have a constitutional right to be present for oral argument in the trial court. See State v. Hardy, 211 N.J. Super. 630, 634-35 (App. Div. 1986) (holding that defendant had the right to be present for remand to the municipal court for the State to supplement its case-in-chief); see also State v. Childs, 204 N.J. Super. 639, 649 (App. Div. 1985) (defendant's right to be present is not triggered where "[t]he proceeding did not involve the receipt of evidence or the confrontation of witnesses").

Defendant also argues that he had a right under Rule 3:16 to be present at the oral argument on remand. We disagree. Rule 3:16(a) states that, "[t]he defendant must be present for every scheduled event unless excused by the court for good cause shown." However, this subsection of the rule does not apply to the remand proceeding in this case. The argument on remand was not a pre-trial proceeding.

Rule 3:16(b) also states that a defendant shall be present at every stage of the trial, unless otherwise provided by rule. The rule states, however, that a defendant's presence is not required at a proceeding in which a sentence is reduced or at a

hearing on a PCR petition, except as otherwise provided in Rule 3:22-10. The remand proceeding at issue here was not a "stage" of the trial, nor was it a hearing on a PCR petition.

Even if the remand proceeding was akin to a hearing on a PCR petition, defendant's presence was not required. Rule 3:22-10(b) states that a defendant need not be present at a PCR hearing, unless "oral testimony is adduced." As we have explained, no oral testimony was adduced during the remand proceeding.

We therefore conclude that defendant did not have a constitutional right to be present at the remand proceeding, nor was his presence required by Rule 3:16.

III.

Next, defendant argues that the record before the trial court in the remand proceeding was inadequate. He contends that under the Attorney General's 2008 directive and the 2014 clarification, PTI may be appropriate when a defendant has lawfully acquired a weapon in another jurisdiction, the defendant's possession of the weapon would have been lawful in his or her home jurisdiction, and the defendant was under the misimpression that such possession was lawful in New Jersey.

Defendant argues that if he had been present at the hearing, he would have testified as to his lack of understanding of New

Jersey's firearms law. He contends the matter should be remanded to the trial court for a "proper hearing." Again, we disagree.

In her written opinion dated July 1, 2015, the Law Division judge noted that in 2008, the Attorney General had issued a directive regarding offenses committed by out-of-state visitors from states where a defendant's gun-possession conduct would have been lawful. The 2008 directive generally called for strict enforcement of the presumption that defendants charged with a second-degree weapons offense are not eligible for PTI.

The 2008 directive stated, however, that a prosecutor could admit a defendant charged with a second-degree weapons offense to PTI in "rare cases involving extraordinary and compelling circumstances that fall outside the heartland of the legislative policy to deter unauthorized gun possession." The 2008 directive gave an example of one such extraordinary case. It would be one in which the defendant had no prior involvement with the criminal justice system, the defendant lawfully acquired the weapon in a different state, and defendant was in New Jersey "incident to lawful travel."

The Attorney General's 2014 clarification provided further guidance to prosecutors. The 2014 clarification noted that in exercising their discretion, prosecutors should consider all applicable aggravating and mitigating facts relating to the

weapons offenses and PTI determinations. When applicable and feasible, the prosecutors also should consider certain "special facts."

Those include whether: (1) the manner and circumstances of the weapons-possession minimized the exposure of the firearm to others in this State, thereby reducing the risk of harm; (2) the gun-possession offense was isolated and aberrational; (3) the defendant advised the police officer that a firearm was present, on his or her own initiative; and (4) defendant had not been advised of limitations on the right to possess or carry a firearm in New Jersey.

In her July 1, 2015 opinion, the Law Division judge noted that defendant previously had resided in New Jersey, and had some involvement with the criminal justice system, although he did not have any prior indictable convictions. The judge found that, based on defendant's past involvement with the criminal justice system, it was reasonable to infer that defendant knew that possession of a handgun was illegal in New Jersey.

In her opinion, the judge pointed out that defendant may not have known whether New Jersey had an exemption that allows active members of the military to possess and carry weapons; however, defendant was not active military when he was stopped on January 11, 2012. The judge also noted that defendant did not voluntarily

inform the Trooper of the presence of the firearm when he was stopped, nor did he mention that the weapon was loaded and easily accessible. The judge concluded that, considering the Attorney General's 2008 directive and his 2014 clarification in light of these facts, the ECPO's decision to deny defendant admission to PTI was not a patent and gross abuse of discretion. See State v. Roseman, 221 N.J. 611, 625 (2015) (noting that a prosecutor's PTI decision may not be set aside unless shown to be a "patent and gross abuse of discretion") (citations omitted).

On appeal, defendant argues that if he had appeared at the remand proceeding, he would have testified as to his understanding of New Jersey's firearms law. However, defendant's apparent misimpression that he could carry a firearm in New Jersey because he had purchased it lawfully in Georgia was already in the record.

The judge nevertheless found defendant's understanding of New Jersey's gun laws to be insufficient when considered in light of the entire record and the other considerations set forth in the Attorney General's 2008 directive and his 2014 clarification. All of the facts relevant to that decision were part of the record and further testimony was not required.

We therefore reject defendant's contention that the record before the trial court on remand was insufficient. We conclude that the record contained the essential facts concerning

defendant's understanding of New Jersey's weapons laws, and the matter need not be remanded so that defendant can provide testimony on that issue.

IV.

Next, defendant argues that he was denied his right to the effective assistance of counsel at the remand proceeding. He claims that his attorney was deficient because he formulated a position on his behalf without discussing the matter with him. He also contends that his attorney erred by failing to notify him of the proceeding, thereby denying him the opportunity to appear and testify.

Claims of ineffective assistance of counsel are ordinarily deferred until the filing of a PCR petition because the claims often involve allegations and evidence that lie outside the trial record. State v. Preciose, 129 N.J. 451, 460 (1992). We elect, however, to address defendant's argument because the record discloses all of the facts necessary to resolve his claim. State v. Allah, 170 N.J. 269, 285 (2002).

To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A defendant first must show that his attorney's handling of the matter "fell below

an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

A defendant also must show that there exists 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. Our Supreme Court has adopted this standard for evaluating ineffective assistance of counsel claims. State v. Fritz, 105 N.J. 42, 58 (1987).

Here, appellate counsel had secured for defendant a remand to the trial court, so that the court could reconsider defendant's PTI appeal in light of the 2014 clarification by the Attorney General of the 2008 Directive regarding weapons offenses committed by out-of-state visitors from states where gun-possession conduct would have been lawful.

At the remand proceeding, defendant's attorney expressed some concern about the consequences of securing defendant's admission to PTI. Counsel noted that defendant could ultimately face prosecution for a second-degree offense if he fails to comply with the PTI conditions and he is discharged from PTI. Counsel also noted that he had endeavored to contact defendant but was unable to do so. As noted, oral argument on the appeal went forward in defendant's absence.

Though unsuccessful, defendant's attorney made a reasonable attempt to contact defendant. He stated that he had written to defendant several times. Moreover, counsel cannot be faulted for continuing to assert that the ECPO should have admitted defendant to PTI, since this was the position defendant had previously and repeatedly advanced.

However, even if defendant's attorney erred by failing to contact defendant to notify him of the remand proceeding and discuss the position he would take at the proceeding, defendant has not shown that he was prejudiced by such errors. As we have explained, the facts essential to the trial court's reconsideration of the denial of defendant's admission to PTI were already established. Further testimony by defendant regarding his understanding of New Jersey's gun laws was not required.

Defendant has not shown that it is reasonably probable the result of the proceeding would have been different if his attorney had been able to contact him, and he had been present for the oral argument at the remand proceeding. We therefore conclude that defendant was not denied his right to effective assistance of counsel for the remand proceeding.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION