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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5645-14T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BENJAMIN CAPERS,
a/k/a COOPER BENJAMIN,

Defendant-Appellant.

Submitted March 7, 2017 – Decided July 31, 2017

Before Judges Messano and Espinosa.

On appeal from Superior Court of New Jersey,
Law Division, Union County, Indictment Nos.
09-04-0384 and 09-04-0385.

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

Grace H. Park, Acting Union County Prosecutor,
attorney for respondent (Milton S. Leibowitz,
Special Deputy Attorney General/Acting
Assistant Prosecutor, of counsel and on the
brief).

PER CURIAM

Defendant appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

Following a jury trial, defendant filed a direct appeal from his convictions for two armed robberies, eluding, weapons offenses, assault and resisting arrest. Among the arguments presented in his direct appeal were defendant's contentions in a pro se supplemental brief that his counsel was ineffective for failing to move for a Wade¹ hearing. We affirmed his convictions and sentence in an unpublished opinion, State v. Capers, No. A-4369-10 (App. Div. Apr. 19), certif. denied, 216 N.J. 86 (2013). We did not address defendant's ineffective assistance of counsel claims, observing that, because they concerned the "decisions of trial counsel, the bases for which are not apparent from the appellate record . . . they may be appropriate subjects for a subsequent petition for [PCR], not direct appeal." Id. at 6.

Defendant filed a timely PCR petition that was supplemented by his pro se letter brief and a brief by appointed PCR counsel. Following legal argument, the PCR judge denied his petition and set forth his reasons on the record.

In his appeal, defendant presents the following arguments:

¹ United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING TO FULLY ADDRESS HIS CONTENTION THAT HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION AT THE TRIAL LEVEL.

A. THE PREVAILING LEGAL PRINCIPLES REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, EVIDENTIARY HEARINGS AND PETITIONS FOR POST CONVICTION RELIEF.

B. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF COUNSEL'S FAILURE TO PURSUE A WADE HEARING PRIOR TO TRIAL.

C. THE DEFENDANT DID NOT RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF TRIAL COUNSEL'S FAILURE TO CONDUCT AN ADEQUATE PRETRIAL INVESTIGATION WHICH WOULD HAVE RESULTED IN PURSUING AN ALIBI DEFENSE WITH RESPECT TO THE FIRST OF THE TWO ROBBERIES WITH WHICH THE DEFENDANT WAS CHARGED.

I.

The facts underlying defendant's convictions are set forth in our opinion in his direct appeal. Therefore, we review only the facts pertinent to the issues raised.

Defendant was convicted of two armed robberies that occurred sixteen days apart. He was arrested after he crashed a brown

minivan following a high speed police chase shortly after the second robbery.

The first robbery occurred at a store in Linden. The owner of the store recognized defendant when he walked in because he had been in the store twice recently. After the second robbery, the police prepared a photographic array that included defendant's photograph and showed them to the owner of the Linden store and a customer who had been in the store at the time of the robbery. The Linden store owner positively identified defendant from the photo array and in court. The customer selected a photograph of defendant and was 60-80% sure he was the robber. At trial, she testified she was not 100% certain of her identification. Defendant does not contend his counsel was ineffective for failing to seek a Wade hearing to challenge the identifications made by the Linden store owner and customer.

The second robbery occurred in Elizabeth. The owner spoke directly to defendant before he pulled out a gun to demand money. After taking the money, defendant fled. The owner called 911 and ran outside, where he saw a brown minivan leaving and heading in the direction of Broad Street. The store owner gave the make and license plate number of the minivan to police over the phone and provided the responding officer with a description of defendant's clothing, mask, gun and the bag used during the robbery.

Shortly thereafter, an Elizabeth police officer saw a vehicle matching the minivan's description speeding and turned on his lights and siren. A high speed chase ensued until defendant crashed the minivan into a concrete median at the on-ramp to Interstate 78 West. Defendant jumped out of the minivan and ran across several lanes of Interstate 78 West, ignoring the officer's commands to stop. When police caught up with him, defendant continued to struggle to avoid being handcuffed.

A search of the minivan resulted in the recovery of a laundry bag containing \$4.66 in change, a loaded silver .40 caliber handgun, a knit cap and gloves. When defendant was processed following his arrest, he had \$418.

After defendant's arrest, the Elizabeth store owner was brought to the scene by Officer Patrick Vaughn, who told him, "we are going to show you a possible suspect, please tell us whether or not you believe that he may be a suspect." Defendant was removed from the vehicle and placed on the shoulder of the roadway. Officer Vaughn testified that it took "[a]bout a second" for the store owner to say, "yes, sir, that's the one." The witness also volunteered that the car defendant was removed from was the one he had seen leaving the vicinity of his store earlier. The store owner testified he was a "[h]undred percent" certain defendant was the person who robbed him.

II.

A PCR court should grant an evidentiary hearing if the defendant has presented a prima facie case of ineffective assistance of counsel. State v. Preciose, 129 N.J. 451, 462 (1992). "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).

An evidentiary hearing is required if "there is a dispute of fact with respect to matters which are not of record." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 3:22-10 (2017). However, "[i]f the court perceives that holding an evidentiary hearing will not aid the court's analysis of whether the defendant is entitled to [PCR], . . . then an evidentiary hearing need not be granted." Marshall, supra, 148 N.J. at 158 (citations omitted). "As in a summary judgment motion, courts should view the facts in the light most favorable to a defendant to determine whether a defendant has established a prima facie claim." Preciose, supra, 129 N.J. at 462-63.

To establish a prima facie claim of ineffective assistance of counsel, a defendant must demonstrate a reasonable likelihood of success under the two-prong test set forth in Strickland v.

Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by New Jersey in State v. Fritz, 105 N.J. 42 (1987).

That test is as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

[Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.]

Viewing the facts most favorably to defendant, he has failed to present prima facie evidence to warrant an evidentiary hearing.

III.

Because the identifications challenged here occurred before the Supreme Court's decision in State v. Henderson, 208 N.J. 208 (2011), the standards set forth in Manson v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and adopted in State v. Madison, 109 N.J. 223 (1988), apply. See State v. Jones, 224 N.J. 70, 85 n.2 (2016). Therefore, defendant was required to first "proffer . . . some evidence of impermissible

suggestiveness" to be entitled to a Wade hearing. State v. Rodriguez, 264 N.J. Super. 261, 269 (App. Div. 1993), aff'd o.b., 135 N.J. 3 (1994).

Although "[o]ne-on-one showups are inherently suggestive," the fact that an identification was made at a showup will not alone provide a sufficient basis for excluding an identification. Jones, supra, 224 N.J. at 87.

Our law has permitted "on or near-the-scene identifications because they are likely to be accurate, taking place . . . before memory has faded and because they facilitate and enhance fast and effective police action and they tend to avoid or minimize inconvenience and embarrassment to the innocent."

[Ibid. (alteration in original) (quoting State v. Herrera, 187 N.J. 493, 504 (2006)).]

Applying the Manson/Madison standard, the Court suppressed the identification of the defendant at a showup in Jones, supra, 224 N.J. at 90, finding the procedure impermissibly suggestive. A fourteen-year-old girl, C.W., reported that an adult male wearing a yellow ski mask and a blue and white plaid jacket approached her and exposed himself. Id. at 74-75. After the defendant was arrested, he was brought to C.W.'s school and made to stand between two officers. Id. at 78. She testified at trial: "He just had on a black shirt. At first I didn't recognize him, then they put the jacket back on and I realized it was him." Ibid. She admitted

she had not seen the face of the man and that it was his jacket, and not his face, that she recognized. Id. at 79. C.W. also acknowledged that the police told her before the showup that they had caught the man she had encountered on her way to school. Id. at 78.

In support of his contention that the showup was impermissibly suggestive, defendant relies upon his trial testimony. He stated he was handcuffed and two police officers were holding him, that there were a lot of police on the scene and a helicopter overhead. He could not see the face of the person who identified him. These assertions fall far short of the level of impermissible suggestiveness defendant was required to show to be entitled to a Wade hearing. Because defendant has failed to present prima facie evidence that a request for a Wade hearing would have been successful, he cannot satisfy the first prong of the Strickland test. See State v. Ball, 381 N.J. Super. 545, 554-555 (App. Div. 2005); State v. Roper, 378 N.J. Super. 236, 237 (App. Div.), certif. denied, 185 N.J. 265 (2005).

IV.

Defendant also argues his counsel was ineffective for failing to conduct an adequate investigation regarding the first robbery and, as a result, failed to call an alibi witness. This argument was not presented in defendant's PCR petition or in either his pro

se letter brief or the brief submitted by PCR counsel. Because it was raised for the first time at oral argument before the PCR judge, it was not properly before the court. The PCR judge nonetheless addressed the contention on its merits and found no ground for relief. Defendant's argument that he was improperly denied an evidentiary hearing on this basis lacks sufficient merit to warrant discussion, Rule 2:11-3(e)(2), beyond the following limited comments.

Rule 3:22-10(c) states that "[a]ny factual assertion that provides the predicate for a claim of relief [in a petition for PCR] must be made by an affidavit or certification . . . and based upon personal knowledge of the declarant before the court may grant an evidentiary hearing." Under this rule, a defendant asserting a claim of ineffective assistance of counsel in a petition for PCR based on his counsel's failure to produce a witness at trial must present a certification by that witness concerning the testimony the witness would have been prepared to give. See State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002); State v. Cummings, 321 N.J. Super. 154, 170-71 (App. Div.), certif. denied, 162 N.J. 199 (1999).


Defendant relied upon: (1) a handwritten note from the purported alibi witness, dated January 2, 2015, in which she stated she was with defendant from 5:14 p.m. on January 12, 2009 until

1:26 a.m. the following morning, (2) a report, dated January 5, 2015, from an investigator that reflected the same, and (3) a certification from the investigator, dated January 2, 2015, in which she stated the witness "reviewed, signed, and dated the handwritten notes [she] took while interviewing her."

There is no certification to supply the essential link here — that defendant, who was obviously aware if he had an alibi, disclosed this information to his attorney. The documents submitted, which do not comply with the requirements of Rule 3:22-10(c), fail to present prima facie evidence of ineffective assistance of counsel necessitating an evidentiary hearing.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION