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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5751-14T3
A-0192-15T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JASON E. MCKINNON, a/k/a JASON
E. MORRIS,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GARY MADDOX, a/k/a GARY FOSTER,

Defendant-Appellant.

Submitted (A-5751-14) and Argued (A-0192-15)
October 11, 2017 – Decided November 17, 2017

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Indictment No.
07-09-0124.

Joseph E. Krakora, Public Defender, attorney for appellant Jason E. McKinnon (Suzannah Brown, Designated Counsel, on the brief).

Kelly Anderson Smith argued the cause for appellant Gary Maddox.

Christopher S. Porrino, Attorney General, attorney for respondent in A-5751-14 (Emily R. Anderson, Deputy Attorney General, of counsel and on the brief).

Claudia J. DeMitro, Deputy Attorney General, argued the cause for respondent in A-0192-15 (Christopher S. Porrino, Attorney General, attorney; Ms. DeMitro, of counsel and on the brief).

Appellant Jason E. McKinnon filed a pro se supplemental brief.

PER CURIAM

Co-defendants Jason McKinnon and Gary Maddox appeal from orders denying their petitions for post-conviction relief (PCR). In these back-to-back appeals, which we consolidate for purposes of this opinion, we affirm because neither defendant established a prima facie case of ineffective assistance of trial or appellate counsel.

I.

The charges against defendants arose out of evidence collected during a State Police narcotics investigation. Using a confidential informant (CI), the State Police made a series of

controlled purchases of drugs from defendants. Investigators also obtained a wiretap warrant and recorded numerous phone calls between defendants and other individuals.

Defendants were tried together in 2009. At trial, the State presented testimony from a detective and the CI detailing the controlled buys from both defendants. The State also introduced and played numerous recorded phone calls about narcotic transactions involving defendants and other individuals.

In addition, the State presented testimony from an individual who supplied cocaine to both defendants. That supplier told the jury that he engaged in multiple narcotics transactions with defendants over the course of several years. He testified that he supplied Maddox with cocaine, observed Maddox selling pills, and Maddox told him he sold methamphetamine. The supplier also testified that between 2006 and 2007, he supplied McKinnon with approximately one kilogram of cocaine per week and that McKinnon was his main customer.

The State's evidence also detailed other persons who worked with defendants. Specifically, the State played numerous recorded conversations between defendants, during which they discussed certain associates who could complete a kilogram sale of cocaine with the CI. The evidence established that many of defendants' associates were close friends and family members.

When the State Police arrested defendants, they also executed search warrants. During the search of Maddox's home, the police seized small amounts of cocaine and marijuana, money orders and receipts totaling \$10,000, approximately \$3000 in United States currency, and eight vehicles. A search of a storage unit owned by McKinnon resulted in the seizure of over eight ounces of cocaine, cutting agents for cocaine, sealing and packaging materials, and a Smith & Wesson .375 magnum revolver.

After hearing the testimony and considering the evidence presented at trial, a jury convicted both defendants of first-degree racketeering, N.J.S.A. 2C:41-2(c); first-degree leading a narcotics trafficking network, N.J.S.A. 2C:2-6 and N.J.S.A. 2C:35-3; and related first-, second-, and third-degree drug offenses. McKinnon was also convicted of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7.

Defendants were sentenced in August 2009. On the convictions for first-degree leader of a narcotics trafficking network, both defendants were sentenced to life in prison with thirty years of parole ineligibility. On the convictions for racketeering, defendants were sentenced to fifteen years in prison to run consecutively to the life sentence. On all other convictions, defendants were sentenced to concurrent prison terms.

Accordingly, both Maddox and McKinnon were sentenced to aggregate prison terms of life plus fifteen years.

Each defendant filed direct appeals and we affirmed both defendants' convictions and sentences in a consolidated opinion. State v. Maddox, No. A-1856-09 (App. Div. July 8, 2013). The Supreme Court denied defendants' petitions for certification. State v. Maddox, 217 N.J. 285 (2014).

On June 30, 2014, both defendants filed self-represented petitions for PCR. Defendants were each assigned counsel who filed additional briefs and materials in support of their petitions. Defendants also filed supplemental papers in support of their petitions.

Judge Michele M. Fox denied Maddox's petition in an oral opinion and order dated May 8, 2015. Judge Fox denied McKinnon's petition, without oral argument, in a written opinion and order dated May 29, 2015.

Defendants now appeal those orders. Because defendants presented some of the same arguments, and because the underlying convictions were the result of one trial, we address defendants' appeals in this consolidated opinion.

II.

On this appeal, Maddox raises the following arguments, which he articulates as follows:

POINT I — THE COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING.

POINT II — DEFENDANT'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Trial Counsel, as well as Appellate Counsel, Failed to Adequately Address, Prepare, and Defend against the Charge of a Leader of a Narcotics Organization.

B. The Failure of Trial Counsel to Make Critical Objections Throughout the Trial Denied the Defendant a Fair Trial as Guaranteed by the Constitution.

POINT III — THE PCR COURT ERRED IN DENYING DEFENDANT AN EVIDENTIARY HEARING TO CONSIDER A JUROR WHO FAILED TO FULLY DISCLOSE KNOWLEDGE OF THE CASE AND WHO OPENLY DISREGARDED JUDICIAL DIRECTIONS NOT TO DISCUSS THE TRIAL.

POINT IV — DEFENDANT'S POST-CONVICTION RELIEF COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

POINT V — COUNSEL'S CUMULATIVE ERRORS RESULTED IN A MANIFEST INJUSTICE.

In his reply brief, Maddox argues:

POINT I — THE TRIAL COURT IMPROPERLY RENDERED A WRITTEN DECISION PRIOR TO ORAL ARGUMENT.

McKinnon presents the following arguments:

POINT I — THE LOWER COURT ERRED IN DENYING MR. MCKINNON'S PETITION FOR POST-CONVICTION RELIEF WITHOUT AFFORDING HIM AN EVIDENTIARY HEARING.

POINT II — THE PCR COURT ERRED IN DENYING MR. MCKINNON'S PETITION FOR POST CONVICTION RELIEF

WITHOUT AFFORDING POST CONVICTION RELIEF
COUNSEL AN OPPORTUNITY TO PRESENT ORAL
ARGUMENT.

POINT III — THE MATTER SHOULD BE REMANDED FOR
A NEW PCR HEARING AND THE ASSIGNMENT OF NEW
PCR COUNSEL BECAUSE R. 3:22-6(d) WAS VIOLATED.

Defendants' petitions arise from the application of Rule 3:22-2, which permits collateral attack of a conviction based upon a claim of ineffective assistance of counsel within five years of the conviction. See R. 3:22-12(a)(1); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test by showing: (1) "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) "the deficient performance prejudiced the defense." Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693 (quoting U.S. Const. amend. VI); Fritz, supra, 105 N.J. at 58-59 (adopting the Strickland two-part test in New Jersey).

Rule 3:22-10(b) provides that a defendant is only entitled to an evidentiary hearing if he or she establishes a prima facie case in support of PCR. Moreover, there must be "material issues of disputed fact that cannot be resolved by reference to the

existing record," and the court must determine that "an evidentiary hearing is necessary to resolve the claims for relief." State v. Porter, 216 N.J. 343, 354 (2013) (quoting R. 3:22-10(b)). To establish a prima facie case, a defendant must demonstrate "the reasonable likelihood of succeeding under the test set forth in Strickland." State v. Preciose, 129 N.J. 451, 463 (1992).

In her oral opinion issued on April 24, 2015, and May 8, 2015, Judge Fox analyzed all of the arguments put forward by Maddox in support of his petition. She then applied the well-established law and found that Maddox had not presented a prima facie showing of ineffective assistance by either his trial or appellate counsel. On May 29, 2015, Judge Fox issued a forty-eight page opinion where she analyzed the arguments put forward by McKinnon. After addressing all of those arguments, including the arguments McKinnon made on his own behalf, Judge Fox denied McKinnon's PCR petition. Having reviewed defendants' arguments on these appeals, we affirm the denial of their petitions for PCR substantially for the reasons explained by Judge Fox in her detailed oral and written opinions.

We also address two arguments only raised by defendants on these appeals. First, defendants contend that Judge Fox improperly rendered her decisions prior to affording them oral argument. Second, McKinnon argues that his matter should be remanded for a

new PCR hearing and the assignment of new PCR counsel because he contends that Rule 3:22-6(d) was violated. We find no merit in either of these arguments, and we will analyze them in turn.

A. The Alleged Failure to Hear Oral Argument

Judge Fox conducted three hearings on Maddox's PCR petition. She heard oral argument on March 20, 2015, and April 24, 2015. She then read a prepared opinion into the record on April 24, 2015, and May 8, 2015. Nevertheless, Maddox contends that Judge Fox did not afford him a real opportunity to be heard because she interrupted his counsel during oral argument and had a prepared decision before hearing all of counsel's arguments.

Judge Fox conducted one hearing on May 29, 2015, to address McKinnon's PCR petition. At the beginning of that hearing, the judge informed counsel that she had a prepared written opinion, which she handed out to both counsel. McKinnon was also present and he was provided with a copy of the opinion. McKinnon's PCR counsel thanked the judge, stated that he would review the opinion with McKinnon, and did not ask to present oral argument.

Our Supreme Court has emphasized "that there is a strong presumption in favor of oral argument in connection with the initial petition for post-conviction relief." State v. Parker, 212 N.J. 269, 283 (2012) (citing State v. Mayron, 344 N.J. Super. 382, 387 (App. Div. 2001)). The purpose of oral argument is to

ensure that defendant has a full hearing and that all his or her positions are presented and understood by the PCR court. The Court has also explained that a PCR judge has some "residuum of discretion" not to hear oral argument, but the judge must explain why oral argument is not necessary. Parker, supra, 212 N.J. at 282. Thus, the Court explained that

when a trial judge does reach the determination that the arguments presented in the papers do not warrant oral argument, the judge should provide a statement of reasons that is tailored to the particular application, stating why the judge considered oral argument unnecessary. A general reference to the issues not being particularly complex is not helpful to a reviewing court when a defendant later appeals on the basis that the denial of oral argument was an abuse of the trial court's discretion.

[Ibid. at 282-83.]

Here, we find no abuse of discretion. Maddox was afforded oral argument. While his current counsel contends that Judge Fox interrupted oral argument, a review of the transcript discloses that she listened carefully to the arguments that were presented and asked questions where appropriate. Just as critically, the record discloses that Judge Fox carefully considered all of the arguments put forward by Maddox and addressed those arguments in detail.

In addressing McKinnon's PCR petition, Judge Fox conducted a brief hearing. Critically, PCR counsel for McKinnon did not ask to present oral argument or supplement the arguments that had been set forth in his brief, as well as the brief McKinnon prepared himself. Importantly, Judge Fox's detailed written opinion addressed all of McKinnon's arguments. Thus, the record here establishes that McKinnon had a full and fair opportunity to present all of his arguments.

B. The Alleged Violation of Rule 3:22-6(d)

McKinnon contends that his PCR counsel violated Rule 3:22-6(d) by not listing, or incorporating by reference, all of the contentions made by McKinnon in his pro se petition. Thus, McKinnon requests that his matter be remanded and that he be assigned a new PCR counsel and afforded a new PCR hearing.


Rule 3:22-6(d) states that assigned PCR counsel should advance "all of the legitimate arguments requested by defendant that the record will support." The rule goes on to provide that "[i]f defendant insists upon the assertion of any grounds for relief that counsel deems to be without merit, counsel shall list such claims in the petition or amended petition or incorporate them by reference. Pro se briefs can also be submitted."

Here, the record establishes that Judge Fox considered all of the contentions raised by defendant himself, as well as his PCR

counsel. McKinnon filed a pro se petition. PCR counsel subsequently filed a brief in support of McKinnon's petition and made additional arguments. McKinnon also submitted a certification in which he made additional contentions. Judge Fox addressed each of the points McKinnon raised in her comprehensive written decision. Accordingly, defendant received the PCR court's full consideration of all of his arguments.

The orders denying both defendants' PCR petitions are affirmed.

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


CLERK OF THE APPELLATE DIVISION