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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0629-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GARY SAYERS,

Defendant-Appellant.

Submitted December 12, 2017 – Decided January 25, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Atlantic County, Indictment No.
06-08-1865.

Joseph E. Krakora, Public Defender, attorney
for appellant (David A. Gies, Designated
Counsel, on the briefs).

Damon G. Tyner, Atlantic County Prosecutor,
attorney for respondent (Melinda A. Harrigan,
Assistant Prosecutor, of counsel and on the
brief).

Appellant filed a pro se supplemental brief.

PER CURIAM

Defendant Gary Sayers appeals from an order entered by the Law Division on May 19, 2016, which denied his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

In August 2006, a grand jury in Atlantic County returned Indictment No. 06-08-1865 charging defendant, Derrick Johnson, and Steven L. McGuire with various offenses. McGuire entered into a plea agreement with the State. Defendant and Johnson were tried before a jury.

At the trial, evidence was presented which established that on June 22, 2006, at approximately 11:00 p.m., the TGI Fridays in Somers Point closed for the evening, but five employees remained in the restaurant: the kitchen manager, assistant kitchen manager, bartender, a cook, and the dishwasher. About twenty minutes later, the cook went outside to discard some trash, and he was confronted by defendant, who pointed a gun at him. McGuire and Johnson were also present.

Defendant and Johnson were wearing regular ski masks, while McGuire was wearing a stocking as a mask. Defendant had a silver revolver, and Johnson had a black revolver. McGuire was carrying a BB gun, which looked like a black revolver.

Defendant ordered the cook to tell him how many persons were inside and where they were located. At gunpoint, the cook was

taken inside and directed to a dry goods storage area. On the way, they came upon the assistant kitchen manager and the dishwasher, who were also taken to the storage area. Defendant asked the assistant kitchen manager where the safe was located, and she directed him to the bar area.

The intruders made their way to the bar area, where they found the kitchen manager and bartender. Johnson ordered the bartender to go to the storage area, and told him to bind the other employees' hands with duct tape. Defendant emptied the cash drawer at the bar, taking about \$900. Defendant then ordered the kitchen manager to take him to the safe, and told him to open it.

When the kitchen manager said he was not able to do so, defendant jabbed him in the head with the pistol and told him to open the safe. However, the kitchen manager could not access the bottom portion of the safe, and he was sent back to the storage area. McGuire and Johnson took money and cell phones from several workers.

At gunpoint, the employees were forced into the beer cooler. They heard the padlock being placed on the door, but the lock was faulty and one of the employees was able to open the door. The employee noticed that the intruders had departed and he called the police.

The following day, McGuire met his girlfriend and asked her to meet him in a motel in Atlantic City. McGuire was in possession of about \$1200 in cash. McGuire told his girlfriend he obtained the money in a robbery which he, defendant, and Johnson committed at TGI Fridays. McGuire instructed his girlfriend not to tell anyone where he got the money.

McGuire's girlfriend nevertheless reported the robbery to the police, and an officer of the Somers Point Police Department (SPPD) asked her if she knew where he could locate McGuire. She told the officer she did not know where he was, but she would contact him and try to convince him to turn himself in to the police. She contacted McGuire, who called defendant and relayed what his girlfriend told him.

Defendant decided that he, Johnson, and McGuire should leave the area so they traveled to New Hampshire. McGuire informed defendant that he wanted to turn himself in to the police. Defendant and Johnson told him not to do so. McGuire testified he was afraid that defendant and Johnson would kill him.

Eventually, McGuire's girlfriend persuaded McGuire to turn himself in to the police and he was arrested in Atlantic City on July 7, 2006. Detective Robert Somers of the SPPD interviewed McGuire, who identified defendant and Johnson as the other persons who committed the robberies. Based on that information, Somers

obtained arrest warrants for defendant and Johnson. They were arrested in Atlantic City.

Defendant signed a consent-to-search form, which authorized a search of his car. In the car, the police found a white bag containing McGuire's identification and a folding knife. A black hoodie, two woolen masks, and nine gloves also were found in the car. Tests showed that Johnson's DNA was inside one of the gloves, and defendant's DNA was on the inside and outside of one of the masks and on the collar of the hoodie.

Defendant's former girlfriend testified that she had been living periodically with defendant in New Hampshire. She said defendant owned a silver revolver that matched the description of the gun used by one of the robbers. She also stated that shortly before the robberies, she and defendant broke off their relationship.

She said defendant left to return to New Jersey and took the gun with him. She also said she overheard a telephone conversation between defendant and Johnson before defendant left. During that call, defendant told Johnson he had a gun. Defendant said they were "going to roll" once he returned to Atlantic City.

The jury found defendant guilty of: first-degree conspiracy to commit robbery, N.J.S.A. 2C:5-2 (count one); five counts of first-degree robbery, N.J.S.A. 2C:15-1 (counts two, three, four,

five, six); second-degree burglary, N.J.S.A. 2C:18-2 (count seven); five counts of third-degree criminal restraint, N.J.S.A. 2C:13-2 (counts nine, ten, eleven, twelve, thirteen); five counts of fourth-degree aggravated assault with a firearm, N.J.S.A. 2C:12-1(b)(4) (counts fourteen, fifteen, sixteen, seventeen, eighteen); three counts of second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (counts nineteen, twenty, twenty-one); three counts of third-degree possession of a handgun without a permit, N.J.S.A. 2C:39-5(b) (counts twenty-two, twenty-three, twenty-four); and second-degree certain persons not to possess weapons, N.J.S.A. 2C:39-7 (count thirty-seven).

The trial judge granted the State's motion for imposition of an extended term and sentenced defendant on count two (first-degree robbery) to fifty years of incarceration, with an eighty-five percent period of parole ineligibility, pursuant to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. The court imposed a consecutive ten-year term, subject to NERA, on count seven (second-degree burglary); and a consecutive ten-year term on count thirty-seven (certain persons not to possess weapons) with a five-year period of parole ineligibility. The court also imposed concurrent sentences on the other counts.

II.

Defendant appealed from the judgment of conviction dated November 12, 2008. We affirmed defendant's convictions except for the conviction on count one (conspiracy), and remanded the matter for entry of an amended judgment of conviction. State v. Sayers, No. A-2074-08 (App. Div. Aug. 24, 2010) (slip op. at 19). The Supreme Court thereafter denied defendant's petition for certification. State v. Sayers, 205 N.J. 81 (2011).

On May 13, 2011, defendant filed a pro se PCR petition, in which he alleged he was denied the effective assistance of trial counsel. He also claimed that the assistant prosecutor had improperly withheld a videotaped statement of the State's chief witness, which defendant alleged contained exculpatory evidence. The trial court appointed PCR counsel who filed a brief in support of the petition.

In oral argument before the PCR court, defendant asserted that trial counsel's performance was deficient because counsel: (1) had little or no contact with him before trial; (2) did not convey the State's plea offer until the day of trial; (3) did not provide him with discovery; and (4) did not undertake an adequate pretrial investigation or call additional witnesses. In addition, defendant alleged the State had withheld evidence material to his

defense. The PCR court rejected these claims and entered an order dated October 10, 2012, denying PCR.

Defendant appealed. We determined that the record supported the PCR court's finding that defendant was provided with the State's plea offer six months before the trial, but the record was not sufficient to resolve defendant's claim that his attorney failed to provide him with discovery, and failed to adequately investigate the case and call additional witnesses. State v. Sayers, No. A-2379-12 (App. Div. July 15, 2014) (slip op. at 11-13). We remanded the matter to the PCR court for an evidentiary hearing on these claims, and directed the court to reconsider defendant's contention that the State had not provided defendant with evidence material to the defense. Id. at 14. We also directed the PCR court to consider defendant's claim that his arrest was illegal and his claim that the complaint was not signed under oath or in the presence of a deputy clerk or other authorized person. Id. at 15.

III.

The PCR court conducted the evidentiary hearing on March 17, 2016. On May 19, 2016, the court filed a written opinion setting forth its findings of fact and conclusions of law. The court determined that defendant had not been denied the effective assistance of trial counsel.

The court found that defendant's claim that his attorney did not provide him with discovery was refuted by the testimony and evidence presented at the hearing, and the record did not support defendant's claim that his attorney did not adequately investigate the case. The court also found that defendant had not shown that the result of the proceeding would have been different if counsel had handled the matter differently.

In addition, the court rejected defendant's claim that his arrest was illegal because the arresting officer did not have a warrant, and his claim that the complaint had not been signed under oath in the presence of a deputy clerk or other authorized person. The court entered an order dated May 19, 2016, denying PCR. This appeal followed.

On appeal, in his counseled brief, defendant argues:

POINT ONE:

THE PCR COURT ERRED WHERE, WITHOUT CONDUCTING AN EVIDENTIARY HEARING REGARDING THE ISSUE, IT DETERMINED THE DEFENDANT DID NOT PRESENT A PRIMA FACIE SHOWING THAT THE WARRANT FOR HIS ARREST WAS NOT ISSUED AT THE TIME HE WAS TAKEN INTO CUSTODY.

POINT TWO:

THE PCR COURT ERRED WHERE IT DID NOT ALLOW THE DEFENDANT TO QUESTION ON REMAND HIS RIGHT TO EFFECTIVE LEGAL ASSISTANCE REGARDING THE ADVICE HE RECEIVED AS TO WHETHER HE SHOULD HAVE ACCEPCTED THE STATE'S PLEA OFFER.

POINT THREE:
THE DEFENDANT INCORPORATES IN SUMMARY FASHION
THE ARGUMENTS BELOW.

In addition, defendant has filed a supplement pro se brief, in which he argues: (1) trial, appellate, and PCR counsel were ineffective because they did not argue that the consent-to-search form signed by defendant was invalid; (2) trial, appellate, and PCR counsel were ineffective because they failed to argue and challenge the lack of an affidavit in support of probable cause for the issuance of the arrest warrant; and (3) defendant did not receive adequate legal representation from trial counsel because he failed to inform defendant that he could have accepted a conditional plea offer and reserved the right to appeal the denial of certain pretrial motions.

IV.

As noted, in his counseled brief, defendant argues that the PCR court erred by deciding that he did not present a prima facie case for relief on his claim that he was arrested before the arrest warrant was issued. He also argues that the warrant was technically deficient. Defendant contends the PCR court should have conducted an evidentiary hearing on these issues.

An evidentiary hearing on a PCR petition is warranted only when the defendant establishes a prima facie case in support of PCR, the court determines that there are genuine issues of material

fact that cannot be resolved by reference to the existing record, and an evidentiary hearing is required to resolve the claims. R. 3:22-10(b). Furthermore, "[t]o establish a prima facie case, defendant must demonstrate a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits." Ibid.

On appeal, defendant notes that his arrest warrant has been identified as W-2006-0382, but he asserts that the surrender report of the Atlantic City Police Department (ACPD) does not indicate that the officers relied upon that warrant when he was arrested. The record includes pages ten, eleven, and twelve of the report.

On page ten, the report states that defendant and Johnson were arrested by officers of the ACPD. Pages ten and eleven of the report describe Johnson's arrest, and indicate that he was taken into custody at a location on North Maryland Avenue in Atlantic City. Page eleven of the report states that both suspects were taken into custody without incident and turned over to the Somers Point police for processing. Page eleven refers to warrant W-2006-0378, the warrant issued for Johnson's arrest.

Page twelve of the report describes defendant's arrest and indicates that defendant was arrested at a location on North Magellan Avenue in Atlantic City before Johnson was arrested. Warrant W-2006-0382, the warrant for defendant's arrest, is not

cited on this page. However, the record includes warrant W-2006-0382, which is dated and signed as of July 7, 2006. Defendant has conceded he was arrested that day.

Therefore, the record establishes that a warrant for defendant's arrest was issued the day he was taken into custody. Furthermore, there is nothing in the record which supports the claim that the ACPD officers arrested defendant without first obtaining the warrant.

On appeal, defendant also asserts that the SPPD investigation report dated July 9, 2006, which was prepared by Somers, "appears to indicate" that defendant was arrested before the municipal court judge was contacted. As noted, the ACPD surrender report notes that defendant and Johnson were arrested and turned over to the Somers Point police.

The record includes page three of Somers's three-page report. In that part of the report, Somers stated that he attempted to interview defendant but defendant asked to speak with an attorney and refused to sign the form waiving his Miranda rights.¹ Somers wrote that he contacted the municipal court judge and warrants for robbery and weapons offenses were issued. He notes that additional charges "are forth coming."

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

The SPPD report does not, however, support defendant's contention that Somers did not obtain the arrest warrant until after defendant's arrest. Somers merely commented that the municipal court judge had been contacted and warrants issued, but he does not say when. As stated previously, the warrant issued for defendant's arrest is dated July 7, 2006, the date when defendant was arrested. The record does not support defendant's claim that Somers did not obtain the arrest warrant until after the arrest.

Defendant further claims that the arrest warrant was technically deficient. He asserts that it is unclear from the warrant whether a probable cause determination was made. He also asserts that at trial, Somers testified that he issued the arrest warrants for defendant and Johnson. Somers stated that he "ultimately became lead investigator" in the case. Defendant contends that viewed in a light most favorable to him, Somers' trial testimony established that he was not a neutral and detached officer and he issued the arrest warrant in violation of Rule 3:3-1.

Here, the PCR judge found that the warrant was issued in compliance with Rule 3:3-1. The rule was amended in August 2016, and the amendments took effect on January 1, 2017. See Pressler & Verniero, Current N.J. Court Rules, R. 3:3-1 (2017). However, the

version of the rule in effect when the warrant was issued stated in part:

(a) Issuance of a Warrant. An arrest warrant may be issued on a complaint only if (1) a judge, clerk, deputy clerk, municipal court administrator or deputy municipal court administrator finds from the complaint or an accompanying affidavit or deposition, that there is probable cause to believe that an offense was committed and that the defendant committed it and notes that finding on the warrant; and (2) a judge, clerk, deputy clerk, municipal court administrator, or deputy municipal court administrator finds that subsection (c) of this rule allows a warrant rather than a summons to be issued.

. . . .

(c) Determination of Whether to Issue a Summons or Warrant. A summons rather than an arrest warrant shall be issued unless: (1) the defendant is charged with murder, kidnapping, aggravated manslaughter, manslaughter, robbery, . . . any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes . . . (3) there is reason to believe that the defendant is dangerous to self, other persons, or property

[Ibid.]

In her decision, the PCR judge noted that the complaint was signed under oath on July 7, 2006. The warrant also indicates that probable cause was found, and that the warrant was signed by the court administrator and issued by the municipal court judge.

The judge also noted that at trial, Somers had testified that he issued warrants for defendant and Johnson, but the judge found that this was a misstatement. The judge wrote:

The warrant clearly indicates that Detective Somers did not issue the warrant as [d]efendant contends. The signature of the [c]ourt [a]dministrator is present on the line in the warrant where it states, "signature and Title of Judicial Officer Issuing Warrant." Directly beneath the signature, the warrant states, "To any peace officer or other authorized person: pursuant to this warrant you are hereby commanded to arrest the named defendant and bring that person forthwith before the court to answer the complaint." The signature following this statement is that of [the municipal court judge]. Thus, it cannot be argued that Detective Somers issued the warrant in question.

We are convinced there is sufficient credible evidence in the record to support the judge's findings of fact. Notwithstanding Somers's misstatement in his trial testimony, the record shows that the warrant was, in fact, issued by the municipal court judge in compliance with Rule 3:3-1. We therefore conclude that defendant failed to present a prima facie case for relief on his claims regarding the arrest warrant, and an evidentiary hearing was not required on those claims.

V.

In his counseled brief, defendant also argues that the PCR court erred by refusing to allow PCR counsel to question

defendant's trial attorney about his communications with defendant regarding the consequences of rejecting the State's plea offer. At the hearing, the State objected to this line of questioning on the ground that this court had previously decided the issue. The PCR court sustained the objection.

On appeal, defendant argues that in the earlier appeal from the order dated October 10, 2012, denying PCR, he raised a claim that he had been denied the effective assistance of counsel because his attorney had not provided him with the State's plea offer until the day before the trial. In our opinion, we determined that the claim was not supported by the record because defendant signed a pretrial memo on March 18, 2008, about six months before the trial, and the memo set forth the terms of the State's plea offer. Sayers, No. A-2379-12 (slip op. at 11).

Defendant asserts that he is now raising a different claim. In a certification dated September 25, 2015, which was filed with the PCR court following our remand, defendant asserted that his trial attorney was deficient because he failed to discuss with him the strengths and weaknesses of the State's case before he formally rejected the plea offer. Defendant claims that if his attorney had properly advised him concerning the plea offer, he would have accepted it.

We are convinced, however, that the PCR judge did not err by precluding PCR counsel from questioning defendant's trial attorney about the advice he provided to defendant regarding the State's plea offer. This particular claim was not raised in the PCR petition filed in May 2011, or in the arguments presented to the PCR court on that petition. Moreover, defendant did not raise this issue in his appeal from the court's October 10, 2012 order, denying PCR. In addition, our remand was limited to specific issues and did not include this particular claim.

Here, the PCR judge correctly found that defendant was barred from raising this new issue in the remand proceeding. Indeed, our court rules provide that a defendant is barred from raising an issue that was not raised in prior proceedings unless the defendant shows that the issue could not reasonably have been raised earlier, enforcement of the procedural bar would result in a fundamental injustice, or denial of relief would be contrary to a new rule of constitutional law, made retroactive to defendant's petition. R. 3:22-4(a)(1)-(3). Because defendant's claim does not fall within any of these exceptions, he is barred from raising it at this time. See State v. Reevey, 417 N.J. Super. 134, 148 (App. Div. 2010).

VI.

In his counseled brief, defendant incorporates by reference the other claims defendant presented in the PCR court. Defendant claims he was denied the effective assistance of counsel because his attorney did not adequately investigate the case, provide him with discovery, or subpoena certain witnesses. He also claims the State failed to produce McGuire's videotaped statement, which defendant states may have contained exculpatory evidence.

Claims of ineffective assistance of counsel are considered under the two-part test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). The Strickland test requires a defendant to show that the performance of his attorney was deficient, and counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687.

To satisfy the first part of the Strickland test, a defendant must establish that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Ibid. The defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

Furthermore, to satisfy the second part of the Strickland test, the defendant must show "that counsel's errors were so

serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. The defendant must establish that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

Here, the PCR judge found that defendant's trial attorney had provided defendant with all discovery. That finding was based on the testimony of defendant's attorney, the testimony of the assistant prosecutors who handled the matter, and the documentary evidence presented at the remand hearing. The judge noted that the discovery provided to defendant included McGuire's statement and the statements of the other witnesses involved in the matter.

In addition, the judge found that defense counsel had investigated every potential witness that defendant identified. The judge noted that defendant's employer in New Hampshire "proved to be a dead end" and counsel believed he could establish by other means that defendant wore a particular type of mask for his work.

The judge also found that defendant's attorney elected as a matter of sound trial strategy not to call a witness whose wife had had an affair with defendant. The judge noted that the witness had indicated he did not intend to help defendant in any way. The judge added that counsel had checked on other potential witnesses, but "none bore any fruit."

The judge therefore determined that defendant failed to establish the first prong of the Strickland test because he failed to show that counsel's representation was deficient. The judge added, however, for the sake of completeness, that defendant also failed to satisfy Strickland's second prong because he had not shown that the results of the proceeding would have been different if counsel had handled the matter differently.

The judge wrote that there was overwhelming evidence of defendant's guilt. That evidence included the gloves, hoodie, and masks recovered by the police, DNA evidence, McGuire's testimony, the testimony of McGuire's girlfriend, and the testimony of defendant's former girlfriend.

We are convinced there is sufficient credible evidence in the record to support the PCR judge's factual findings and conclusion that defendant was not denied the effective assistance of trial counsel. Defendant's arguments to the contrary lack sufficient merit to warrant further comment. R. 2:11-3(e)(2).

VII.

As noted, defendant has filed a pro se supplemental brief. In that brief, defendant raises entirely new claims of ineffective assistance of trial, appellate, and PCR counsel. Because defendant did not raise these claims in the PCR court, we decline to address

them for the first time on appeal. State v. Harris, 209 N.J. 431, 445 (2012) (citing State v. Robinson, 200 N.J. 1, 20-22 (2009)).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION