SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2747-16T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

OSHA L. DABNEY,
a/k/a OMAR GOODING,

Defendant-Appellant.

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Submitted February 6, 2018 – Decided February 23, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Indictment No. 11-05-1130.

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

Damon G. Tyner, Atlantic County Prosecutor, attorney for respondent (Nicole L. Campellone, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Osha Dabney appeals from a January 19, 2017 order denying his petition for post-conviction relief (PCR). We affirm.

An Atlantic County grand jury charged defendant in a nine-count indictment as follows: third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a)(1) (count one); third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(13) (count two); third-degree possession of a CDS within 1000 feet of school property, N.J.S.A. 2C:35-7 (count three); second-degree possession of a weapon while in possession of a CDS with intent to distribute, N.J.S.A. 2C:39-4.1 (count four); third-degree unlawful possession of a weapon, N.J.S.A. 2C:39-3(b) (count five); third-degree theft, N.J.S.A. 2C:20-3 (count six); fourth-degree tampering with physical evidence, N.J.S.A. 2C:28-6(1) (count seven); second-degree possession of a CDS within 500 feet of public housing, N.J.S.A. 2C:35-7.1 (count eight); and fourth-degree possession of a weapon by a convicted felon, N.J.S.A. 2C:39-7 (count nine).

Defendant pled guilty to second-degree possession of a weapon while in possession of a CDS with intent to distribute, N.J.S.A. 2C:39-4.1 (count four); and fourth-degree possession of a weapon by a convicted felon, N.J.S.A. 2C:39-7 (count nine). Pursuant to the negotiated plea, defendant agreed to an extended term under State v. Brimage, 153 N.J. 1 (1998), and was sentenced to an eight-year prison term subject to a five-year parole disqualifier.

The facts underlying defendant's conviction were as follows. On April 13, 2011, members of the Atlantic County Prosecutor's Office and the Pleasantville Police Department where en route to execute a search warrant for a residence in which defendant occupied a room. Before arriving police noticed a tan Lincoln Navigator from which defendant had conducted drug transactions according to a confidential informant. Police noticed defendant in the passenger seat and stopped the vehicle.

The driver of the vehicle would not give consent to a search, however, police removed the driver and defendant from the vehicle because they had received a tip defendant was in possession of a sawed-off shotgun. A police K-9 signaled the possible presence of narcotics. Therefore, the vehicle was towed and an application for a warrant to search the vehicle was made.

Police continued to defendant's residence to execute the warrant for his room, where they recovered the sawed-off shotgun from behind a chained closet door. A search of defendant's residence also revealed a scale with white residue believed to be cocaine.

During his plea colloquy, defendant admitted he had a prior felony conviction. He admitted to being in possession of the shotgun. Defendant also admitted he possessed oxycodone without

a prescription, and that he possessed cocaine with the intent to distribute or share it with others. Defendant's sentence followed.

Defendant filed a direct appeal from his sentence and we heard the matter on our excessive sentencing oral argument calendar. Pursuant to a consent order, defendant's sentence on count four was remanded based on a misunderstanding of Brimage. Thus, defendant was re-sentenced to a five-year prison term with a three year term of parole ineligibility on count four to run concurrently with the five-year term with five years of parole ineligibility on count nine.

Defendant filed his PCR petition. In it he argued his plea counsel and his sentencing counsel were ineffective because there was no factual basis for the plea, and that trial counsel failed to file a motion to suppress evidence seized from the search of the vehicle and his residence. Defendant also argued counsel never made a motion to dismiss count nine, and that his appellate counsel was ineffective for only appealing the sentence. Defendant argued his plea counsel and his sentencing counsel gave incorrect advice that Brimage applied and therefore his plea was not knowing and voluntary.

The PCR judge denied defendant's petition without an evidentiary hearing. She concluded the Brimage issue had been addressed when defendant appealed his sentence and thus defendant

was barred from asserting the claim in his PCR petition. The judge held the warrants to search defendant's room and the vehicle defendant occupied were valid, and thus a motion filed by his trial counsel to suppress the evidence obtained would be meritless. The judge found a motion to dismiss count nine would not have prevented the State from presenting evidence to the grand jury to demonstrate he qualified as a "certain persons" to thus meet the elements of the offense. The PCR judge determined the remainder of defendant's claims were barred because they were not brought on direct appeal. This appeal followed.

On appeal, defendant raises the following arguments:

> POINT I — DEFENDANT'S PETITION FOR POST CONVICTION RELIEF SHOULD NOT BE BARRED BECAUSE DEFENDANT'S CLAIMS WERE NOT EXPRESSLY ADJUDICATED BY THE APPELLATE DIVISION.
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> POINT II — DEFENDANT'S PETITION FOR POST CONVICTION RELIEF SHOULD NOT BE BARRED BECAUSE DEFENDANT COULD NOT HAVE BROUGHT HIS CLAIMS IN A PRIOR PROCEEDING AND THE INTERESTS OF JUSTICE REQUIRE HIS CLAIMS BE HEARD.
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> POINT III — DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ENTITLING HIM TO POST CONVICTION RELIEF AND AN EVIDENTIARY HEARING.
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> > (a) Counsel was ineffective for affirmatively misadvising the defendant as to the penal consequences of his plea.
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> > (b) Counsel was ineffective for failing to file a motion to withdraw defendant's plea once the Appellate

> Court determined the trial court illegally applied Brimage rules to his sentence.

I.

The PCR process affords an adjudged criminal defendant a "last chance to challenge the 'fairness and reliability of a criminal verdict . . . .'" State v. Nash, 212 N.J. 518, 540 (2013) (quoting State v. Feaster, 184 N.J. 235, 249 (2005)); see also R. 3:22-1. As to our standard of review, "where the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014) (citing State v. Harris, 181 N.J. 391, 420-21 (2004)).

"Post-conviction relief is neither a substitute for direct appeal, [Rule] 3:22-3, nor an opportunity to relitigate cases already decided on the merits, [Rule] 3:22-5." State v. Preciose, 129 N.J. 451, 459 (1992).

> Consequently, petitioners may be procedurally barred from post-conviction relief under Rule 3:22-4 if they could have, but did not, raise the claim in a prior proceeding, unless they satisfy one of the following exceptions:
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> > (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result

> in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.
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> [Ibid.]

II.

Defendant contends the PCR judge erred in ruling his Brimage eligibility argument was procedurally barred because his prior illegal sentence was corrected following his direct appeal. Defendant argues the true issue on PCR is whether he would have pled guilty at all but for plea counsel's incorrect Brimage advice. We agree with defendant that this claim was not procedurally barred by the appeal, but affirm for different reasons.

Rule 3:22-10(b) provides:

> A defendant shall be entitled to an evidentiary hearing only upon the establishment of a prima facie case in support of post-conviction relief, a determination by the court that there are material issues of disputed fact that cannot be resolved by reference to the existing record, and a determination that an evidentiary hearing is necessary to resolve the claims for relief. To 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.

Furthermore, Rule 3:22-10(e) provides the "court shall not grant an evidentiary hearing" if: (1) it "will not aid [in] the court's

analysis of the defendant's entitlement to post-conviction relief;" (2) "the defendant's allegations are too vague, conclusory or speculative; or" (3) the defendant is attempting to use the hearing to explore or investigate other possible unsubstantiated PCR claims.

The decision of whether to hold an evidentiary hearing on a PCR petition is committed to the sound discretion of the PCR judge. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). The judge should grant an evidentiary hearing and make a determination on the merits of a defendant's claim only if the defendant has presented a prima facie claim of ineffective assistance. Preciose, 129 N.J. at 462.

In determining whether a prima facie claim has been established, the facts should be viewed "in the light most favorable to a defendant . . . ." Id. at 462-63. Additionally, "[a] petitioner must establish the right to such relief by a preponderance of the credible evidence." Id. at 459. "To sustain that burden, specific facts must be alleged and articulated" to "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

To establish ineffective assistance of counsel, defendant must satisfy a two-prong test:

> 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 or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
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> [Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, 466 U.S. at 687).]

Counsel's performance is evaluated with extreme deference, "requiring 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'" Fritz, 105 N.J. at 52 (alteration in original)(quoting Strickland, 466 U.S. at 688-89). "To rebut that strong presumption, a [petitioner] must establish . . . trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689). "Mere dissatisfaction with a 'counsel's exercise of judgment' is insufficient to warrant overturning a conviction." Nash, 212 N.J. at 542 (quoting State v. Echols, 199 N.J. 344, 358 (2009)).

To demonstrate prejudice, "'actual ineffectiveness' . . . must [generally] be proved[.]" Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 692-93). Petitioner must show the existence of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. (quoting Strickland, 466 U.S. at 694). Indeed,

> [i]t is not enough for [a] defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.
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> [Strickland, 466 U.S. at 693 (citation omitted).]

In the context of a guilty plea, defendant must show "that (i) counsel's assistance was not 'within the range of competence demanded of attorneys in criminal cases,' and (ii) 'that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial.'" State v. DiFrisco, 137 N.J. 434, 457 (1994) (alteration in original) (citations omitted), (quoting Tollet v. Henderson, 411 U.S. 258, 266 (1973); Hill v. Lockhart, 474 U.S. 52, 59, (1985)). Defendant must also show "a decision to reject

the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010); see State v. Maldon, 422 N.J. Super. 475, 486 (App. Div. 2011).

Here, given the severity and the number of the charges in the grand jury indictment, it was unlikely defendant would have obtained a better result had he gone to trial. Setting aside the indictment as a whole, the charges to which defendant pled guilty alone would have exposed him to significantly worse consequences. Indeed, as the State points out, although defendant was not eligible under Brimage, he could have been sentenced to ten years in prison for each of the two second-degree counts to which he pled guilty. Moreover, defendant was eligible for an extended term of incarceration. For these reasons, we reject defendant's argument that he would have wanted to withdraw his plea and proceed to trial in the absence of Brimage.

Additionally, we reject defendant's argument his counsel was ineffective for failing to file a motion to withdraw his guilty plea. In State v. Slater, 198 N.J. 145, 157-58 (2009), the Supreme Court stated:

> We hold that trial judges are to consider and balance four factors in evaluating motions to withdraw a guilty plea: (1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether

> withdrawal would result in unfair prejudice to the State or unfair advantage to the accused.

Defendant concedes he has not asserted a colorable claim of innocence as required by Slater. Therefore, a motion to withdraw his plea would not have succeeded, and his counsel was not ineffective for failing to file one.

We reject defendant's argument his counsel was ineffective because there was a lack of a factual basis for the plea. The PCR judge recounted her review of the transcript of the plea proceeding and concluded the judge who accepted defendant's plea had followed the guidelines in Rule 3:9-2, and assured there was an adequate factual basis. The PCR judge noted the judge at the time of the plea ensured defendant "had a complete understanding of the situation" when he replied to the questions regarding the factual basis. The PCR judge further noted the judge who took the plea "also reviewed the plea forms with his attorney and signed them each in turn."

Our review of the transcript of defendant's plea demonstrates he voluntarily admitted the shotgun was in his room and that he possessed the weapon. Defendant admitted that he had been convicted in 2003 of possession of a CDS with intent to distribute, which constituted a prior felony conviction. Thus, defendant admitted he was a certain persons to meet the elements of N.J.S.A.

2C:39-7. Defendant also admitted he possessed oxycodone pills, for which he did not have a prescription, and that he had cocaine, which he intended to share. This testimony provided the factual basis to support the guilty plea on both counts of defendant's conviction. We agree with the PCR judge a motion to withdraw the plea for lack of a factual basis would not have been successful.

Similarly, we agree with the PCR judge a motion to dismiss count nine of the indictment would have been meritless. The judge addressed this argument as follows:

> Defendant maintains that his attorney should have contested count nine of the indictment because the State presented evidence of his prior crimes to bias the grand jury to indict him. However, defendant's prior conviction was used to establish the predicate offense, which prohibited him from possessing a firearm, one of the counts of the indictment. There is . . . nothing precluding the State from presenting evidence as to why the defendant was what they call a certain person not allowed by law to possess weapons of any sort and, in fact, they are obligated to do so, particularly at the grand jury level. One of the elements of a certain persons offense is that the offender has a prior felony conviction.
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> Finally, the motion to dismiss has no support. [Defendant] advances nothing except a bald assertion and, taking all of the above into consideration, that motion to dismiss obviously would also have been meritless.

As we have noted, defendant provided the factual basis for the certain persons charge, namely, by testifying to his 2003

conviction for possession of CDS with intent to distribute. The PCR judge correctly found a motion to dismiss count nine of the indictment would have been meritless and this argument lacks merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Finally, we agree with the PCR judge that defendant failed to demonstrate his counsel was ineffective for failing to file a motion to suppress the evidence obtained pursuant to the search warrants for the vehicle and his residence. The PCR judge held the following:

> First, the search warrant is valid. It is based on an investigation by the detective on the case who used a confidential informant to . . . purchase crack cocaine from the defendant [] three times while under constant surveillance. It also informed him that defendant was actively seeking to purchase a firearm. Two of those times defendant had used the tan Lincoln Navigator he was stopped in during his arrest in order to me[et] (sic) . . . the [confidential informant] and distribute the drugs from the vehicle. Prior to all three of those purchases the confidential informant was searched for contraband and monies and then was under constant supervision before and during the sale. During the first sale the confidential informant was asked to meet the defendant in his home. The surveillance team observed defendant leave his residence to meet the CI outside, and a hand-[to]-hand (sic) exchange was observed. On another occasion a similar occurrence transpired, but instead of meeting the confidential informant on foot the defendant entered the tan Lincoln Navigator

> . . . . The confidential informant then entered the vehicle and exited after a few minutes with another folded paper containing crack cocaine, and . . . this same scenario again occurred about . . . a couple of weeks later . . . .
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> Based upon the above[,] Detective Taggart collected enough proof to reach the probable cause threshold and obtain a search warrant for the building. Any motion trying to [in]validate (sic) that search warrant would have been meritless.
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> Along these lines a motion to suppress the evidence obtained for the warrantless search of the Lincoln Navigator would also have been meritless. It was used in two of the three drug transactions in which defendant was observed distributing the drugs. It is obvious how this meets the reasonable suspicion standard as to there being criminally-related objects in the vehicle subject to search.

Defendant has advanced no basis for us to disagree with the PCR judge's findings. The record amply supports the judge's findings a motion to suppress the evidence obtained from the vehicle and defendant's room would have been meritless. For these reasons, defendant has failed to establish a prima facie showing of ineffective assistance of counsel.

Affirmed.