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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2788-16T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSE A. CANTARERO,

Defendant-Appellant.

Submitted January 24, 2018 – Decided April 17, 2018

Before Judges Alvarez and Nugent.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Indictment No.
13-03-0680.

Joseph E. Krakora, Public Defender, attorney
for appellant (Andrew R. Burroughs, Designated
Counsel, on the brief).

Robert D. Laurino, Acting Essex County
Prosecutor, attorney for respondent (Kayla
Elizabeth Rowe, Special Deputy Attorney
General/Acting Assistant Prosecutor, of
counsel and on the brief).

PER CURIAM

This is an appeal from the denial of a petition for post-conviction relief (PCR). A jury convicted defendant of third-

degree assault by auto, serious bodily injury, N.J.S.A. 2C:12-1(c)(2), and driving while intoxicated (DWI), N.J.S.A. 39:4-50. The trial judge sentenced defendant to a three-year custodial term on the assault offense and a ninety-day concurrent custodial term on the DWI offense. The judge also imposed appropriate penalties, fines, and assessments. Defendant did not appeal. He filed a PCR petition a year after the judge sentenced him. The trial judge denied defendant's PCR petition without an evidentiary hearing.

Defendant appeals and argues:

POINT I

AS PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, HE WAS ENTITLED TO POST-CONVICTION RELIEF.

(1) Defense counsel failed to investigate the case to determine whether an expert witness was required for the defense.

(2) Defense counsel failed to object to inadmissible and prejudicial hearsay and opinion testimony.

(3) Defense counsel's cumulative errors denied his client effective assistance of counsel.

POINT II

AS THERE ARE GENUINE ISSUES OF MATERIAL FACTS IN DISPUTE AN EVIDENTIARY HEARING WAS REQUIRED.

Finding no merit in defendant's arguments, we affirm.

These were the State's trial proofs. On a foggy October morning in 2012, Newark patrol officers Natasha Green and Rhonda Washington were walking to their patrol vehicle from precinct headquarters when they heard an approaching car's engine revving loudly. A gray taxicab with a "Classic" company emblem, traveling north on Broadway, came into view. The speed limit was twenty-five miles per hour. The officers watched the cab pass at a high rate of speed and disregard a red traffic light before disappearing into the fog. Concerned that members of the public would be endangered if they pursued the cab through the fog, the officers did not pursue; rather, they completed a check of their patrol car then proceeded northbound on Broadway. They had not driven far when they encountered the cab and its driver, defendant.

Approximately a block from the precinct, at the intersection of Chester and Broadway, the taxicab had collided with a blue Nissan. The collision occurred when defendant, driving the cab, disregarded a red traffic signal. The cab could not be driven because of the damage to its front passenger side. The Nissan's driver's side was heavily damaged. The young woman driving the Nissan was slumped over the steering wheel and either semi-conscious or unconscious. Following the accident, she was hospitalized for approximately a week and underwent surgery and other treatment for her injuries. Her injuries included a

fractured pelvis, six fractured ribs, internal bleeding, and a traumatic brain injury.

Both officers attempted to speak with defendant at the accident scene. Because defendant spoke only Spanish and the officers did not, they were unable to carry on a conversation with him. Nonetheless, defendant attempted to exit the cab. He got approximately halfway out by holding onto the car door with one hand and placing one foot outside of the car on the ground. He nearly fell, but caught himself before he hit the ground, at which time Officer Green told him to remain in the car. He eventually got out anyway.

Officer Green stood between the door and the car, approximately one foot from defendant, as she attempted to speak to him. He attempted to answer her in Spanish and "[h]e was slurring a little bit." Officer Green described defendant's attempted speech as a long, slow slur. His face was "a little flush" and the officer could smell a strong odor of alcohol. She initially thought the odor was coming from his breath but conceded during cross-examination it could have been coming from the car. Defendant made no attempt to communicate that he had been injured. He was not bleeding. Based on her observations of defendant and her previous experience with DWI arrests, Officer Green opined defendant was under the influence of alcohol.

Officer Washington reached the same conclusion. Defendant was standing outside the cab leaning on the door and holding onto the roof for balance when she first attempted to speak with him. He was swaying and staggering a little bit. The officer observed defendant's face was flushed. She could smell alcohol coming from him, not the car. Officer Washington testified defendant did not appear to be hurt from the accident. The officer opined defendant was under the influence of alcohol.

With the assistance of a Spanish-speaking officer who had arrived at the accident scene, Officer Washington asked defendant to take a breath test. Defendant did not respond. He would not talk. When Officer Washington placed defendant under arrest, however, he said in English, "I do nothing."

The Spanish-speaking officer was Edgardo Gonzalez, who had arrived at the accident scene to help with traffic. In response to Officer Washington's request, he asked defendant to voluntarily take a field sobriety test. Defendant replied that he would not, he was fine, and he did not want to comply. Officer Gonzalez asked about injuries. Defendant replied he was fine. Speaking to defendant from a distance of approximately two feet, Officer Gonzalez detected an odor of alcohol that appeared to be coming from defendant's mouth when he spoke. Defendant was slurring his speech. From Officer Gonzalez's observations of defendant's

speech and general demeanor, as well as defendant's refusal to take field sobriety tests and later a breath test, Officer Gonzalez concluded defendant was under the influence of alcohol.

Defendant argued in his PCR petition that his trial counsel was ineffective for failing to consult with an expert. To support his PCR argument, defendant submitted the report of an expert licensed to practice law, medicine, and surgery in New Jersey, and Board Certified in Addiction Medicine. In his report to defense counsel, the expert wrote:

Your client was accused of driving while intoxicated and refusal to submit to a breath specimen. This decision was based loosely upon the National Highway Traffic Safety Administration (NHTSA) "clues". Such positive determinations are fraught with a high false-positive rate compared to [the Diagnostic and Statistical Manual of Mental Disorders (DSM)]. In New Jersey, DSM criteria are used.

The expert added: "The questions in [defendant's] case revolve around whether there were any circumstances, particularly medical conditions that impacted upon the prosecution's observations, psychophysical tests, and biochemical analysis resulting from conclusions that lead to the impression that your client was driving while intoxicated." The expert explained why the odor of alcoholic beverage, blood shot eyes, and defendant's "indifferent" demeanor were not reliable indicators of intoxication. The expert also explained why a police officer's

belief defendant did not perform satisfactorily on Standardized Field Sobriety Tests might have been misplaced.

The expert concluded, "[t]he DSM criteria for alcohol and intoxication are not satisfied." He also concluded, "[t]he prosecution's observations in discovery were insufficient to indicate impairment due to intoxication within a reasonable degree of medical certainty. Additionally, there were medical conditions sufficient to cast doubt upon the results of the prosecution's findings, analysis and conclusions in this case."

Defendant also alleged trial counsel was ineffective for failing to object to inadmissible hearsay and opinion testimony. Specifically, defendant recounted how Officer Green had authenticated traffic tickets, including one for disregarding a red traffic light near the precinct, and others for reckless driving, refusal to submit to a breath test, and DWI. Defense counsel also failed to object to Officer Green's opinion that defendant had been driving recklessly, as well as her reading from the "State Police Drinking and Driving" report, where she noted defendant "grasping for support, . . . staggering . . . rambling a little bit . . . bloodshot eyes, flushed face . . . just kind of slow and the smell of alcohol."

In its January 27, 2017 written opinion, the trial judge denied defendant's petition without first conducting an

evidentiary hearing. The judge determined defense counsel "opted not to engage with an expert as part of his defense strategy." The judge further concluded, contrary to defendant's assertions, the testimonial evidence complained of by defendant was "not hearsay, within the scope of expert opinion and tended to prove a fact of consequence in this litigation – that the defendant was intoxicated." Again, the judge determined defense counsel's choice not to object was a matter of trial strategy.

On appeal, defendant raises essentially the same arguments as he made to the trial judge. We review his arguments under well-established standards.

"A petitioner must establish the right to [post-conviction] relief by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992). To sustain their burden, the petitioner must set forth specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

To establish a PCR claim that trial counsel was constitutionally ineffective, a defendant must prove two elements: first, that "counsel's performance was deficient," that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; second, that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694 (1984); accord State v. Fritz, 105 N.J. 42, 58 (1987). To prove the first element, a defendant must "overcome a strong presumption that counsel exercised reasonable professional judgment and sound trial strategy in fulfilling his responsibilities." State v. Nash, 212 N.J. 518, 542 (2013) (citation omitted). To prove the second element, a defendant must demonstrate "how specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

A defendant must do more than make bald assertions that he was denied effective assistance of counsel; he must allege specific facts sufficient to demonstrate counsel's alleged substandard performance. State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

Whether a PCR hearing on an ineffective assistance of counsel petition is necessary is a matter within the court's discretion. See Preciose, 129 N.J. at 462; see also Rule 3:22-10(b) ("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.").

We discern no abuse of discretion on the part of the trial judge in denying defendant's PCR petition without an evidentiary hearing. The expert report submitted with defendant's PCR petition appears to be a generic report that has little application to defendant's case. For example, the expert discusses why the field sobriety tests are not reliable, even though in this case defendant refused to perform them. And though the expert asserted "there were medical conditions sufficient to cast doubt on the results of the prosecution's findings, analysis, and conclusions in this case," defendant provided no certification as to any such medical conditions. Cummings, 321 N.J. Super. at 170 ("[W]hen a petitioner claims his trial attorney inadequately investigated his case, he must assert the facts that an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification.").

Moreover, the expert based his opinion mostly on DSM criteria. He apparently did not interview defendant and had no knowledge of how much alcohol defendant had consumed. The expert did not address the odor of alcohol on defendant's breath, his imbalance


and staggering, his flushed face, or his slurred speech in the context of defendant speeding through the fog in a twenty-five mile per hour speed limit zone while disregarding red traffic lights. In view of such glaring omissions, we cannot conclude defendant established a prima facie case that but for defense counsel's failure to investigate the use of an expert, the trial result would have been different. Fritz, 105 N.J. at 58.

Defendant also contends his trial counsel was ineffective for failing to object to the following: Officer Washington reading from the State Police Drinking and Driving report concerning her observations of defendant's appearance and demeanor; Officer Green opining defendant's conduct was reckless; and the State introducing motor vehicle summonses for various traffic offenses, including reckless driving and refusal to submit a breath sample. Having considered these arguments in light of the record, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2). We add only that the three officers who opined defendant was intoxicated based their impressions on first-hand observations that amply supported their lay opinions. N.J.R.E. 701. Their testimony, considered in view of defendant's operation of the taxicab, refusal to take field sobriety tests, and refusal to submit to a breath test, rendered

harmless any error based on trial counsel's failure to object to
the testimony defendant now cites.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION