SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3102-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DASHAWN GREENE, a/k/a SHAWN GREEN, DASWN GREENE, SEAN GREENE, SHAWN GREENE, DARREL McMILLAN and ANTHONY MIDDLETON,

Defendant-Appellant.

Submitted April 10, 2018 – Decided May 15, 2018

Before Judges Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 12-01-0190.

Joseph E. Krakora, Public Defender, attorney for appellant (David J. Reich, Designated Counsel, on the brief).

Andrew C. Carey, Middlesex County Prosecutor, attorney for respondent (Patrick F. Galdieri, II, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals the denial of his petition for post-conviction relief (PCR), arguing:

> THE TRIAL COURT ERRED IN DENYING [DEFENDANT'S] PETITION FOR [PCR] WITHOUT AN EVIDENTIARY HEARING CONCERNING HIS CLAIM THAT HIS COUNSEL'S FAILURE TO EXERCISE REASONABLE DILIGENCE TO SECURE HIS ADMISSION TO DRUG COURT AS AN ALTERNATIVE TO INCARCERATION VIOLATED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

We conclude these arguments are meritless and affirm.

Absent an evidentiary hearing, our review of the factual inferences drawn by the PCR court from the record is de novo. State v. Blake, 444 N.J. Super. 285, 294 (App. Div.), certif. denied, 226 N.J. 213 (2016). Likewise, we review de novo the PCR court's legal conclusions. Ibid.

To establish a PCR claim of ineffective assistance of counsel, a defendant must satisfy the test formulated 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), first by showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687); then by proving he suffered prejudice due to counsel's deficient performance, Strickland, 466 U.S. at 687, 691-92. Defendant must show by a "reasonable probability" that the

deficient performance affected the outcome. Fritz, 105 N.J. at 58.

Defendant pleaded guilty in June 2013 to third-degree possession with intent to distribute controlled dangerous substances in a school zone. N.J.S.A. 2C:35-7(a). The plea agreement provided defendant would be sentenced to a six-year prison term during which he would he ineligible for parole for three years.[1] The judge noted defendant had a pending Drug Court application; although defendant had been legally accepted, he was not clinically cleared. The judge set sentencing for early September, deducing that would allow enough time to resolve the clinical issue which defense counsel said was going to be "worked out very shortly." Defendant acknowledged that the plea agreement was not contingent upon his acceptance into Drug Court and that if he failed to appear for sentencing he would face a ten-year prison sentence, for half of which he would be parole ineligible. See State v. Subin, 222 N.J. Super. 227, 238-40 (App. Div. 1988) (approving plea agreement terms that provide for an increased sentence when a defendant fails to appear for sentencing).

[1] The record is not clear, but the judge surmised defendant was subject to a mandatory extended—term sentence under N.J.S.A. 2C:43-6(f) — to which defendant agreed.

Notwithstanding the issuance of a bench warrant for defendant's failure to appear on the September sentencing date, sentencing was rescheduled five times to allow defendant to resolve the Drug Court application issues; as the judge recognized, on each of those adjourned dates, defendant was advised by the judge "in the presence of his attorney . . . [that] he needed to get this information" for the Drug Court.[2] The judge later recounted: "[E]ach time we came to [c]ourt, in the presence of his client, [c]ounsel told me, I'm still waiting for [defendant] to give me

[2] The Drug Court clinical evaluator's report of February 4, 2013 noted defendant's diabetes diagnosis and related prescriptions, and that a doctor in Clifton had prescribed Methadone for defendant's "back pain related to 'calcium build up,'" without any knowledge of defendant's heroin use. The evaluator wrote:

> Client was advised that this [c]linician needs the following [m]edical [d]ocumentation:
>
> - A letter advising whether or not he can titrate from the Methadone and be prescribed a non-narcotic medication for pain management issues.
> - Most recent A1C panel that supports his report that his diabetes is within normal range.
> - Updated [m]edication [l]ist for all the biomedical complications he is receiving medication for.

this information so I can [submit it to Drug Court]." Defendant appeared in court on February 28, 2014, but fled before sentencing. As his counsel said at the June 6, 2014 sentencing — after defendant was arrested on the bench warrant issued on February 28 — "he disappeared. I couldn't get a hold of him, I didn't know where he was, he never -- I haven't seen or heard from him except for today." The judge meted out an eight-year prison term with four years of parole ineligibility.[3]

Setting aside that defendant was directed to obtain the necessary documentation for Drug Court and remained incommunicado with his defense counsel,[4] and countenancing defendant's argument that counsel should "have taken the necessary proactive steps to obtain a satisfactory resolution" to the Drug Court application process, defendant has still not produced the documents required by Drug Court. He has failed to show that counsel's alleged deficient performance would have changed the result. In short, he still has not shown he could have been clinically cleared for

[3] We affirmed the sentence on our excessive sentencing calendar. State v. Greene, No. A-4920-14 (App. Div. Dec. 15, 2015).

[4] At sentencing, defense counsel told the court, "I've done everything I could do for him. I even went to Drug Court again today to see what I can do. They are not going to accept him and they look very unfavorabl[y], as I know Your Honor does[,] that . . . he fled the last time."

Drug Court. As the judge found in ruling on defendant's PCR application: "I don't have any medical records, I don't have any -- any previous records that [were] the subject of what the TASC[5] evaluator was looking for and that could have been retrieved and hadn't been retrieved." That deficiency also renders meritless defendant's claim of error for failing to submit a Drug Court appeal. He, again, has failed to show a reasonable probability that the motion would have been successful. See State v. Roper, 362 N.J. Super. 248, 255 (App. Div. 2003) (holding "[i]n an ineffective assistance claim based on failure to file a suppression motion, the prejudice prong requires a showing that the motion would have been successful"). Defendant's unsubstantiated claims do not satisfy the second Strickland-Fritz prejudice prong.

We determine the balance of defendant's arguments — especially his claim that he was compelled to plead guilty while the Drug Court application was still pending — lack sufficient merit for discussion in this opinion. R. 2:11-3(e)(2). We add, defendant did not present a prima facie case in support of his PCR application by demonstrating "the reasonable likelihood of succeeding" under the test set forth in Strickland, to warrant an evidentiary hearing. State v. Preciose, 129 N.J. 451, 462-63

[5] Treatment Assessment Services for the Courts.

(1992); R. 3:22-10(b). Nor is an evidentiary hearing to be used to — in defendant's words — "explore" PCR claims. See State v. Marshall, 148 N.J. 89, 157-58 (1997).

Affirmed.