SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3249-16T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELIJAH MORALES,

Defendant-Appellant.

Submitted February 7, 2018 – Decided February 27, 2018

Before Judges Koblitz and Suter.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Indictment No. 14-08-0679.

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

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Christopher W. Hsieh, Chief Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Elijah Morales appeals the March 7, 2017 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

On January 1, 2014, an off-duty Paterson City police officer, in uniform, and his cousin were trying to disperse a crowd gathered outside of the Main Street Lounge. Defendant fired a handgun in the direction of the officer and his cousin. The officer shot back, hitting defendant in the arm. The shooting was captured on videotape.

In May 2015, defendant pled guilty to two counts of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a) (Counts One and Four), and to second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(a) and (b)(1) (Count Thirteen).

At the plea hearing, the judge explained that under the plea, defendant would be required to serve a minimum of fourteen years, five months and four days. Defendant was advised that he could be sentenced to an extended term based on his criminal record if the case were tried and he was convicted. Upon questioning, defendant denied being forced, threatened, or coerced to plead guilty. He stated he was satisfied with his attorney's services.

Defendant provided a factual basis for the plea. He admitted that he fired at least six rounds at the police officer and his cousin and that he was trying to kill them.

During his plea, defendant testified:

> PROSECUTOR: Mr. Morales, . . . let me take you back to the shooting. At one point you were

behind the bar, right? You were hunched over, you were loading the gun. Is that correct?

DEFENDANT: Yes.

PROSECUTOR: And that was a 22 caliber [Taurus]?

DEFENDANT: Yes

PROSECUTOR: And after that point you knew that there was an officer who was, he was you could see that he was an officer. He was wearing officer clothing. Right?

DEFENDANT: Yes.

PROSECUTOR: He was in uniform?

DEFENDANT: Yes.

PROSECUTOR: And he was trying to get the crowd to disperse. Is that correct?

DEFENDANT: Yes

PROSECUTOR: And you knew he was an officer? You knew he was a Paterson officer because you could see his full uniform. Right,

DEFENDANT: Yes.

. . . .

PROSECUTOR: And you fired at least six rounds?

DEFENDANT: Yes.

PROSECUTOR: Okay. And when you did that it was your purpose to cause their death? As the Judge had asked you intended to kill them. Is that correct?

DEFENDANT: Yes.

In July 2015, defendant was sentenced to two concurrent seventeen years in prison on the two counts of attempted murder, subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. He also was sentenced to a concurrent ten-year term with five years of parole ineligibility on the certain person's charge. The remaining charges in the indictment were dismissed.

Defendant filed a direct appeal, arguing that his sentence was excessive. We affirmed his sentence in State v. Morales, No. A-1590-15 (App. Div. May 4, 2016).

In June 2016, defendant filed a PCR petition in which he raised a claim of ineffective assistance of counsel, alleging that he was pressured by his attorney to testify during the plea hearing that he knew the victim was a police officer. Defendant alleged his plea was "not voluntary, knowing[] or intelligent[]" and otherwise would not have "been what it was." This petition was supplemented by a letter brief from PCR counsel. In addition to alleging ineffective assistance of counsel, defendant alleged his trial counsel failed to challenge his sentence as disparately imposed. Defendant cited to two other cases where he alleged those defendants received eight-year sentences for the same offenses. Defendant requested a post-conviction hearing.

On March 7, 2017, the PCR court denied defendant's petition without an evidentiary hearing. In rejecting defendant's claim

of ineffective assistance of counsel, the court did not find counsel's performance was deficient. The plea was reasonable given defendant's possible extended term sentencing of "[twenty years] to life" on all the charges. The court stated that "the status of the victim being a police officer ha[d] no bearing on the sentence." Defendant was not entitled to an evidentiary hearing because he had not shown a prima facie case of ineffective assistance of counsel.

The PCR court also rejected Defendant's claim of disparate sentencing, applying the two prong test set forth in State v. Roach, 146 N.J. 208, 232 (1996).

Defendant presents the following issue for our consideration in his appeal.

> MR. MORALES IS ENTITLTED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT HIS ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

We are not persuaded by defendant's arguments and affirm.

The standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment was formulated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by our Supreme Court in State v. Fritz, l05 N.J. 42 (l987). In order to prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test of establishing both that: (l) counsel's performance was deficient and he or she made errors

that were so egregious that counsel was not functioning effectively as guaranteed by the Sixth Amendment to the United States Constitution; and (2) the defect in performance prejudiced defendant's rights to a fair trial such that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

In the guilty plea context, "a defendant must prove 'that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial.'" State v. Gaitan, 209 N.J. 339, 351 (2012) (alteration in original) (quoting State v. Nunez-Valdez, 200 N.J. 129, 139 (2009)), and that "a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010). We agree with the PCR court that defendant's claims did not meet the standards under Strickland and Fritz.

Defendant has not shown a prima facie claim under the Strickland/Fritz test. Defendant's allegation that he was pressured by trial counsel to say that one of the victim's was a police officer was not supported by the record. At sentencing, the judge said that the officer's uniform could be seen on the videotape of the shooting. By accepting the State's offer to

plead guilty in exchange for a recommended sentence of seventeen years on both Counts One and Four to be served concurrently, defendant avoided the potential prejudice of a longer sentence. Defendant never alleged that he would have proceeded to trial in this case, just that the plea would be different.

We agree that defendant's allegation of disparate sentencing was without merit especially in the context of PCR. It is an issue that should be raised on direct appeal. See R. 3:22-4(a)(1). We already have affirmed defendant's sentence.

We are satisfied from our review of the record that defendant failed to make a prima facie showing of ineffectiveness of trial counsel within the Strickland/Fritz test. Accordingly, the PCR court correctly concluded that an evidentiary hearing was not warranted. See State v. Preciose, 129 N.J. 451, 462-63 (1992).

Affirmed.