SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4766-15T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AMIR W. KREPS, a/k/a AMIR JOHNSON
and AMIR WASSIM KREPS,

Defendant-Appellant.

Submitted September 18, 2017 – Decided January 24, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Indictment No. 09-02-0580.

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

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

PER CURIAM

In this post-conviction relief (PCR) appeal, defendant Amir W. Kreps collaterally challenges his 2010 conviction, after a

guilty plea to three counts of first-degree robbery, N.J.S.A. 2C:14-1. Defendant admitted that he participated in the gunpoint robbery of two men, C.H. and M.G., and a woman, M.B., in Newark. Defendant also pleaded guilty to one count of aggravated criminal sexual contact, N.J.S.A. 2C:14-3(a); he admitted he touched the female victim's breasts. The PCR court granted relief as to the aggravated criminal sexual contact count, and the State subsequently dismissed that count, after the PCR court found defendant had not provided a sufficient factual basis for his plea, because he did not address the state-of-mind element of the offense. However, the PCR court rejected defendant's challenge to the robbery convictions.

On appeal, defendant raises the following points for our consideration.

> POINT I
>
> THIS COURT MUST VACATE DEFENDANT'S PLEA IN ITS ENTIRETY BECAUSE THE PCR COURT DETERMINED THAT THE DEFENDANT DID NOT PROVIDE AN ADEQUATE FACTUAL BASIS FOR THE THIRD-DEGREE AGGRAVATED CRIMINAL SEXUAL CONTACT, N.J.S.A. 2C:14-3(A)(6) (COUNT FIFTEEN), CHARGE (NOT RAISED BELOW).
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> POINT II
>
> THE PCR COURT'S ORDER THAT DENIED DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF IN PART MUST BE REVERSED BECAUSE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PROCEEDINGS BELOW.

A. Appellate Counsel's Failure to Challenge Judge Bernstein's December 18, 2008 Order That Denied Defendant's Motion to Suppress Evidence Constituted Ineffective Assistance of Counsel.

B. Trial Counsel's Failure To Challenge The Reliability of the Out-Of-Court Identifications Made By [M.B., C.H. and M.G.] Constituted Ineffective Assistance Of Counsel.

C. Trial and Motion counsels Provided Ineffective Assistance of Counsel When They Failed to Interview and/or Obtain a Certification or Affidavit From Defendant's Alibi Witness.

D. PCR Counsel Provided Ineffective Assistance of Counsel By Failing to Properly Present the Identification Issue and By Failing to Obtain an Affidavit or Certification from Defendant's Aunt (Not Raised Below).

POINT III

THIS COURT SHOULD REMAND THE MATTER FOR AN EVIDENTIARY HEARING.

We review de novo the PCR court's denial of relief without an evidentiary hearing. State v. Harris, 181 N.J. 391, 421 (2004). As we discern no merit in defendant's points on appeal, we affirm.

In return for his guilty plea, the State agreed to dismiss a certain persons charge, and related firearms charges, and recommend an aggregate thirteen-year sentence, consisting of three concurrent thirteen-year sentences on the robbery counts, subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, concurrent with

a five-year sentence on the aggravated criminal sexual contact count, subject to Megan's Law and Parole Supervision for Life. After denying defendant's motion to withdraw his plea, the trial court sentenced defendant in accord with the plea agreement. On direct appeal, we affirmed the denial of his motion, and affirmed the sentence. State v. Kreps, No. A-6008-09 (App. Div. Nov. 14, 2011).

Defendant contends, for the first time on PCR appeal, that his entire plea must be vacated because the sexual offense conviction was vacated. We disagree. First, neither the State nor the PCR court had the opportunity to consider defendant's newly minted contention, which may have affected the court's analysis. For that reason alone, we reject defendant's argument. See State v. Arthur, 184 N.J. 307, 327 (2005); Neider v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Second, defendant misplaces reliance on State v. Ashley, 443 N.J. Super. 10, 22-23 (App. Div. 2015), which addressed, on direct appeal, the impact of vacating guilty pleas to attempted murder and conspiracy — for an inadequate factual basis — on a guilty plea to aggravated assault. Unlike the defendant in Ashley, who sought to withdraw his plea, defendant seeks PCR. See State v. O'Donnell, 435 N.J. Super. 351, 368-73 (App. Div. 2014) (reviewing distinctions between motion to withdraw plea and petition for

PCR). Defendant must show a substantial denial of his constitutional or legal rights. R. 3:22-2(a). As defendant did not assert a claim of innocence contemporaneous to his plea to aggravated criminal sexual contact, it is questionable whether that conviction should have been disturbed at all. See State v. Belton, ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 18-19) (stating that a court's failure to elicit a factual basis does not entitle a defendant to PCR absent a contemporaneous claim of innocence) (citing State v. Barboza, 115 N.J. 415, 421 n.1 (1989)).

In any event, defendant pleaded guilty to the robbery counts knowingly and voluntarily, upon providing a sufficient factual basis. Cf. Barboza, 115 N.J. at 415 n.1 (stating that a guilty plea is "constitutionally defective if it is not voluntary and knowing"). The court in Ashley held that the defendant's plea had to be vacated in its entirety, although he gave an adequate factual basis for the lesser charge, because the rejection of the plea to the more serious counts was "a material change to the reasons why he pled in the first instance." Ashley, 443 N.J. Super. at 22.

By contrast, vacating defendant's sexual offense conviction did not undermine defendant's plea to the robbery counts. At the outset of defendant's plea hearing, he hesitated to enter the plea agreement because he said he was unaware that he had to plead to a sex offense that would subject him to Megan's Law, although it

would not affect his aggregate sentence. However, defendant raised no objection to pleading to the robbery counts. The State's offer was a favorable one, considering defendant's much greater sentencing exposure, and that the State's proofs on the robbery counts were strong. All three victims identified defendant in a photo line-up; defendant and his co-defendant, Jason O'Neill, possessed the victims' property when police stopped them; and O'Neill implicated defendant in entering his own guilty plea, and was willing to testify against him at trial. There is no reason to believe that vacatur of the third-degree sexual offense would have made defendant less willing to plead guilty to the first-degree robbery counts pursuant to the plea agreement.

Defendant also contends he received ineffective assistance of counsel at various stages of his case. He asserts his plea counsel was ineffective by failing to move to exclude the victims' identification of him. He also argues the attorney who represented him on his motion to withdraw his plea was ineffective by failing to obtain an affidavit from an alleged alibi witness, his aunt. He contends appellate counsel was ineffective by failing to challenge the trial court's denial of his motion to suppress testimony about the traffic stop. And he contends, for the first time, his PCR counsel was ineffective by failing to obtain a certification from his aunt.

As did the trial court, we apply the two-pronged Strickland test, and determine whether counsel's performance was constitutionally deficient, and whether defendant suffered resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Fritz, 105 N.J. 42, 58 (1987). With respect to the prejudice prong, we must determine in this case whether defendant has demonstrated a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

It is not ineffective to withhold a meritless motion, or to refrain from making unsuccessful legal arguments. See State v. O'Neal, 190 N.J. 601, 619 (2007); State v. Worlock, 117 N.J. 596, 625 (1990). Furthermore, while the Constitution guarantees a defendant the right to effective assistance of appellate counsel on direct appeal, State v. O'Neil, 219 N.J. 598, 610 (2014), "appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant," State v. Morrison, 215 N.J. Super. 540, 549 (App. Div. 1987).

We are unpersuaded that appellate counsel was deficient, because we are not convinced that the trial court erred in denying the joint suppression motion. The police had reasonable and articulable suspicion to approach defendant's vehicle, which was

already stopped. Alerted about a nearby robbery of an elderly man (not the three victims defendant later admitted he robbed), plainclothes police officers in an unmarked police vehicle observed defendant and O'Neill run to a car and speed off; drive erratically; turn without a signal; and then come to a stop without police compulsion. The officers had ascertained that the vehicle belonged to a woman, but was not reported stolen.

The officers observed defendant and O'Neill actively engage in furtive movements. The officers approached the vehicle; obtained the occupants' identification; recognized O'Neill as a prior narcotics arrestee; and, for their safety, asked the occupants to exit the vehicle. The officers were justified in doing so. They had a reasonable and articulable suspicion to conduct an investigatory stop based on the observed traffic violation. See, e.g., State v. Locurto, 157 N.J. 463, 470 (1999) ("It is firmly established that a police officer is justified in stopping a motor vehicle when he [or she] has an articulable and reasonable suspicion that the driver has committed a motor vehicle offense."). Under the circumstances, the officers were also justified in asking the two men to exit their car. See State v. Bacome, 228 N.J. 94, 106-07 (2017) (stating "a police officer may order a passenger out of a vehicle if the officer can 'point to specific and articulable facts that would warrant heightened

caution to justify ordering the occupants to step out of a vehicle detained for a traffic violation'" (quoting State v. Smith, 134 N.J. 599, 618 (1994)).

Once the men exited the vehicle, the police observed, in plain view, a ladies purse and a wallet on the floor in front of the driver's seat; another wallet on the floor in front of the passenger's seat; and a cellphone and pair of athletic shoes in the console. As the officer testified, it was highly unusual for two men to possess a ladies purse; and to keep it on the driver's side floor. The surrounding circumstances only heightened their suspicion.

The officers reached into the vehicle to retrieve the wallets and purse. They were authorized to do so, based on the plain view exception to the warrant requirement, as they were lawfully in the viewing area, they discovered the items inadvertently, and they appeared to be contraband. See State v. Mann, 203 N.J. 328, 340-41 (2010) (holding that the plain view exception justified police entry into a vehicle to seize bags of what appeared to be drugs in plain view, notwithstanding the prior arrest of the suspect);

State v. Johnson, 171 N.J. 192, 206-07 (2002) (setting forth elements of plain view exception).[1]

Defendant's remaining arguments warrant only brief discussion. Defendant contends his attorney was ineffective by failing to file a motion to exclude the victims' identification of him. He cites minor discrepancies in the documentary record of the identification. However, none of these meet a threshold showing that the State engaged in impermissible suggestiveness sufficient to warrant a hearing, see State v. Ortiz, 203 N.J. Super. 518, 522 (App. Div. 1985), let alone satisfy the requirements then applicable for excluding an identification, see State v. Madison, 109 N.J. 223, 232 (1988) (requiring a showing that law enforcement used an impermissibly suggestive identification procedure and it resulted in a very substantial likelihood of irreparable misidentification); see also Manson v. Braithwaite, 432 U.S. 98, 114-16 (1977).

[1] The officers ultimately let defendant and O'Neill go after they offered an explanation — albeit it later proved to be false — for their possession of the items. However, that subsequent explanation does not vitiate the probable cause the officers had at the time of their brief seizure, to "associate the item[s] with criminal activity . . . ." Johnson, 171 N.J. at 213 (stating courts look "to what the police officer reasonably knew at the time of the seizure" in evaluating whether it was immediately apparent that the item was contraband).

Nor was there ineffective assistance by trial counsel in failing to interview defendant's aunt, whom defendant claimed was an alibi witness. We recognize that the "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction." State v. Porter, 216 N.J. 343, 353 (2013). Yet, "[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." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). Defendant has not done so. Rather, he presented a memorandum from an investigator — which is not included in the record before us. In any event, the aunt reportedly said that defendant arrived at her house sometime after 11:00 p.m. on the night of the robbery. That did not describe defendant's arrival with sufficient precision to directly controvert defendant's presence at a robbery before midnight.

To the extent not addressed, defendant's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.