SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0513-19
A-0514-19
A-0516-19
A-0517-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAWMEEN D. FITZGERALD,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOHN FITZGERALD, a/k/a DAVID L. MILLER, HODGE GREGORY, and JOHN D. FITZGERAID,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAWUD FITZGERALD,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DAWSHON T. FITZGERALD,

Defendant-Appellant.

Argued December 13, 2022 – Decided December 21, 2022

Before Judges Sumners, Geiger and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 03-08-0819.

Frank M. Gennaro, Designated Counsel, argued the cause for appellants (Joseph E. Krakora, Public Defender, attorney; Frank M. Gennaro, on the brief).

Meredith L. Balo, Assistant Prosecutor, argued the cause for respondent (William A. Daniel, Union County Prosecutor, attorney; Meredith L. Balo, of counsel and on the brief).

Appellant Dawmeen Fitzgerald filed a pro se supplemental brief.

Appellant Dawud Fitzgerald filed a pro se supplemental brief.

PER CURIAM

At the conclusion of a lengthy trial in 2005, defendants Dawmeen, Dawud, John, and Dawshon Fitzgerald were convicted of leading a narcotics trafficking network, N.J.S.A. 2C:35-3, and numerous other serious offenses. Judge William L'E. Wertheimer, who presided over the trial, sentenced John to life in prison plus forty years, with a fifty-year parole disqualifier, and sentenced the others to aggregate terms of life in prison plus 100 years, with sixty-five-year parole disqualifiers. All four appealed and, by a single opinion, we affirmed their convictions but remanded for resentencing, largely because of the impact of State v. Natale, 184 N.J. 458 (2005), which was decided three months after these defendants were sentenced. State v. Fitzgerald, Nos. A-5387-04, A-6158-04, A-6176-04, A-1282-05 (App. Div. June 30, 2008). The Supreme Court denied defendants' petitions for certification. 196 N.J. 597 (2008).

On resentencing, Judge Wertheimer resentenced Dawmeen and Dawud to the same aggregate prison terms. Dawshon received the same aggregate term but with a parole disqualifier of sixty instead of sixty-five years. John was

resentenced to life in prison plus twenty years with a thirty-five-year parole disqualifier.

Defendants filed timely post-conviction relief petitions. After hearing oral argument but without conducting an evidentiary hearing, Judge Wertheimer denied their PCR petitions by way of a written opinion, in which he determined that "[t]he vast majority" of defendants' arguments "should have been raised on appeal and not" by way of PCR petitions, and that, because in his many years on the bench he had not seen "such overwhelming evidence of each defendant's guilt," he found their arguments "absurd." We affirmed the denial of Dawshon's, Dawud's, and Dawmeen's PCR petitions in a comprehensive unpublished opinion, State v. Fitzgerald, Nos. A-5134-09, A-5810-09, A-5814-09 (App. Div. Feb. 15, 2012), certif. denied, 212 N.J. 459 (2012), and we affirmed the denial of John's PCR petition in a shorter unpublished opinion substantially for the reasons given by Judge Wertheimer, State v. Fitzgerald, No. A-1864-11 (App. Div. Oct. 30, 2013), certif. denied, 217 N.J. 588 (2014).

In late December 2018, defendants submitted pro se new-trial motions that were filed in early January 2019. These motions sought a new trial based on defendants' allegation that the State failed to provide in discovery the existence

and identity of confidential informants and that this failure constituted a violation of the principles enunciated in Brady v. Maryland, 373 U.S. 83 (1963).

Five months later, the motion judge entered an order that stated the new-trial motions were "voluntarily withdrawn and dismissed without prejudice" because they were "not based on newly discovered evidence," were "out of time," and lacked merit. On May 30, 2019, nine days after entry of the judge's order, attorneys with the Public Defender's Office who represented defendants each wrote to their clients and stated, in similar language, that their motions had to be based on newly-discovered evidence to be timely and that their claim that the State had failed to provide the identity and other information about a confidential informant was "nothing new[]." Defense counsel also recognized and stated that "none of the information regarding the confidential informants" was presented at trial, and

> [t]o say that the State failed to disclose the identity of confidential informants that were not used during your trial is harmless error at best. As such, there is nothing material about this evidence that would have affected the jury's verdict at all.

For these reasons, each attorney advised his or her client that "[o]n your behalf, I am going to withdraw your motion," even though the judge's order that both

memorialized the withdrawal and denied relief on the merits had already been entered.

Defendants timely moved for reconsideration, arguing they did not consent to the withdrawal or voluntary dismissal of their motions and that the judge's disposition of their motions on that basis or otherwise was erroneous. By way of a written decision, the judge denied those reconsideration motions.

Defendants appeal, arguing in a consolidated brief filed by the Public Defender:

> THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING DEFENDANTS' MOTION[S] FOR A NEW TRIAL, BECAUSE THE COURT MISAPPLIED THE LEGAL PRINCIPLES SET FORTH IN BRADY v. MARYLAND; AND BECAUSE THE SUMMARY DISMISSAL DENIED DEFENDANTS THEIR CONSTITUTIONAL RIGHT TO COUNSEL.

On John's behalf only, the Public Defender also argues:

> THE TRIAL COURT ERRED IN REFUSING TO REVOKE THE FINANCIAL PENALTIES IMPOSED ON JOHN FITZGERALD ON THE GROUND OF FINANCIAL HARDSHIP.

In a pro se brief, Dawud argues:

> I. (A) THE COURT ABUSED ITS DISCRETION BY RELYING ON THE OFFICE[] OF THE PUBLIC DEFENDER'S ANALYSIS TO WITHDRAW[] APPELLANT'S MOTION FOR NEW TRIAL AND USED THE SAME ANALYSIS TO DEN[Y]

APPELLANT'S MOTION FOR RECONSIDERATION; (B) THE COURT ERRED BY FAILING TO CONDUCT A HEARING [] ACCORDING TO [RULE] 1:2-1 AND [RULE] 1:7-4(a)(b) PERTAINING TO APPELLANT'S BRADY CLAIMS, WHICH WAS A DENIAL OF DUE PROCESS OF THE FIFTH AND FOURTEENTH AMENDMENT(S) OF THE CONSTITUTION; THEREFORE, THE CONVICTION SHOULD BE REVERSED AND THE 21 COUNTS OF THE INDICTMENT DISMISSED.

II. THE OFFICE OF THE PUBLIC DEFENDER DENIED APPELLANT COUNSEL BY DRAFTING A LETTER TO THE COURT TO WITHDRAW[] APPELLANT'S PRO SE BRIEF WITHOUT APPELLANT['S] "VOLUNTARY CONSENT" WHEN APPELLANT'S PRO SE BRIEFS SET FORTH MERITO[]RIOUS BRADY CLAIMS, WHICH WAS A DENIAL OF COUNSEL AND DENIED APPELLANT DUE PROCESS OF THE SIXTH, FIFTH AND FOURTEENTH AMENDMENT(S) OF THE CONSTITUTION; THEREFORE, THE CONVICTION SHOULD BE REVERSED AND THE 21 COUNTS OF THE INDICTMENT DISMISSED.

III. THE RESPONDENT DENIED APPELLANT DUE PROCESS BY ALLOWING ITS CASE TO GO FORWARD WHEN THE RESPONDENT ESTABLISH[ED] NO FACTS TO SUBSTANTIATE AN ONGOING INVESTMENT, WHEN 19 ITEMS WERE SUPPRESSED TO SUPPORT AN ONGOING INVESTIGATION EXISTENCE, WHICH WAS A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT(S) OF THE CONSTITUTION; THEREFORE, THE CONVICTION SHOULD BE REVERSED AND THE 21 COUNTS OF THE INDICTMENT DISMISSED.

> IV. THE RESPONDENT'S FAILURE TO DISMISS[] 21 COUNTS OF THE INDICTMENT RESULTED [IN] CRUEL AND UNUSUAL PUNISHMENTS INFLICTED ON APPELLANT AND THE APPELLATE DIVISION SHOULD TAKE ORIGINAL JURISDICTION, APPELLANT WAS DENIED DUE PROCESS OF THE EIGHTH, FIFTH AND FOURTEENTH AMENDMENT(S) OF THE CONSTITUTION; THEREFORE, THE CONVICTION SHOULD BE REVERSED AND THE 21 COUNTS OF THE INDICTMENT[] DISMISSED.

We find insufficient merit in these arguments to warrant discussion in a written opinion, R. 2:11-3(e)(2), adding only the following brief comments.

We start by stating the obvious. The strength of defendants' arguments about the denial of reconsideration rises only as high as the worth of their arguments about their new-trial motions, and vice versa. In other words, if the new-trial motions were meritorious, then the judge erred in denying reconsideration and, if the new-trial motions lacked merit, then the judge properly denied the reconsideration motions. Having considered the parties' arguments, we conclude that defendants' new-trial motions were untimely and properly dismissed;[1] there was, therefore, no merit to their reconsideration motions.

[1] So, we need not discuss whether the judge correctly viewed those motions as properly withdrawn by defense counsel or whether the actions taken by defense

Rule 3:20-2 declares that a new-trial motion "on the ground of newly-discovered evidence may be made at any time . . ."; all other new-trial motions must be made "within 10 days after the verdict or finding of guilty, or within such further time as the court fixes during the 10-day period." It follows from the Rule's unambiguous declaration that defendants' pro se motions – filed more than thirteen years after the verdict – were not cognizable unless based on newly-discovered evidence.

There is also no doubt that these new-trial motions were not based on newly-discovered evidence. They were instead based on a newly-minted allegation that the State violated the principles set down in Brady v. Maryland by failing to provide the identity of a confidential informant who provided the State with information used to obtain a wiretap that produced evidence admitted at trial. There is no dispute that defendants were aware prior to trial of the existence of a confidential informant. And, while there is no dispute that the State did not reveal the informant's identity, it is also clear that the defense never sought the informant's identity prior to trial. See, e.g., Fitzgerald, No. A-5134-

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counsel to withdraw the pro se motions deprived defendants of their constitutional right to the effective assistance of counsel.

09 (slip op. at 20-21) (arguing the ineffectiveness of counsel for not seeking, prior to trial, disclosure of the confidential informant's identity).

It is also far from certain that defendants would have obtained that information if sought prior to trial. Our courts recognize the "indispensable role in police work" played by informants, and the well-established principle that the State's right to withhold the disclosure of an informant's identity "has long been considered essential to effective enforcement of the criminal code." State v. Desir, 245 N.J. 179, 194 (2021) (quoting State v. Williams, 356 N.J. Super. 599, 603 (App. Div. 2003)). For that reason, it is unlikely the defense would have obtained this information – that defendants now claim is newly-discovered evidence – if sought prior to trial. Presumably, had the information then been sought, the State would have asserted its privilege and the trial court would have engaged in the balancing test described in cases like Roviaro v. United States, 353 U.S. 53, 62 (1957) and State v. Milligan, 71 N.J. 373, 384 (1976). None of this ever occurred and defendant's Brady argument, which could have been asserted many years ago, may not now serve as a ground upon which a new-trial motion could be validly based.

To repeat, the new-trial motions were not based on newly-discovered evidence but on a newly-minted allegation that would likely never have

uncovered the evidence that defendants now argue is relevant. So viewed, we reject the argument that the motion was timely under Rule 3:20-2.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION