SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1808-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

BRYAN BURFORD,
a/k/a BIG B,

Defendant-Appellant.

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Submitted April 25, 2022 – Decided June 15, 2022

Before Judges Sabatino and Rothstadt.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 14-06-1117.

Joseph E. Krakora, Public Defender, attorney for appellant (Phuong V. Dao, Designated Counsel, on the brief).

Lori Linskey, Acting Monmouth County Prosecutor, attorney for respondent (Alecia N. Woodard, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Bryan Burford appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

Defendant pled guilty pursuant to a plea agreement to first-degree manslaughter, N.J.S.A. 2C:11-4(a)(1). On June 1, 2017, the trial judge imposed a sentence, in accordance with defendant's plea agreement, of eighteen years imprisonment, subject to a period of parole ineligibility under the No Early Release Act, N.J.S.A. 2C:43-7.2. Defendant did not file a direct appeal from his conviction or sentence.

The facts leading to defendant's conviction are summarized from the record as followed. On August 13, 2013, while intending to shoot a different person, defendant shot and killed his friend. After shooting six times, defendant got closer to his victim. When he realized it was his friend, he shot him one more time and fled. Defendant was later apprehended and charged in an indictment with one count of first-degree murder, N.J.S.A. 2C:11-3(a)(1); one count of first-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); one count of second-degree possession of a weapon for an unlawful purpose,

N.J.S.A. 2C:39-4(a); and one count of second-degree certain persons not to have weapons, N.J.S.A. 2C:39-7(b)(1).

While his case was pending, defendant was charged in another indictment with the additional offense of attempted tampering with a witness or informant, N.J.S.A. 2C:28-5(a). The charge arose from his alleged attempt to prevent two witnesses from testifying against him.

Prior to being indicted for his friend's murder, and pertinent to his PCR petition, law enforcement officers caused a baseball cap recovered from the crime scene to be subjected to DNA testing. DNA reports issued in January and February 2014 stated that, although a CODIS search matched defendant to a DNA profile from the cap, without additional information—"a buccal swab reference" from defendant—"[n]o conclusion can be reached regarding [defendant] as a possible contributor to the DNA profile(s) identified in the casework samples." No further action was taken regarding the reports.

On the day this matter was scheduled to be tried, defendant pled guilty. In a prior offer, the State proposed defendant plead guilty in exchange for the State's recommendation that he be sentenced to life with a thirty-year parole ineligibility. This time, in response to defendant's trial counsel's actions, the State offered to recommend eighteen years, which defendant accepted.

During his plea hearing, defendant admitted to the shooting and confirmed his review, signing, and initialing of the plea agreement with counsel, as well as his satisfaction with his counsel with whom he stated he did not need additional time to consult. Further, defendant confirmed he reviewed all discovery with his counsel before pleading guilty. Based on defendant's testimony, the trial judge accepted defendant's plea and, as already noted, later sentenced defendant in accordance with his plea agreement.

In his ensuing pro se PCR petition, defendant stated he received the ineffective assistance of counsel (IAC) because his counsel failed to "challenge analyst of DNA" testing, "did not provide applicable procedures for ballistics reports," and failed to "file pre-trial motions." He also contended that "questions [had] been raised in [a] probable cause hearing [but were] excluded from transcript[]s," and that his "first attorney created a conflict of interest by compelling [defendant] to accept a plea."

In a brief later filed on defendant's behalf by PCR counsel, defendant also argued that he received IAC because trial counsel failed to conduct "a thorough investigation into the merits of [defendant's] case and to discuss trial strategy in order to challenge the State's proofs," and failed to "communicate with [defendant] during the course of their plea discussions in order for [defendant]

to determine what [was] in his best interest." He also argued that he was entitled to an evidentiary hearing on his petition and that it was not procedurally barred.

Relative to this appeal from the denial of PCR, in an amended petition for PCR, PCR counsel asserted that, according to defendant, "[trial] counsel did not thoroughly review discovery and discuss trial strategy with [defendant] in order to challenge the DNA . . . [r]eports. In particular, . . . counsel failed to challenge the DNA analysis of the baseball hat that was located at the scene of the offense that revealed [defendant's] DNA." In the supporting brief filed on his behalf, PCR counsel reiterated the same contention. According to defendant, "[i]f trial counsel [had] discussed trial strategy with [defendant] and challenged the State's proofs, there is a reasonable likelihood that the State would have presented a more favorable plea offer."

On July 21, 2020, Judge Paul X. Escandon considered the parties' oral arguments on defendant's petition. On August 4, 2020, the judge entered an order denying defendant's petition without an evidentiary hearing. The order was accompanied by an eighteen-page, supporting opinion.

In his opinion, Judge Escandon concluded defendant's claim that trial counsel failed to conduct investigations was unsupported by any evidence of what such an investigation would have revealed and was otherwise belied by the

record. Citing State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999), the judge concluded "[d]efendant's claim is nothing more than a bald assertion. Defendant fail[ed] to provide affidavits, certifications or any other evidence to establish that [trial] counsel failed to communicate with any witnesses." And, in any event, citing State v. Porter, 216 N.J. 343, 350 (2013), he observed that defendant had not "shown what these witnesses would say that would have changed the outcome of the case." Moreover, in light of the favorable plea offer secured by trial counsel, the judge found that defendant failed to prove the second prong under the Strickland/Fritz test.[1] He stated, defendant "has not

[1] As explained by Judge Escandon in his opinion, the standard for determining whether counsel's performance was ineffective for purposes of the Sixth Amendment to the United States Constitution was 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, 49 (l987). In order to prevail on a claim of IAC, 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; and (2) the defect in performance prejudiced defendant's right 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 687, 694.

This two-prong analysis applies equally to convictions after a trial or after a defendant pleads guilty. In the context of a PCR petition challenging a guilty plea, the first Strickland prong is satisfied when a defendant establishes a reasonable probability he or she would not have pled guilty but for counsel's errors. State v. Gaitan, 209 N.J. 339, 351 (2012). The second prong is met when

shown that but for counsel's failure to reach out to the alleged recanting witnesses, there would have been a better plea offer or even more favorable resolution of these charges."

Judge Escandon also found that defendant's claims about counsel not conferring with defendant were belied by the record of the plea hearing. He concluded that not only did "defendant admit[] under oath he went over his entire case with [trial] counsel," but also "[c]ounsel was able to present a reasonable defense[as demonstrated by] win[ning] a [m]otion to suppress [a] witness identification [of defendant]."

Addressing defendant's argument about counsel's failure to secure a DNA expert, the judge found defendant's contention that "the State would have offered a better plea deal because an expert would have found some deficiencies in the DNA report" was totally unsupported. He added the following:

> [Defendant] does not say what deficiencies there were. Defendant also fails to establish that there was a reasonable probability that had an expert been contacted the result would have been different. Defendant's claim is nothing more than a bald assertion.

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a defendant establishes a reasonable probability he or she would have insisted on going to trial. Ibid. "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." Lee v. United States, 137 S. Ct. 1958, 1967 (2017).

> Defendant provides no proof that the State would have offered a different plea had an expert challenged the DNA . . . report. . . . .
>
> Defendant fails to provide specific facts to which the expert would have discovered or testified. Defendant asks this Court to presume that he would have received a better deal and a reduced sentence, if the expert would have challenged the DNA report. Since prejudice must be proved and cannot be presumed, defendant fails to meet this prong of the test.

Having concluded that defendant failed to meet his burden under Strickland/Fritz to make a prima facie showing of IAC, the judge, citing State v. Preciose, 129 N.J. 451 (1992), concluded defendant was not entitled to an evidentiary hearing. This appeal followed.

On appeal, defendant argues the following points:

> POINT I
>
> BECAUSE DEFENDANT RECEIVED [IAC], HE WAS PREJUDICED BY NOT HAVING EXPERT DNA ANALYSIS, AND THEREFORE, HE IS ENTITLED TO [PCR].
>
> A. IN LIGHT OF CONFLICTING DNA REPORTS DATED JANUARY 2014 AND FEBRUARY 2014, TRIAL COUNSEL SHOULD HAVE OBTAINED EXPERT INDEPENDENT DNA ANALYSIS.
>
> B. BECAUSE TRIAL COUNSEL FAILED TO MAKE A FULL INVESTIGATION INTO THE

DNA FOUND ON THE BASEBALL CAP, DEFENDANT'S GUILTY PLEA COULD NOT HAVE BEEN KNOWINGLY AND VOLUNTARILY ENTERED.

POINT II

DEFENDANT HAS MADE A PRIMA FACIE SHOWING OF [IAC], AND THUS, THE PCR COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING.

We are not persuaded by any of defendant's arguments.

In our review, "where the [PCR] court does not hold an evidentiary hearing, we may exercise de novo review over the factual inferences the trial court has drawn from the documentary record." State v. Lawrence, 463 N.J. Super. 518, 522 (App. Div. 2020) (alterations in original) (quoting State v. O'Donnell, 435 N.J. Super. 351, 373 (App. Div. 2014)). "We [also] review a PCR court's legal conclusions de novo." Ibid. (citing State v. Harris, 181 N.J. 391, 415-16 (2004)).

We conclude from our de novo review of the record that defendant failed to make a prima facie showing of IAC within the Strickland/Fritz test. Accordingly, Judge Escandon correctly concluded that an evidentiary hearing was not warranted. See Preciose, 129 N.J. at 462-63. We affirm substantially for the reasons expressed by the judge in his comprehensive written decision. We only add our observation that the DNA reports upon which defendant relies

did not inculpate defendant. Even if they had, as Judge Escandon correctly concluded, defendant did not establish what a DNA expert that counsel should have hired would have determined and how that finding would have resulted in a better plea offer or supported a decision to not plead guilty. We have no cause to disturb the result here.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION