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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2149-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LA-QUANE B. CURRY,

Defendant-Appellant.

Submitted May 11, 2022 – Decided June 9, 2022

Before Judges Hoffman, Whipple and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Accusation No. 17-09-0907.

Joseph E. Krakora, Public Defender, attorney for appellant (David A. Gies, Designated Counsel, on the briefs).

Esther Suarez, Hudson County Prosecutor, attorney for respondent (Lillian Kayed, Assistant Prosecutor, on the brief).

PER CURIAM

Defendant La-Quane B. Curry appeals from the November 5, 2020 order of the Law Division denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

We derive the following facts from the record. On August 4, 2017, in the late evening, Jersey City police officers pulled over defendant's gray Dodge Charger, after receiving a report that a similar vehicle was involved in an armed robbery nearby. The victims described the perpetrators as four black men, wearing blue bandanas, and driving a black Dodge Charger.

Several officers approached the passenger's side of the Dodge Charger with weapons drawn, while other officers approached the driver's side. Sergeant Dennis Winters and Officer Kevin Wendolowski ordered defendant, who was driving the vehicle, to turn the engine off. Officer Matt Lowenwirth advised the vehicle's remaining three occupants to place their hands outside of the windows. The officers then removed the occupants from the vehicle.

When Officer Lowenwirth removed the rear passenger-side occupant, he noticed the occupant attempting to "close down [the] seat by rapidly pressing his back against it and planting his feet on the floor and pushing back." Another officer then completed the removal of the occupant; at that point, as he was being

removed, the fold-down seat remained open. After the officer escorted the individual away from the vehicle, another officer observed a gun located on the open fold-down seat. In addition, the officers observed what they suspected to be cocaine and marijuana. The four men were handcuffed and placed under arrest.

On September 27, 2017, defendant pled guilty to one count of first-degree armed robbery in violation of N.J.S.A. 2C:15-1, pursuant to a negotiated plea agreement. In exchange, the State agreed to recommend a ten-year sentence with an eighty-five percent parole bar subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

On December 8, 2017, defendant filed a pro se motion seeking to withdraw his guilty plea. On April 6, 2018, at defendant's sentencing hearing, defendant moved to withdraw his motion to set aside his guilty plea. The court granted defendant's request and proceeded to sentence him in conformity with the plea agreement.

On October 4, 2018, defendant appealed his sentence, which we affirmed. State v. Curry, No. A-0522-18 (App. Div. Oct. 4, 2018). On February 12, 2020, defendant filed a petition for PCR, in which he alleged ineffective assistance of both trial and appellate counsel. In his petition, defendant asserted that he

received ineffective assistance because: (1) trial counsel failed to conduct any investigation into the facts, and did not review discovery with him; (2) trial counsel failed to file a motion to suppress the handgun found in the warrantless search of defendant's vehicle; (3) trial counsel failed to develop an alibi defense; (4) trial counsel failed to request a Wade-Henderson¹ motion with regard to identification; and (5) appellate counsel did not address issues such as identification and attorney ineffectiveness.

On November 5, 2020, Patrick J. Arre, J.S.C., issued a written opinion denying defendant's petition without an evidentiary hearing. The judge concluded that defendant failed to establish a prima facie case of ineffective assistance of counsel because: (1) trial counsel effectively conducted an investigation into the facts of the case, and defendant, at the time, was satisfied and had the opportunity to speak with his attorney; (2) trial counsel was not ineffective for failing to file a motion to suppress because the handgun was found in plain view, and therefore the motion would not have been successful; (3) defendant did not describe how an alibi defense could have been developed, nor how this defense would have impacted his case; (4) defendant did not

¹ United States v. Wade, 388 U.S. 218 (1967); State v. Henderson, 208 N.J. 208 (2011).

describe how a Wade-Henderson motion would have impacted his case, and such a motion would have been inappropriate as there were no arguable issues pertaining to the identity of the culprits; and (5) defendant submitted no argument regarding how his appellate counsel was ineffective by failing to raise issues of 1) mistaken identification and 2) constitutionally deficient representation by trial counsel.

This appeal followed, with defendant raising the following arguments:

POINT I

THE DEFENDANT PRESENTED A PRIMA FACIE CASE FOR INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY DID NOT FILE A MOTION TO SUPPRESS THE HANDGUN RECOVERED FROM THE REAR PASSENGER AREA OF THE CAR.

POINT II

THE DEFENDANT INCORPORATES HEREIN ALL OF HIS PRO SE ARGUMENTS FOR POST-CONVICTION RELIEF.

In his reply brief, defendant raises this additional argument:

WITHOUT AN EVIDENTIARY HEARING, DEFENDANT'S PRO SE CERTIFICATION IS NOT DETERMINATIVE OF HIS CLAIM THAT HE DID NOT CONSENT TO THE SEARCH OF HIS CAR.

II.

Under Rule 3:22-2(a), a defendant is entitled to PCR if there was a "[s]ubstantial denial in the conviction proceedings of defendant's rights under the Constitution of the United States or the Constitution or laws of the State of New Jersey[.]" "A petitioner must establish the right to such relief by a preponderance of the credible evidence." State v. Preciose, 129 N.J. 451, 459 (1992).

The Sixth Amendment to the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution guarantee criminal defendants the right to the effective assistance of counsel. State v. O'Neil, 219 N.J. 598, 610 (2014) (citing Strickland v. Washington, 466 U.S. 668, 686 (1984); State v. Fritz, 105 N.J. 42, 58 (1987)). To succeed on a claim of ineffective assistance of counsel, the defendant must meet the two-part test established by Strickland, and adopted by our Supreme Court in Fritz. 466 U.S. at 687; 105 N.J. at 58.

Under Strickland, a defendant first must show that his or her attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Counsel's performance is deficient if it "[falls] below an objective standard of reasonableness." Id. at 688.

A defendant also must show that counsel's "deficient performance prejudiced the defense[.]" id. at 687, because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Ibid.

We review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58 (1997)). A hearing is required only when: (1) a defendant establishes a prima facie case in support of PCR; (2) the court determines that there are disputed issues of material fact that cannot be resolved by review of the existing record; and (3) the court determines that an evidentiary hearing is required to resolve the claims asserted. State v. Porter, 216 N.J. 343, 354 (2013) (citing R. 3:22-10(b)). "A prima facie case is established when a defendant demonstrates 'a reasonable likelihood that his or her claim, viewing the facts alleged in the light most favorable to the defendant, will ultimately succeed on the merits.'" Id. at 355 (quoting R. 3:22-10(b)).

"[T]o establish a prima facie claim, a petitioner must do more than make bald assertions that he was denied effective assistance of

counsel." Ibid. (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999)). A PCR petition must be "accompanied by an affidavit or certification by defendant, or by others, setting forth with particularity[.]" State v. Jones, 219 N.J. 298, 312 (2014), "facts sufficient to demonstrate counsel's alleged substandard performance." Porter, 216 N.J. at 355 (quoting Cummings, 321 N.J. Super. at 170); see also R. 3:22-10(c).

Having carefully reviewed defendant's argument in light of the record and applicable legal principles, we affirm substantially for the reasons set forth by the PCR judge in his cogent written opinion. We add the following comments.

Defendant's argument that trial counsel was ineffective for failing to file a motion to suppress would not only have been unsuccessful, but also meritless, as the handgun was recovered in plain view. See State v. Gonzales, 227 N.J. 77, 90 (2016) ("One . . . exception to the warrant requirement authorizes a police officer to seize evidence or contraband that is in plain view.").

As the PCR court noted, in defendant's brief in support of his petition for PCR, defendant wrote, "[o]ne officer on the scene observed defendant's companions pushing the gun in the backseat area to the trunk." Moreover, defendant's supporting certification also described that, "the police officer observed the backseat passenger hiding the gun in defendant's vehicles back seat

area." At the time, the officer was lawfully positioned alongside defendant's vehicle, subject to a valid motor vehicle stop, where the officers had cause to believe that the vehicle, and its occupants, were previously involved in an armed robbery. Further, the record supports it was immediately apparent that the handgun was evidence of a crime, as the men and the vehicle were suspected of a recently reported armed robbery. See Gonzalez, 227 N.J. at 101 ("Under the plain-view doctrine, the constitutional limiting principle is that the officer must lawfully be in the area where he observed and seized the incriminating item or contraband, and it must be immediately apparent that the seized item is evidence of a crime.").

In addition, defendant cites to no evidence in support of his position that trial counsel "could have advanced an alibi defense or even a mis-identification defense." Indeed, "a petitioner must do more than make bald assertions that he was denied the effective assistance of counsel," and here, defendant presents nothing more than bald assertions. See Cummings, 321 N.J. Super. at 170.

Lastly, defendant argues that his appellate counsel "failed to address any meritorious issue, including defendant's motion to withdraw his guilty plea and his purported waiver, other than pertaining to his sentence[,] amounts to constitutional ineffectiveness." Again, defendant fails to sufficiently brief this

issue in light of the Strickland-Fritz test, as he does not provide specific facts or evidence supporting his allegations, nor does he address how counsel's purported ineffectiveness resulted in prejudice.

Any arguments not addressed lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.

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



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