SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4604-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHAD J. CONSHAFTER,

Defendant-Appellant.

Submitted January 5, 2022 – Decided May 2, 2022

Before Judges Gilson and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 17-11-3114.

Joseph E. Krakora, Public Defender, attorney for appellant (Andrew R. Burroughs, Designated Counsel, on the brief).

Grace C. MacAulay, Camden County Prosecutor, attorney for respondent (Maura M. Sullivan, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant appeals from the March 11, 2020 Law Division order, stating that defendant's petition for post-conviction relief (PCR) was withdrawn at defendant's request and dismissed "with prejudice." We affirm in part and reverse in part.

Defendant was charged in a twelve-count indictment with third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(7) (count one); four counts of first-degree human trafficking, N.J.S.A. 2C:13-8(a)(1)(a) and/or (b), 2C:13-8(a)(1)(d), 2C:13-8(a)(1)(g), and 2C:13-8(a)(2) (counts two through five); five counts of third-degree promoting prostitution, N.J.S.A. 2C:34-1(a)(4)(a), 2C:34-1(a)(4)(g), 2C:34-1(a)(4)(f), 2C:34-1(a)(4)(c), and 2C:34-1(b)(2) (counts six through ten); second-degree witness tampering, N.J.S.A. 2C:28-5(d) (count eleven); and second-degree conspiracy to commit witness tampering, N.J.S.A. 2C:5-2 and 2C:28-5(d) (count twelve).

The principal charges occurred on diverse dates between October 1, 2015, and October 31, 2016, and stemmed from allegations that defendant had engaged in human trafficking and promoted prostitution of two women, B.E. and M.H. Evidence presented to the grand jury showed, among other things, that defendant posted online advertisements for sex with photos of B.E. and M.H. on Backpage.com, an online classified advertising website. Generally, the

prostitution activity occurred in various motel rooms that were procured from the proceeds. Defendant also provided illegal narcotics to B.E. and M.H. from the prostitution proceeds to feed their respective addictions.

Defendant was arrested on October 31, 2016, when police responded to a domestic dispute at the Days Inn in Runnemede. Inside one of the rooms, B.E. reported to police that defendant had attacked and assaulted her following an argument over money. B.E. also told police that "she was being pimped out by [defendant] out of that room and other locations." During the ensuing investigation, B.E. disclosed in a taped statement that when "she first met [defendant] in October of 2015," she was "homeless . . . and . . . prostituting herself on Broadway in Camden." The investigation revealed that M.H. had only met and agreed to work for defendant on October 27, 2016, just a few days before his arrest. After defendant was arrested, he allegedly attempted to prevent B.E. from testifying against him by offering her money.

By way of background, during status conferences, defendant repeatedly complained about his attorney's performance, the prosecutor's conduct, and the judge's handling of his case. By July 2018, defendant was being represented by his third attorney, an attorney assigned by the Public Defender's Office. Defendant's prior two attorneys had been privately retained.

During the July 9, 2018 status conference, defendant complained about his attorney's representation and stated the discovery he had received from his attorney was illegible. Defendant also accused the prosecutor of malicious prosecution, falsifying records, and destroying exculpatory evidence. Moreover, defendant "accused the State of human trafficking for allowing [the victims] to continue and remain prostitutes" and for "giv[ing] them immunity [for] the[ir] crimes" in exchange for them "implicat[ing]" him and others for their conduct. Defendant also requested that the judge recuse herself for her role in facilitating the prosecutor's misconduct. To show the judge's purported bias, defendant noted the judge had presided over an unrelated trial involving the prosecution of a different defendant, Brian Moore, for similar charges. According to defendant, as in his case, the prosecutor had "admitted . . . on the record that the girls involved in . . . Moore's human trafficking ring were all prostitutes before he knew them."

The judge denied defendant's recusal application, found there was no credible showing of "malice" on the part of the prosecutor, and directed defense counsel to provide legible copies of the discovery to defendant. The judge also encouraged defendant to file his grievances with the appropriate authorities. During the next status conference on July 23, 2018, defense counsel reported

that defendant had been sent "all the CDs" as well as "a thumb drive" containing over 1,000 pages of discovery. The discovery was sent to the Southern State Correctional Facility where defendant was serving a prison sentence on an unrelated conviction.

On September 10, 2018, during the pretrial conference, see R. 3:9-1(f), while the judge reviewed the pretrial memorandum with defendant before fixing a trial date, defendant resolved the case by entering negotiated guilty pleas to count seven, promoting prostitution, and count eleven, as amended to charge third-degree witness tampering, N.J.S.A. 2C:28-5(a). Under the terms of the plea agreement, defendant waived his right to appeal. In exchange, in addition to a maximum sentencing recommendation, the State agreed to forego seeking an extended term of imprisonment pursuant to N.J.S.A. 2C:44-3(a) and move to dismiss the remaining charges at sentencing. The State also agreed to the award of negotiated jail credits beginning October 31, 2016, defendant's arrest date, which credits would not otherwise have been permitted.

During his plea allocution, defendant admitted that between August 1, 2015, and August 31, 2016, he was in control of a hotel room located in Runnemede that he allowed B.E. to use for prostitution. He further admitted that between May 23 and June 8, 2017, while confined in the Camden County

jail, he wrote a letter to someone requesting that the person extend an offer of money to B.E. in exchange for her not cooperating with the investigation or testifying at his trial.

On October 26, 2018, when defendant appeared for sentencing, he reiterated his prior complaints about his attorney, the prosecutor, and the judge. He also complained he had not received the victims' statements to police in discovery. When the judge repeatedly asked defendant if he wanted to file a motion to withdraw his guilty plea, defendant insisted that he did not and stated he was "guilty of what [he] pled guilty to." However, he sought a more lenient sentence than he had bargained for, asserting he was entitled to consideration of mitigating factor twelve based on his "willingness . . . to cooperate with law enforcement authorities." N.J.S.A. 2C:44-1(b)(12). The judge adjourned the sentencing so that copies of the victims' statements could be provided to defendant and defense counsel could submit a sentencing memorandum.

On December 7, 2018, defendant again appeared for sentencing. Based on defendant's continued iterations of his dissatisfaction with his attorney and the prosecutor, the judge indicated she would vacate defendant's guilty pleas. See R. 3:9-3(e). However, defendant insisted that he did not want to withdraw his guilty pleas and reaffirmed to the court that he had entered the pleas

knowingly and voluntarily and with an understanding of their consequences. See R. 3:9-2. Defendant also affirmed that he had reviewed the discovery he was provided and that his attorney had answered all his questions to his satisfaction. The judge then sentenced defendant in accordance with the plea agreement to an aggregate term of eight years' imprisonment, with three years of parole ineligibility, to be served concurrently with the sentence defendant was already serving.[1]

Defendant did not file a direct appeal. However, on April 18, 2019, defendant filed a pro se petition for PCR, alleging "[p]rosecutorial misconduct" by, among other things, the suppression of exculpatory evidence and violation of discovery rules; "judicial misconduct where the judge refused to intervene[;]" and "ineffective assistance of counsel." With newly retained counsel, defendant was granted additional time for his attorney to file a supplemental brief based on additional investigation.

Prior to submitting the supplemental brief, defendant moved to compel discovery from the State over the State's objection. In a supporting certification, defense counsel stated defendant was "seeking to show that trial counsel's

[1] Defendant also pled guilty to violating probation on an unrelated third-degree drug offense and was sentenced to a four-year term of imprisonment to run concurrently with the present sentence.

performance was unreasonable as he failed to investigate the victims' engagement in prostitution of their own volition prior to recommending that he enter into a plea agreement." In support, defendant submitted a draft report authored by Spencer McInvaille of Envista Forensics to contradict the State's contention that defendant's cell phone posted advertisements on Backpage.com. According to the report, from September 10 to 16, 2016, while defendant was incarcerated, postings seemed to originate from defendant's phone when, in actuality, they did not. Instead, defendant's phone shared a common Gmail account with other devices from which the posts presumably originated. Defense counsel averred "[i]f the Backpage advertisements occurred while defendant was incarcerated, this would show that he was not engaged in any of the acts alleged in the indictment when he was not incarcerated."

In his discovery motion, defendant sought the following items from the State to support his ineffective assistance of counsel claim:

> (1) All Backpage.com advertisements created by B.E. and M.H. from October 1, 2015, to October 31, 2016, the dates alleged in the indictment, and from November 1, 2016, the date after he was arrested, to September 10,

2018, the date he entered the guilty pleas, as well as during February 2014;

(2) Backpage.com advertisements from an email address associated with another individual who purportedly posted advertisements for B.E.;

(3) Access to B.E.'s Facebook account to obtain evidence regarding "her continued prostitution business";

(4) Copies of photos Brian Moore took of B.E. and M.H. to create Backpage.com advertisements in 2013 "that the State obtained in connection with the criminal prosecution of . . . Moore[]" to "show that . . . the alleged victims were engaging in acts of prostitution of their own volition";

(5) "[T]he complete letter[defendant] wrote to Scott Saunders" that formed the evidentiary basis for the tampering related charges because "[t]he items produced in discovery [were] not the full contents of the letter";

(6) "[A]ny video," including body-worn camera footage, "or audio recordings of the police the night . . . defendant was arrested" on October 31, 2016, as "[s]uch recordings would provide evidence" that "the police placed undue pressure on [B.E.] to inculpate . . . defendant";

(7) "[A]ll email exchanges . . . between the State and Dennis Wixted," defendant's first attorney, as "the emails will show that counsel provided the State with three advertisements being posted on Backpage after . . . defendant's arrest."

On March 11, 2020, the judge conducted oral argument on the motion, during which the prosecutor informed the judge that PCR counsel "had made several requests for discovery from the State . . . and each time those requests were made the file was reviewed and anything even remotely relating to the request . . . was provided," notwithstanding that the materials "had already been provided prior to . . . the guilty plea." Defense counsel did not rebut the prosecutor's contention in that regard.

However, prior to addressing the merits, defense counsel stated defendant "wishe[d] to withdraw his [PCR] application on the condition that the [c]ourt allow[ed] him to do it without prejudice." Defense counsel explained defendant was "hindered" in preparing the application "by being incarcerated" but had "four months" until he "max[ed]-out" and was released. Defendant therefore sought to withdraw his PCR application but "reserve his right . . . to re-file" after his release.

The judge reminded counsel that the application had been "filed some time ago," and the court had already "given additional time at [defense counsel's] request." The judge refused to "put[] off [the PCR] for four months." She indicated she was prepared to proceed with the discovery motion, and if defendant "wish[ed] to withdraw [the PCR application], then it[would be] withdrawn with prejudice." After consulting with defendant, defense counsel stated that based on the "ruling that the [c]ourt [would] not dismiss [the PCR application] without prejudice," defendant was prepared "to go forward on the discovery motion."

Following oral argument, the judge determined defendant "failed to show good cause for th[e discovery] request[s]" and denied the motion in an oral opinion on the record. The judge found that given the time frame alleged in the

indictment, there was "absolutely nothing before th[e c]ourt that suggest[ed] the requested discovery exculpate[d] . . . defendant." In that regard, the judge explained that even if the victims engaged in prostitution of their own volition, that fact "[did] not negate . . . defendant's guilt in promoting the act of prostitution by providing a place for it to occur." Moreover, according to the judge, there was "absolutely nothing . . . requested that suggest[ed] that [B.E.] gave a false statement."

Further, the judge pointed out that throughout the proceedings, defendant repeatedly complained that he did not receive the discovery, notwithstanding his prior attorneys' statements to the contrary. The judge also addressed each requested item individually, noting that some of the requests were tantamount to "a fishing expedition" for "possible [PCR] claims" and others had no connection to the case.

Specifically, regarding the Backpage.com advertisements, the judge accepted the prosecutor's uncontroverted representation that the State had "already provided" all Backpage.com advertisements in its possession to defendant. The judge also accepted the prosecutor's representation that the State was not in possession of B.E.'s Facebook account and described the request as "a general request" for "possible claims." Regarding defendant's request for

photos used by the State in the 2013 prosecution of Brian Moore, the judge stated those records were "wholly unrelated" to defendant's case.

As to defendant's letter to Scott Sanders, the judge accepted the prosecutor's representation that the letter provided to defendant was the entire letter as it existed in the State's file. The judge explained that the letter included a statement purportedly made by defendant that B.E. would be paid $5,000 by defendant's then attorney, Dennis Wixted, "to fix it." The judge stated that based on the content of the letter, she had relieved Wixted as defendant's attorney because Wixted became "a potential witness" for the State on the witness tampering related charges. Moreover, according to the judge, in adjudicating that conflict-of-interest issue, "it was [her] understanding" that defendant was in possession of the letter in its entirety.

Regarding the request for video or audio recordings purportedly showing officers pressuring B.E. to incriminate defendant on the night of his arrest, the judge accepted the prosecutor's representation that no such recordings existed. Finally, as to email exchanges between the State and Wixted, the judge stated defendant could obtain any such documents from Wixted directly.

In reaction to the judge's adverse ruling on the discovery motion, defendant exclaimed he was "withdrawing [his] PCR application," stating he

was "not [being] given the evidence . . . [he] need[ed] to show that [the victims'] statements were false [statements]" made "in order for them to evade prosecution." The judge offered defendant time to consider his decision and consult with his attorney before deciding to withdraw his petition.

After further discussion on the record regarding defendant's decision to withdraw his PCR, the following colloquy ensued:

> [DEFENSE COUNSEL]: Judge, my client, again as his advocate, he's indicating today that he wants to withdraw it with prejudice. I'd be happy to take voir dire from him to make sure he understands what he's doing.
>
> . . . .
>
> [COURT]: It would be . . . in your client's best interest to digest my decision, to maybe speak with you again, and then make a decision if he wants to pursue it or not . . . .
>
> [DEFENSE COUNSEL]: . . . [M]y client apparently does not want to speak with me any further about it. That's my understanding. He's indicated to me several times at counsel table that he wants to withdraw this with prejudice. . . .
>
> [DEFENDANT:] I want to do it without prejudice . . . .
>
> [COURT]: So he's told you several times he wants to withdraw it with prejudice.
>
> [DEFENDANT]: Without prejudice. But I'm being told . . . .

> [COURT]: Okay . . . . I am not allowing a litigant to control my calendar, if he wants to withdraw it without prejudice. I am . . . signing an order to that effect.
>
> . . . .
>
> I am not pushing this case off until he gets out of custody. He wants to do his own research or whatever it is that he says he wants to do. I'm not doing that.
>
> Now, if he wants to withdraw it, it's his choice. I have it scheduled to be heard on [May 6, 2020].
>
> [DEFENSE COUNSEL]: My client's indicating he wants to withdraw it now, Judge.

At that juncture, defendant was sworn and questioned by the judge regarding his decision to withdraw his PCR petition. Defendant insisted that he wanted to withdraw his petition because he was dissatisfied with his attorney's handling of the matter and had "no faith in what[was] going on." After questioning defendant to ensure that he was making the decision "knowingly and voluntarily," the judge dismissed the PCR application "with prejudice."

When defense counsel asked the judge to ensure that defendant understood what it meant to dismiss the application with prejudice so that "there[was] no misunderstanding on [defendant's] part," the judge responded:

> I'm satisfied that [defendant] understands what it means to be dismissed without prejudice . . . he's shaking his head yes . . . and to be dismissed with prejudice. He

> made the request himself to dismiss it without prejudice until he's released from prison in four months so he can start conducting his own investigation. I'm satisfied, for the record, he understands the difference between the two.

The judge then asked defendant if he understood "that this [was] the end of [his] PCR" and that he could "no longer raise any claims for [PCR] with th[e] dismissal," and defendant responded that he understood. The judge entered a memorializing order dated March 11, 2020, stating the PCR petition was "[withdrawn and dismissed with prejudice] at the request of [d]efendant." No written order was entered memorializing the denial of defendant's motion to compel discovery from the State. This appeal followed.

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

> POINT I
>
> THE PCR COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO COMPEL DISCOVERY.
>
> POINT II
>
> THE PCR COURT ERRED WHEN IT DISMISSED DEFENDANT'S PCR APPLICATION WITH PREJUDICE.

"The scope of permissible discovery at [the PCR] stage is limited." State v. Herrerra, 211 N.J. 308, 328 (2012). "[O]ur Court Rules concerning petitions

for PCR do not contain any provision authorizing discovery in PCR proceedings," and "the general discovery obligations contained in the Rules Governing Criminal Practice do not extend to post-conviction proceedings." State v. Marshall, 148 N.J. 89, 268 (1997) (citations omitted) (first citing R. 3:22-1 to -12; and then citing R. 3:13-2 to -4). Further, "[t]here is no general constitutional right to discovery in a criminal case, and [Brady v. Maryland, 373 U.S. 83 (1963)] did not create one." Weatherford v. Bursey, 429 U.S. 545, 559 (1977); cf. Commonwealth v. Williams, 86 A.3d 771, 781-82 (Pa. 2014) ("Brady does not purport to speak to, or govern, the distinct question of the scope of discovery . . . under any state's post-conviction review regime." (citing Dist. Att'y's Off. for Third Jud. Dist. v. Osborne, 557 U.S. 52, 68-69 (2009))).

Thus, "[r]equests for discovery made post-conviction -- even if the requested materials should have been turned over automatically post-indictment -- are therefore not granted automatically under either our Court Rules or Brady." State v. Szemple, 247 N.J. 82, 97 (2021). "Rather, post-verdict discovery requests fall within the discretion of the trial court . . . ." Ibid. In that regard, "where a defendant presents the PCR court with good cause to order the State to supply the defendant with discovery that is relevant to the defendant's case and not privileged, the court has the discretionary authority to grant relief."

Marshall, 148 N.J. at 270. However, "in recognition of the importance of finality," Szemple, 247 N.J. at 97, "only in the unusual case will a PCR court invoke its inherent right to compel discovery," Marshall, 148 N.J. at 270.

In turn, we review "[t]he PCR judge's discovery order . . . on appeal for abuse of discretion." Herrerra, 211 N.J. at 328. "Thus, an appellate court should generally defer to a trial court's resolution of a discovery matter, provided its determination is not so wide of the mark or is not 'based on a mistaken understanding of the applicable law.'" State in Int. of A.B., 219 N.J. 542, 554 (2014) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)); see generally Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (explaining that "abuse of discretion" "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis'" (quoting Achacoso-Sanchez v. Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985))).

Here, we discern no abuse of discretion in the judge's denial of defendant's motion to compel post-conviction discovery, and we reject defendant's contention to the contrary. As the judge explained, defendant failed to show good cause for the requests. The items requested by defendant were either not in the State's possession, previously turned over to defendant, nonexistent,

largely irrelevant to defendant's guilt or innocence, or already in defendant's or his former attorney's possession. We agree with the judge that defendant's requests were tantamount to a fishing expedition.

Furthermore, as our Supreme Court explained in Marshall, "PCR 'is not a device for investigating possible claims, but a means for vindicating actual claims.'" Id. at 270 (quoting People v. Gonzalez, 800 P.2d 1159, 1206 (Cal. 1990)). "The filing of a petition for PCR is not a license to obtain unlimited information from the State, but a means through which a defendant may demonstrate to a reviewing court that he was convicted or sentenced in violation of his rights." Ibid. Thus, "[t]here is no postconviction right to 'fish' through official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope that a basis for collateral relief may exist." Ibid. (quoting Gonzalez, 800 P.2d at 1205). Based on the judge's familiarity with the conduct of the parties, the judge's informed sense of whether any discoverable documents remained unseen by defendant, and our own independent review of the record, we decline to disturb the judge's ruling on the discovery motion.

However, we agree with defendant that his petition should have been dismissed without prejudice. Although the judge remained patient and professional in her interactions with a difficult litigant and attempted to ensure

that defendant appreciated the consequences of dismissal with prejudice, we are constrained to reverse the dismissal in the interest of justice. Defendant brought a cognizable PCR claim well within the five-year time limitation for seeking post-conviction relief and should have the opportunity to be heard should he choose to refile his petition. See R. 3:22-12. And, critically, on at least three occasions, defendant expressed his desire and intent to withdraw his petition "without prejudice." Accordingly, we reverse the order of dismissal and remand for the entry of an order dismissing the PCR petition without prejudice.

Affirmed in part, reversed in part, and remanded for entry of a corrected order. We do not retain jurisdiction.