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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0144-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

SETH D. HOFFMAN,

Defendant-Appellant.

Submitted January 10, 2023 – Decided March 31, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-01-0128.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Steven Cuttonaro, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Defendant Seth D. Hoffman appeals from an April 19, 2021 Law Division order rendered by Judge Mitzy Galis-Menendez denying his petition for post-conviction relief (PCR). Defendant pled guilty pursuant to a plea agreement to second-degree possession of a weapon for an unlawful purpose—a Graves Act¹ offense. The plea agreement resulted in the dismissal of a first-degree robbery charge subject to the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. It also allowed defendant to avoid an extended first-degree term as a persistent offender. Defendant had used the gun to intimidate a store's loss prevention officer as defendant exited the store without paying for merchandise.

Defendant contends his trial counsel rendered ineffective assistance by advising him to accept the plea offer and by not filing two motions: (1) a motion to suppress evidence obtained following the stop of defendant's vehicle based on a "be on the lookout" (BOLO) description; and (2) a motion to suppress the loss prevention officer's "showup" identification of defendant. After an evidentiary hearing, Judge Galis-Menendez determined that contrary to defendant's claim, his attorney discussed the motions with him and told him they were unlikely to be granted and would result in the prosecutor rescinding the

¹ N.J.S.A. 2C:43-6(c) generally requires that defendants convicted of certain gun offenses be sentenced to at least a forty-two-month term of imprisonment.

favorable plea offer. After carefully reviewing the record in light of the governing legal principles, we affirm the denial of PCR.

I.

We briefly summarize the relevant facts and procedural history. On November 4, 2018, at around 2:00 a.m., police responded to reports of an armed robbery at a store in Bayonne. Defendant and co-defendant Unique M. Daymon² attempted to leave the store without paying for merchandise. Defendant pointed a gun at the store's loss prevention officer after she tried to stop them.

The Bayonne Police Department issued a BOLO alert that described the suspects as a "[B]lack male with dreadlocks wearing a gray sweatshirt and a [B]lack female who fled in a black colored utility vehicle." The BOLO further advised that the suspects' vehicle exited the parking lot onto East 22nd Street and fled toward Route 440.

Police stopped a vehicle fitting the description just north of East 22nd Street on Route 440 North. Police found .380-caliber ammunition in the car. Defendant was arrested and placed in a police vehicle.

The loss prevention officer was brought to the scene of the arrest and identified defendant as one of the individuals who had committed the robbery.

² Daymon is not a party to this appeal.

Although an initial on-scene search of defendant's person did not reveal a weapon, a loaded handgun with a defaced serial number was eventually found "tied in [defendant's] underwear" during a strip search at the police station.

In January 2019, defendant was indicted for (1) first-degree robbery, N.J.S.A. 2C:15-1(a)(2); (2) first-degree conspiracy to commit armed robbery, N.J.S.A. 2C:5-2(a)(1) and 2C:15-1(a)(2); (3) second-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(b); (4) second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1); and (5) fourth-degree unlawful possession of a defaced firearm, N.J.S.A. 2C:39-9(e).

At the PCR evidentiary hearing, defendant's trial attorney, Jennifer Blum, testified that after being assigned the case, she reviewed the police reports, "substantial paper discovery," a victim-witness' account, and video surveillance from the store. She also visited the crime scene.

Blum considered filing two pretrial motions—a motion to suppress evidence from the motor vehicle stop and a motion to suppress the victim's out-of-court identification. Although Blum did not think either motion was frivolous, she was not confident that either would succeed. She was also informed by the prosecutor that pursuant to an escalating plea policy, the

favorable³ plea offer—which defendant ultimately accepted—would be rescinded if she filed the motions.

Blum testified that she discussed the merits of the motions with defendant. She advised defendant that while the decision was ultimately his to make, she thought the plea agreement was "the best offer that we're going to get right now because I don't think that we would win these motions." Defendant testified he relied on Blum's assertion that the plea offer was "the best that she could do," and so he accepted the plea agreement. But defendant also claims he wanted Blum to file the motions and never told her otherwise.

In July 2019, defendant pled guilty to second-degree possession of a weapon for an unlawful purpose pursuant to the agreement. The remaining charges, including the first-degree robbery count, were dismissed. In September 2019, defendant was sentenced to a ten-year term of imprisonment with five years of parole ineligibility pursuant to the Graves Act.

In early 2020, defendant withdrew a direct appeal of his guilty plea. Shortly after, in February 2020, defendant filed a petition for PCR. Judge Galis-

³ Based on his criminal record, defendant met the criteria for a persistent offender under N.J.S.A. 2C:44-3(a) and was facing an extended first-degree term of twenty years to life, N.J.S.A. 2C:43-7(a)(2), subject to an eighty-five-percent period of parole ineligibility under NERA. The plea offer was for a ten-year prison term with five years of parole ineligibility.

Menendez conducted an evidentiary hearing on February 23, 2021. On April 19, 2021, she denied defendant's PCR petition,⁴ rendering a ten-page written opinion.

After reciting the pertinent facts and legal principles, Judge Galis-Menendez determined that Blum's failure to file a Wade⁵ motion challenging the out-of-court identification was not ineffective assistance of counsel. Defendant's two concerns about the "showup" identification were that the police report did not sufficiently detail the circumstances under which the identification procedure was conducted and that the time recorded on the police's "Showup Identification Procedures Worksheet" was prior to the actual incident.⁶ Judge Galis-Menendez opined that Blum's concerns about the likely outcome of the motion, the available video evidence even if the Wade motion was successful, and the loss of the favorable plea agreement made the advice to not file this motion "within the wide range of reasonable assistance."

⁴ The State conceded defendant was entitled to 305 days of jail credit. Judge Galis-Menendez amended the Judgment of Conviction to reflect the additional credits.

⁵ United States v. Wade, 388 U.S. 218 (1967).

⁶ The timing discrepancy is attributable to the ending of daylight saving time.

Judge Galis-Menendez made a similar determination regarding the motion to suppress evidence based on an unlawful stop. Defendant argued the BOLO description was too generic to provide reasonable suspicion for the stop. In addition to the concerns referenced with regard to the Wade motion, Blum also expressed concern about the gun that was recovered at the police station pursuant to a strip search. Judge Galis-Menendez again found that Blum's advice to take the plea offer instead of filing this motion was not ineffective assistance. Accordingly, the judge denied PCR, aside from awarding additional jail credits pursuant to the State's concession.

Defendant raises the following contention for our consideration:

[DEFENDANT] IS ENTITLED TO RELIEF ON HIS CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO DISCUSS WITH HIM AND FILE MOTIONS TO SUPPRESS EVIDENCE AND IDENTIFICATION.

II.

PCR serves the same function as a federal writ of habeas corpus. State v. Preciose, 129 N.J. 451, 459 (1992). It is not a substitute for a direct appeal. Ibid. When petitioning for PCR, defendants must establish by a preponderance of the credible evidence that they are entitled to the requested relief. Ibid. To sustain this burden, the petitioner must allege and articulate specific facts,

"which, if believed, would provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

We defer to a PCR court's factual findings "when supported by adequate, substantial and credible evidence." State v. Harris, 181 N.J. 391, 415 (2004) (quoting Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002)). For mixed questions of law and fact, we give deference to the supported factual findings of the PCR court but review de novo the application of the law to those facts. Id. at 416 (quoting State v. Marshall, 148 N.J. 89, 185 (1997)). Purely legal conclusions are reviewed de novo. Ibid.

In order to demonstrate ineffectiveness of counsel, "[f]irst, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). In State v. Fritz, our Supreme Court adopted the two-part test articulated in Strickland. 105 N.J. 42, 58 (1987).

To meet the first prong of the Strickland/Fritz test, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. Reviewing courts indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

The second prong of the Strickland/Fritz test requires the defendant to show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Put differently, counsel's errors must create a "reasonable probability" that the outcome of the proceedings would have been different if counsel had not made the errors. Id. at 694.

Blum's advice to take the plea offer instead of filing motions was a carefully considered strategic decision that does not amount to constitutionally deficient performance. When a defendant challenges his or her attorney's decision to not file a motion, in addition to meeting both Strickland prongs, the defendant must show the unfiled motion was meritorious. State v. Fisher, 156 N.J. 494, 501 (1998). A decision to not file a motion based on "strategic considerations," as opposed to "an erroneous interpretation of the law," is not ineffective assistance of counsel. Id. at 507–08. Reviewing courts, moreover, must be "highly deferential" to tactical decisions. State v. Arthur, 184 N.J. 307, 318–19 (2005) (quoting State v. Norman, 151 N.J. 5, 37 (1997)). In this instance, the uncertainty of the contemplated motions' outcomes, combined with the risk of losing a favorable plea offer, clearly shows Blum's advice was a strategic decision and not constitutionally deficient.

We add that to lawfully initiate an investigative stop, police must have "'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." State v. Rodriguez, 172 N.J. 117, 126 (2002) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)). Whether a reasonable and articulable suspicion exists is highly fact-sensitive and requires evaluation of "the totality of circumstances surrounding the police-citizen encounter, balancing the State's interest in effective law enforcement against the individual's right to be protected from unwarranted and/or overbearing police intrusions." State v. Privott, 203 N.J. 16, 25–26 (2010) (quoting State v. Davis, 104 N.J. 490, 504 (1986)).

In State v. Nyema, our Supreme Court held that a description limited to the suspect's race and gender was insufficient to establish reasonable and articulable suspicion. 249 N.J. 509, 531–32 (2022). The Court required an additional description "such as the suspects' approximate heights, weights, ages, clothing worn, mode of transportation, or any other identifying feature that would differentiate the two Black male suspects from any other Black men in New Jersey." Id. at 531 (emphasis added).

Here, the robbers were described in the BOLO as a "[B]lack male with dreadlocks wearing a gray sweatshirt and a [B]lack female who fled in a black

colored utility vehicle." Furthermore, the police were alerted to the suspects' specific road and direction of travel. In these circumstances, Blum had good reason to doubt that a motion to suppress based on an inadequate BOLO description would have been successful. Certainly, her assessment of the likelihood of success falls within the bounds of competent representation.

Similarly, Blum was in no way ineffective in gauging the likelihood the victim's out-of-court "showup" identification would be suppressed, especially considering that a defendant must demonstrate "a very substantial likelihood of irreparable misidentification." State v. Henderson, 208 N.J. 208, 289 (2011).

We likewise reject defendant's contention that Blum was ineffective because she failed to discuss the merits of the motion with defendant. Attorneys are required to "consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify." R.P.C. 1.2(a). Additionally, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." R.P.C. 1.4(c). As stated in Strickland, counsel has the "basic dut[y]" to "consult with the defendant on important decisions." 466 U.S. at 688.

Defendant's contention his attorney failed to discuss the likelihood of winning the motions is belied by Blum's unequivocal testimony. Furthermore, defendant acknowledged at the hearing that Blum told him "she weighed everything out . . . and [he thought] this was the best deal that she was able to get."

In sum, we conclude defendant has failed to establish his counsel rendered ineffective assistance. We add that defendant has also failed to establish the second prong of the Strickland/Fritz test. To demonstrate prejudice in the context of a guilty plea, a defendant must show "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pled guilty and would have insisted on going to trial." State v. DiFrisco, 137 N.J. 434, 457 (1994) (alteration in original) (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). This is the "far more difficult" prong of the Strickland test. State v. Gideon, 244 N.J. 538, 550 (2021) (quoting Preciose, 129 N.J. at 463). Additionally, a particularly attractive plea offer weighs against a finding of prejudice. See State v. O'Donnell, 435 N.J. Super. 351, 377 (App. Div. 2014).

In this instance, defendant has not demonstrated either that he would have rejected the plea offer but for counsel's alleged errors or that he has suffered prejudice by accepting what can only be described as a favorable offer.

To the extent we have not addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. 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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