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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0351-21
A-0354-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RABAH RABAH, a/k/a
RABAH K. RAHBAH
and RABAH K. RABAH,

Defendant-Appellant.

Submitted November 15, 2022 – Decided February 14, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Indictment Nos. 12-04-0286, 13-06-0616, 14-03-0151, and 14-09-0780, and Bergen County, Indictment No. 14-03-0367.

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

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent in A-0351-21 (Ali Y. Ozbek,
Assistant Prosecutor, of counsel and on the brief).

Mark Musella, Bergen County Prosecutor, attorney for
respondent in A-0354-21 (Edward F. Ray, Assistant
Prosecutor, on the brief).

PER CURIAM

In two separate appeals, defendant, Rabah K. Rabah, challenges Law Division orders denying his petitions for post-conviction relief (PCR) after evidentiary hearings. One petition—Docket No. A-351-21—arises from his guilty plea convictions in Passaic County. The other—Docket No. A-354-21—arises from his guilty plea convictions in Bergen County. Because both appeals raise the same legal issues and depend on the same facts, we consolidate them for purposes of issuing a single opinion.

In these appeals, defendant contends his attorney rendered ineffective assistance by failing to advise him on the immigration consequences of his guilty pleas. We reject that contention substantially for the reasons explained by the Passaic County PCR court in its written opinion.¹ Defendant in both appeals also contends his attorney had a conflict of interest that defendant did not waive.

¹ As we explain below, we do not reach defendant's immigration-consequence contention in the Bergen County appeal because we vacate those convictions on different grounds.

After carefully reviewing the record in view of the governing legal principles, we conclude a per se conflict of interest arose because defendant's attorney, Harley Breite, appeared on behalf of the co-defendant, Andaleeb Alkhales, without obtaining a waiver from defendant.

The attorney's appearance on behalf of the co-defendant occurred after defendant pled guilty to the Passaic charges. We remand for the Passaic PCR court to make findings as to when Breite's representation of Alkhales commenced. If the court determines that representation began before defendant pled guilty to the Passaic charges, those guilty pleas must be vacated. If not, those guilty pleas and the ensuing sentence, for which defendant was represented by a replacement attorney who did not have a conflict, are unaffected by the subsequent dual-representation conflict.

With respect to the Bergen County appeal, the record shows that the per se conflict of interest arose before defendant entered his guilty pleas. We therefore reverse the denial of PCR in A-354-21 and direct that the Bergen County convictions be vacated and the charges that were dismissed pursuant to the plea agreement be reinstated.

I.

We discern the following facts and procedural history from the record. Defendant was charged with various offenses in four separate Passaic County indictments. In April 2012, a Passaic County grand jury charged defendant with: (1) first-degree robbery, N.J.S.A. 2C:15-1(a)(1); (2) third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2); (3) fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(3); (4) third-degree aggravated assault, N.J.S.A. 2C:12-1(b)(2); (5) fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(3); (6) fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and (7) third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d).

In June 2013, a Passaic County grand jury charged defendant with: (1) fourth-degree conspiracy to distribute a controlled dangerous substance (CDS), N.J.S.A. 2C:5-2, 2C:2-6, 2C:35-5(a)(1) and (b)(12); (2) fourth-degree possession of CDS with intent to distribute N.J.S.A. 2C:2-6, 2C:35-5(a)(1) and (b)(12), and; and (3) third-degree possession of CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:2-6, 2C:35-5(a) and -7.

In March 2014, a Passaic County grand jury charged defendant with: (1) second-degree aggravated assault of Alkhales,² N.J.S.A. 2C:12-1(b)(1); (2) third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); (3) third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3); (4) third-degree possession of CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-5(a) and -7; (5) second-degree possession of CDS with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:35-5(a) and -7.1; (6) third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); (7) third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(3); (8) third-degree possession of CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-5(a) and -7; (9) second-degree possession of CDS with intent to distribute within 500 feet of a public park, N.J.S.A. 2C:35-5(a) and -7.1; (10) fourth-degree aggravated assault of a police officer, N.J.S.A. 2C:12-1(b)(5)(a); and (11) third-degree resisting arrest, N.J.S.A. 2C:29-2(a)(3).

Also in March 2014, a Bergen County grand jury charged defendant and Alkhales with (1) second-degree possession of CDS with intent to distribute

² Alkhales was defendant's fiancé at the time and was a co-defendant in several of the Passaic and Bergen County charges. She has since become his wife.

within 500 feet of a public park, N.J.S.A. 2C:35-7.1; (2) third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(5); (3) third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); and (4) fourth-degree possession of a weapon without an explainable lawful purpose, N.J.S.A. 2C:39-3(e).

In September 2014, a Passaic County grand jury charged defendant and Alkhaless with: (1) third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); (2) third-degree distribution of CDS, N.J.S.A. 2C:35-5(a)(1) and (b)(5); (3) third-degree distribution of CDS within 1,000 feet of school property, N.J.S.A. 2C:35-5(a) and -7; (4) third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(5); (5) third-degree possession of CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-5(a) and -7; (6) third-degree possession of CDS, N.J.S.A. 2C:35-10(a)(1); (7) third-degree possession of CDS with intent to distribute, N.J.S.A. 2C:35-5(a)(1) and (b)(13); and (8) third-degree possession of CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-5(a) and -7.

Defendant and Alkhaless approached Breite together to discuss their pending charges in both counties. Breite informed them that because they were co-defendants, he could not "represent both of them due to a conflict of interest

and, although it can be waived, [he] wasn't interested in having them waive it." Breite agreed to represent defendant and referred Alkhales to another attorney, Robert Baer, who Breite described as his "mentor" and "best friend." Breite also referred defendant's family to an immigration attorney, Edward Shulman, because defendant is not a United States citizen.

On April 9, 2015, defendant appeared with Breite before a Passaic County Superior Court judge and pled guilty pursuant to a plea agreement to five Passaic County charges: count one of the April 2012 indictment, first-degree armed robbery; count three of the June 2013 indictment, third-degree possession of CDS with intent to distribute within 1,000 feet of school property; counts eight and eleven of the March 2014 indictment, third-degree possession of CDS with intent to distribute within 1,000 feet of school property and third-degree resisting arrest; and count five of the September 2014 indictment, third-degree possession of CDS with intent to distribute within 1,000 feet of school property. Pursuant to the plea agreement, the remaining Passaic County charges were dismissed.

On April 17, 2015, defendant appeared before a Bergen County Superior Court judge and pled guilty pursuant to a plea agreement to count one of the Bergen County indictment, second-degree possession of CDS with intent to

distribute within 500 feet of a public park. Pursuant to the plea agreement, the remaining Bergen County charges were dismissed.

In early 2015,³ Baer suffered a stroke and was unable to actively represent Alkhaless. As a result, Breite stood in for Baer and appeared on behalf of Alkhaless when she pled guilty to Passaic County charges on April 16, 2015. At that plea hearing, Alkhaless waived Breite's conflict of interest. Breite also represented Alkhaless at her Passaic County sentencing proceeding on September 12, 2017.

Following defendant's plea hearings, he retained new counsel. On May 27, 2016, attorney Ron Bar-Nadav represented defendant in the Bergen County sentencing proceeding, standing in for Benjamin Morton, the attorney of record. On October 21, 2016, Morton represented defendant at his Passaic County sentencing proceeding.

Defendant raises the following contentions for our consideration in both his Passaic and Bergen County appeals:

POINT I

AS DEFENDANT HAD ESTABLISHED THAT HIS
ATTORNEY HAD A CONFLICT OF INTEREST
AND HAD FAILED TO INFORM HIM ABOUT THE
IMMIGRATION CONSEQUENCES OF ENTERING

³ The record does not indicate the exact date on which Baer suffered the stroke.

A GUILTY PLEA, THE PCR COURT ERRED WHEN IT DENIED THE PETITION FOR POST-CONVICTION RELIEF.

A. TRIAL COUNSEL FAILED TO OBTAIN DEFENDANT'S WAIVER BEFORE HE CONCURRENTLY REPRESENTED CO-DEFENDANT ANDALEEB ALKHALES.

B. TRIAL COUNSEL FAILED TO ADVISE DEFENDANT ABOUT THE IMMIGRATION CONSEQUENCES BEFORE HE ENTERED A GUILTY PLEA.

II.

We first address defendant's conflict-of-interest contentions. When petitioning for PCR, a defendant must establish by a preponderance of the credible evidence that he or she is entitled to the requested relief. State v. Preciose, 129 N.J. 451, 459 (1992) (citing State v. Mitchell, 126 N.J. 565, 579 (1992)). 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." Mitchell, 126 N.J. at 579.

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 trial court but review de novo the lower court's 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.

"Under our State Constitution, [e]ffective counsel is an attorney who represents his client with undivided loyalty, unimpaired by conflicting interests." State v. Cottle, 194 N.J. 449, 466–67 (2008) (alteration in original) (internal quotation marks omitted) (quoting State v. Norman, 151 N.J. 5, 23 (1997)). "[A]n attorney hobbled by conflicting interests that so thoroughly impede his [or her] ability to exercise single-minded loyalty on behalf of the client cannot render the effective assistance guaranteed by our constitution." Id. at 467.

Our courts "have adhered to a two-tiered approach in analyzing whether a conflict of interest has deprived a defendant of his [or her] state constitutional right to the effective assistance of counsel." Ibid. (citing Norman, 151 N.J. at 24–25). When "a private attorney, or any lawyer associated with that attorney, is involved in simultaneous dual representations of co-defendants," there is a "per se conflict," and, absent a valid waiver, "the reversal of a conviction is mandated." Ibid. (quoting Norman, 151 N.J. at 24–25). The per se rule applies

to joint representation that occurs before, during, or after trial. Norman, 151 N.J. at 28.

An attorney-client relationship is formed when "the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case." Herbert v. Haytaian, 292 N.J. Super. 426, 436 (App. Div. 1996). The relationship does not depend on the client's formal retention of the attorney or the attorney charging the client. Ibid.

The per se rule against "privately associated attorneys" representing co-defendants is "narrow." Norman, 151 N.J. at 30, 36. In Norman, for example, our Supreme Court held partnership negotiations between private attorneys, which eventually proved fruitful, did not give rise to the per se rule. Id. at 30; see also State v. Grice, 109 N.J. 379, 385, 390 (1988) (finding no conflict as a result of an office-sharing arrangement). In State v. Bellucci, where the per se rule was extended to partnerships, the three reasons the Court gave for that extension were the "ready access to confidential information among members of a law firm[,] . . . [t]he shared economic interest of the entire firm," and the risk to public confidence "if conduct proscribed for one lawyer could be performed by his partner." 81 N.J. 531, 541–42 (1980).

III.

Applying these principles to the matter before us, defendant's assertion that Breite and Baer were partners is not supported by the record—as the Passaic PCR court properly found after taking extensive testimony at the evidentiary hearing. The record shows that Breite and Baer had different offices and operated separate practices. Their personal friendship and mentoring relationship does not satisfy the narrow per se rule of dual representation for associated attorneys under Norman. The only support for the notion that Breite and Baer were partners is in testimony from Alkhaless that the PCR court rejected as not credible. Defendant's claims of fee sharing are not supported in the record. While Alkhaless testified that defendant paid for both representations, there is no additional evidence of fee sharing. Accordingly, we have no basis upon which to overturn the Passaic PCR court's finding that there was no dual representation with respect to Breite and Baer's representation of defendant and Alkhaless. They were represented by separate attorneys until the point of Baer's stroke.

A per se conflict of interest did arise, however, when Breite took over Alkhaless's representation as a result of Baer's stroke. The record shows this conflict existed on April 16, 2015, when Breite stepped in to represent Alkhaless

at her plea hearing. Alkhaless waived this conflict at her plea hearing. However, there was no such waiver by defendant.

The critical question is whether the per se dual-representation conflict arose before defendant pled guilty to the Passaic charges. See State v. Alexander, 403 N.J. Super. 250, 257 (App. Div. 2008) ("Because the conflict arose after defendant pled guilty, there is no basis for disturbing defendant's plea."). An event entry in the trial court's case management system indicates the court was notified that Breite replaced Baer on April 13, 2015. The record does not indicate, however, when Breite agreed to represent Alkhaless. We deem that circumstance to be critical to the question of dual representation and divided loyalty.

If Breite undertook representation of Alkhaless before defendant entered his Passaic County guilty pleas on April 9, 2015, those convictions must be vacated. We therefore remand to the Passaic PCR court to make findings as to when Breite began to represent Alkhaless. See Herbert, 292 N.J. Super. at 436. We leave to the PCR court's discretion whether a new evidentiary hearing is needed to make the required findings of fact.

If the court finds that Breite's representation of Alkhaless commenced before defendant's April 9, 2015 plea hearing, the court shall grant PCR, vacate

defendant's guilty plea convictions, and reinstate all charges that were dismissed pursuant to the plea agreement. If the court finds that Breite's representation of Alkhaless began after April 9, 2015, the denial of PCR is affirmed. See Alexander, 403 N.J. Super. at 257. We add that the record clearly shows defendant was represented by new counsel at his Passaic sentencing hearing.

IV.

The circumstances are markedly different with respect to the Bergen convictions, leading to a different result. The record shows Breite appeared on behalf of Alkhaless at her Passaic County plea hearing the day before defendant pled guilty to the Bergen County charges. Because the record fails to show that defendant waived the conflict when he pled guilty on the Bergen County charges, defendant is entitled to PCR and those convictions must be vacated. As the Supreme Court has repeatedly recognized, "the per se rule is necessary because '[t]he harmful effects of a conflict . . . will not ordinarily be identifiable on the record.'" Id. at 257 (alteration and omission in original) (quoting Norman, 151 N.J. at 24). Additionally, "without a per se rule, [r]equiring a showing of prejudice would place an impossible burden on the accused and force the reviewing courts to engage in unguided speculation." Ibid. (alteration in original) (internal quotation marks omitted) (quoting Bellucci, 81 N.J. at 543).

Accordingly, courts "need not further engage in this type of speculation because the per se rule compels the granting of post-conviction relief." Id. at 259.

V.

Because defendant's Passaic County guilty plea convictions may be unaffected by the conflict of interest if the Passaic PCR court finds the dual representation commenced after defendant pled guilty, we proceed to address defendant's contention that the Passaic PCR court erred in ruling defendant failed to establish that he received ineffective assistance of counsel as to the immigration consequences of his guilty pleas.⁴

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. Nuñez-Valdéz, our Supreme Court held a defendant could establish ineffective assistance of counsel if the defendant's attorney provided false or inaccurate advice that the guilty plea would not result in deportation. 200 N.J. 129, 139–43 (2009).

⁴ As we noted earlier, defendant's immigration assertions with respect to the Bergen County convictions are rendered moot by our determination that those convictions must be vacated because of the per se conflict of interest.

In Padilla v. Kentucky, the United States Supreme Court held a petitioner may meet the first Strickland prong by showing that his or her attorney made misrepresentations, either affirmatively or by omission, regarding the potential immigration consequences flowing from a guilty plea. 559 U.S. 356, 369–71, 374 (2010). The Court explained, when deportation is a clear consequence of a guilty plea, the defendant's counsel has an affirmative duty to address the subject and give correct advice. Id. at 369. However, the Court also held, when the deportation consequences of a plea are uncertain, counsel need only advise his or her client that the plea may carry a risk of adverse immigration consequences. Ibid.

We discern the following pertinent facts concerning defendant's immigration contention. Defendant was born in Jordan, came to the United States as a child, and held a green card. Because Breite does not specifically handle immigration issues, he referred defendant's family to Shulman. Breite testified at the PCR evidentiary hearing that he repeatedly told defendant and Alkhales defendant needed to consult with an immigration lawyer. He testified he was "100 percent" sure he advised defendant to seek such advice.

There was disputed testimony about whether defendant spoke to Shulman directly on the phone. There was no dispute, however, that Shulman met with

Alkhaless and defendant's father.⁵ Shulman also provided an intake form for defendant's case. Shulman explained to Alkhaless and defendant's father that there was nothing he could do for defendant.

Breite testified he spoke with Shulman on the phone and that Shulman told him defendant would be removed from the United States if he pled guilty. Breite explained he confirmed that with Shulman because, while Breite expected that result, he is not an immigration attorney. Breite testified that he conveyed to defendant the immigration consequences Shulman had indicated in the phone conversation "several times."

Breite was insistent defendant and his family, including Alkhaless, were aware that the consequence of his plea would be deportation. He confirmed, "[t]here was absolutely no doubt in [his] mind that [defendant entered the plea agreement] knowingly, intelligently, and voluntarily with a complete and full understanding of all the ramifications of what he did that day." Breite also recounted that defendant was more concerned with the sentence length than the immigration consequences.

⁵ Defendant was incarcerated at the time, so his family met with Shulman on his behalf.

Defendant testified that he never heard anything about immigration consequences from Breite. Additionally, defendant testified that Breite never told him to consult an immigration attorney. Rather, defendant claimed that Breite repeatedly told him variations of "I will take care of it."

The Passaic PCR court reviewed all the testimony presented in the evidentiary hearing and found that defendant's "testimony lacks credibility." In contrast, the court found that Breite was credible. Specifically, the PCR court found that Breite's testimony regarding defendant's awareness of immigration consequences "were entirely satisfactory to th[e] court with respect to defendant's knowledge and understanding of the inevitability of his deportation." Further, the PCR court accepted "as credible [Breite's] testimony that he was 'one hundred percent' certain he advised [defendant] on 'many occasions' to seek individualized advice from an immigration attorney." Additionally, the PCR court found that trial counsel negotiated a good plea deal for defendant given the weight of the numerous indictments defendant faced, which indicated a lack of prejudice.

We accept the factual findings made by the Passaic PCR court with respect to defendant's immigration contentions. See Harris, 181 N.J. at 415. We conclude Breite did not render ineffective assistance with respect to immigration

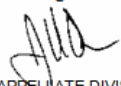
consequences; however, the denial of PCR in Passaic County must still be remanded for further fact finding.

To the extent we have not addressed them, any remaining arguments raised by defendant with respect to the Passaic County convictions lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

In Appeal No. A-351-21, we vacate the denial of PCR and remand to the Passaic County PCR court for proceedings consistent with this opinion. We do not retain jurisdiction.

In Appeal No. A-354-21, we vacate the denial of PCR and remand to vacate the plea convictions and sentence and restore all charges for which defendant was indicted.

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



CLERK OF THE APPELLATE DIVISION