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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0427-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY C. WYATT, a/k/a
ANTHONY C. WYATT-SCALES,
ANTHONY C. WYATT SCALES,
RYAN E. MARRLOW,
ANTHONY C. SCALES,
ANTHONY C. SCALES WYATT,
ANTHONY C. SCALES-WYATT,

Defendant-Appellant.

Submitted November 28, 2022 - Decided January 10, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Camden County, Indictment No. 17-07-1923.

Joseph E. Krakora, Public Defender, attorney for
appellant (Michael A. Priarone, Designated Counsel,
on the brief).

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

PER CURIAM

Defendant Anthony C. Wyatt appeals from the July 26, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. Based on our review of the record and the applicable legal principles, we affirm in part, reverse in part, and remand for further proceedings.

I.

We derive the following facts from the record and our prior opinion denying defendant's direct appeal. State v. Wyatt, No. A-5517-17 (App. Div. Sept. 23, 2019).¹ Police were called to investigate a disturbance at an apartment complex in Lindenwold shortly after midnight on April 20, 2017. Police encountered defendant walking away from the apartment, where it was reported an individual had been banging on the door. Defendant was observed pulling a silver gun from his sweatshirt and then walking toward shrubbery, where he discarded his gun. Two police officers subsequently arrested defendant and recovered the gun he had thrown in the bushes.

¹ On January 31, 2020, the Supreme Court denied defendant's petition for certification. State v. Wyatt, 240 N.J. 557 (2020).

Defendant was indicted for unlawful possession of a gun, N.J.S.A. 2C:39-5(b)(1) (count one), and certain persons not permitted to have weapons, N.J.S.A. 2C:39-7(b)(1) (count three).² In the first part of the bifurcated trial, defendant was found guilty of count one. In the second part of the bifurcated proceeding, defense counsel stipulated defendant had been previously convicted of third-degree possession of a controlled dangerous substance (CDS) with the intent to distribute. Defendant was subsequently convicted on count three. He was sentenced to five years in prison with three and one-half years of parole ineligibility for the unlawful possession count, and a five-year term with a five-year period of parole ineligibility for the certain persons conviction, which were to be served consecutively.³

On July 17, 2020, defendant filed a pro se PCR application, claiming ineffective assistance of trial counsel. Defendant argued trial counsel was ineffective by failing to request the trial judge to sanitize the information related to his prior conviction utilized in the certain persons count. Defendant further asserted defense counsel was ineffective by not filing a motion to suppress

² Count two of the indictment was dismissed before trial.

³ Defendant was also sentenced to an eighteen-month flat term for a conviction not the subject of this PCR.

evidence related to the seizure of the handgun. The trial court denied the PCR application, and this appeal followed.

II.

Defendant raises the following point on appeal:

POINT I

AS THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, THE PCR COURT ERRED WHEN IT DENIED DEFENDANT'S [PCR] PETITION WITHOUT AN EVIDENTIARY HEARING.

More particularly, defendant contends trial counsel was ineffective in permitting the jury to hear the unsanitized details of his prior conviction. Defendant further contends trial counsel failed to file a motion to suppress evidence concerning the seizure of the gun. The State counters it would have been futile for defense counsel to file a motion to sanitize the record because defendant's criminal conviction was part of the State's proofs on count three. As to the suppression argument, the State asserts defendant failed to identify any legal basis to support a claim that a suppression motion would have been successful.

III.

Often, as in this case, a defendant indicted for violating the certain persons statute is also charged in the same indictment for unlawful possession of a weapon. In those circumstances, the trial must be bifurcated, with the jury first considering guilt as to the possessory offense without being told of the prior predicate conviction. See State v. Ragland, 105 N.J. 189, 194 (1986) ("Severance is customary and presumably automatic where it is requested because of the clear tendency of the proof of the felony conviction to prejudice trial of the separate charge of unlawful possession of a weapon." (emphasis added)). In State v. Brown, the Court held that when the State dismisses the possessory offense and tries the defendant solely on the certain persons count, bifurcation is unnecessary. 180 N.J. 572, 582 (2004). However, to ameliorate "any potential for prejudice," the Court required "sanitization of the predicate offense." Id. at 584. The Court held: "if defendant stipulates to the offense, the jury need be instructed only that defendant was convicted of a predicate offense. If the defendant does not stipulate, then the trial court should sanitize the offense or offenses and limit the evidence to the date of the judgment." Id. at 585.

After Brown, the certain persons model charge was amended:

In explaining what crimes are set forth as predicate offenses in N.J.S.A. 2C:39-7(b), the model jury charge

further explains how to sanitize the record of a defendant's predicate offense. Specifically, the charge notes:

Unless the defendant stipulates, the prior crimes should be sanitized. Thus, the trial court should refer to them as crime(s) of the appropriate degree. For example, if the offense were aggravated sexual assault, the court would indicate that defendant previously was convicted of a crime of the first degree. Nothing prevents a defendant, however, from choosing to inform the jury of the name of the prior crime of which he/she was convicted.

[State v. Bailey, 231 N.J. 474, 487 (2018) (quoting Model Jury Charges (Criminal), "Certain Persons Not to Have Any Firearms (N.J.S.A. 2C:39-7(b)(1)" at 1 n.4 (rev. June 13, 2005)).]

In Bailey, the defendant refused to stipulate to the predicate offense, and following the guidance in Brown and the model charge, the judge redacted the predicate judgments of conviction "so as to include only the date and degree of each offense." 231 N.J. at 478-79. On appeal, we found the continued use of the model charge "disquieting," because the State introduced "no proof of any predicate crime"; nonetheless, we affirmed the defendant's conviction, finding any error was invited. Id. at 480.

The Court reversed, holding "[t]he over-sanitization called for in the model charge inject[ed] a constitutional defect into any trial on a certain persons offense where a defendant declines to stipulate," because it relieved the State of "prov[ing] that the defendant was convicted of an enumerated predicate offense and later possessed a firearm." Id. at 488. The Court explained:

If a defendant chooses to stipulate, evidence of the predicate offense is extremely limited: "[t]he most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that . . . bar a convict from possessing a gun[.]" A defendant who stipulates can therefore prevent the State from presenting evidence of the name and nature of the offense. Provided that the stipulation is a knowing and voluntary waiver of rights, placed on the record in defendant's presence, the prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element.

[Ibid. (alterations in original) (citation omitted) (emphasis added).]

However, "[w]hen a defendant refuses to stipulate to a predicate offense under the certain persons statute, the State shall produce evidence of the predicate offense: the judgment of conviction with the unredacted nature of the offense, the degree of offense, and the date of conviction." Id. at 490-91. The Bailey Court referred the matter to its Committee on Model Criminal Jury Charges for revision. Id. at 491.

The Committee subsequently amended the current certain persons model jury charge which now reads: "If defendant is stipulating to the predicate offense, do not read the crime listed in the Certain Persons count." Model Jury Charges (Criminal), "Certain Persons Not To Have Any Firearms (N.J.S.A. 2C:39-7(b)(1))" at 1 n.3 (rev. Feb. 12, 2018) (emphasis added). Additionally, "[w]hen a defendant does not stipulate to a predicate offense under the certain persons statute, the State shall produce evidence of the predicate offense: the judgment of conviction with the unredacted nature of the offense, the degree of offense, and the date of conviction." Id. at 1 n.5 (rev. June 13, 2005)) (citing Bailey, 231 N.J. at 474). However, the comments further provide that when a "defendant stipulates to the offense, the jury must be instructed only that defendant was convicted of a predicate offense." Id. at n.6 (emphasis added) (quoting Brown, 180 N.J. at 585).

We have long recognized that in a prosecution under N.J.S.A. 2C:39-7(b), the court must permit a defendant to stipulate to the predicate conviction. State v. Alvarez, 318 N.J. Super. 137, 152-54 (App. Div. 1999); see also Old Chief v.

United States, 519 U.S. 172, 191 (1997) (holding "it was an abuse of discretion to admit the record when an admission was available").⁴

Here, defense counsel stipulated both that defendant had previously been convicted of a predicate crime enumerated in N.J.S.A. 2C:43-7.2(d) and agreed the jury would be told of the specific crime—third-degree possession of CDS with an intent to distribute.⁵

IV.

Where, as here, a PCR judge does not hold an evidentiary hearing, we "conduct a de novo review of both the factual findings and legal conclusions of the PCR court." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (quoting State v. Harris, 181 N.J. 391, 421 (2004)).

To prevail on an ineffective assistance of counsel (IAC) claim, a defendant must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 694 (1984), and recognized by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). A defendant must first show "that counsel made errors so

⁴ As future Justice Virginia A. Long wrote for our court, "[t]he specifics of defendant's prior crimes have no evidentiary significance beyond a stipulation that defendant falls within the class of offenders our Legislature thought should be barred from possessing weapons." Alvarez, 318 N.J. Super. at 153.

⁵ This stipulation was read to the jury and included on the verdict sheet.

serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Fritz, 105 N.J. at 52 (quoting Strickland, 466 U.S. at 687). As to this prong, "there is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' [and t]o rebut that strong presumption, a defendant must establish that trial counsel's actions did not equate to 'sound trial strategy.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 689).

Additionally, to succeed on an IAC claim, a defendant must prove he suffered prejudice. Strickland, 466 U.S. at 687. A defendant must show by a "reasonable probability" that the deficient performance affected the outcome. Fritz, 105 N.J. at 58. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Pierre, 223 N.J. 560, 583 (2015) (quoting Strickland, 466 U.S. at 694; Fritz, 105 N.J. at 52). In general, "only an extraordinary deprivation of the assistance of counsel triggers a presumption of prejudice." State v. Miller, 216 N.J. 40, 70 (2013) (citing Bell v. Cone, 535 U.S. 685, 695-96 (2002)).

Our rules anticipate the need to hold an evidentiary hearing on a petition "upon the establishment of a prima facie case in support of post-conviction relief." 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.'" State v. Porter, 216 N.J. 343, 355 (2013) (quoting R. 3:22-10(b)). A defendant is entitled to an evidentiary hearing on a PCR petition when he establishes a prima facie claim and "there are material issues of disputed fact that cannot be resolved by reference to the existing record" Id. at 354 (quoting R. 3:22-10(b)).

A.

Here, the PCR court noted, concerning defendant's argument trial counsel should have moved to sanitize defendant's criminal conviction, "the only evidence of the prior conviction received by the jury was that it was third[-]degree possession of [CDS] with intent to distribute Counsel was not deficient for not moving to sanitize this evidence because it was part of the State's proofs of the certain person's charge"

Viewing the facts alleged in the light most favorable to defendant, we conclude an evidentiary hearing is necessary in this matter. Trial counsel's decision to allow the jury to be told defendant was convicted of third-degree possession of CDS with an intent to distribute raises a fact issue that needs to be addressed at a hearing to determine whether this was trial strategy or deficient

performance under prong one of Strickland/Fritz. Again, when a defendant stipulates to an offense, the jury should be instructed only that the defendant was convicted of a predicate offense, and the prosecution is limited to announcing to the jury that the defendant has committed an offense that satisfies the statutory predicate-offense element. Model Jury Charges (Criminal), "Certain Persons Not To Have Any Firearms (N.J.S.A. 2C:39-7(b)(1))" at 1 n.6. It is possible a defendant would want to make the jury aware of the underlying offense to minimize its impact and to prevent the jury from speculating. However, based on the record before us, it is not clear why defense counsel stipulated for the jury to be advised of defendant's record beyond the fact he was convicted of a predicate offense.

Accordingly, we remand to the trial judge to conduct a hearing regarding trial counsel's decisions to enter into the stipulation that provided the jury with information about the nature and degree of defendant's prior conviction and determine if defendant has met the Strickland/Fritz standard set forth above.

B.

Finally, we address defendant's contention trial counsel failed to file a motion to suppress. That argument is unpersuasive. Defendant fails to cite to any facts or caselaw to support the argument trial counsel should have filed a

motion to suppress. The trial court correctly held this argument is a "bald assertion," and we affirm substantially for the reasons set forth in the court's opinion.

Affirmed in part, reversed in part, and remanded for further proceedings.

We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION