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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0687-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

FRANK SAGGESE, a/k/a
CHRISTOPHER BURCHELL,
CHRISTOPHER S. BURCHELL,
FRANK M. SAGGESSE,
FRANK ZABORNY, and
FRANK ZABRORNY,

Defendant-Appellant.

Submitted January 23, 2023 – Decided February 8, 2023

Before Judges Mawla and Smith.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Indictment Nos. 17-04-0347,
17-06-0550, 17-06-0561 and 17-07-0706.

Hunt, Hamlin & Ridley, attorneys for appellant
(Raymond L. Hamlin, of counsel and on the briefs).

Camelia M. Valdes, Passaic County Prosecutor,
attorney for respondent (Marc A. Festa, Chief Assistant
Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Frank Saggese appeals from the denial of his post-conviction relief (PCR) petition. Defendant contends trial counsel was ineffective by failing to present a certain psychiatrist's report in support of mitigating factor arguments at sentencing. We affirm.

Between April and July 2017, defendant was indicted in four separate incidents. Indictment 17-04-0347 charged defendant with third-degree burglary, N.J.S.A. 2C:18-2(a)(1). Next, Indictment 17-06-0550 charged defendant with: three counts of second-degree kidnapping, N.J.S.A. 2C:13-1(b); first-degree carjacking, N.J.S.A. 2C:15-2; second-degree robbery, N.J.S.A. 2C:15-1; second-degree burglary, N.J.S.A. 2C:18-2(a)(1); third-degree aggravated assault, N.J.S.A. 2C:12-1(b); fourth-degree credit card theft, N.J.S.A. 2C:21-6; three counts of third degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1); third-degree theft, N.J.S.A. 2C:20-3(a); and fourth- degree unlawful taking of means of conveyance, N.J.S.A. 2C:20-10(b). Finally, Indictment 17-06-0561 charged defendant with third-degree possession of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-10(a), and Indictment 17-07-0706-

1 charged defendant with third-degree possession of a controlled dangerous substance, (CDS) N.J.S.A. 2C:35-10(a).

While two of the indictments involved defendant's possession of CDS and a third involved a car burglary, Indictment 17-06-0550 detailed defendant's criminal acts against a mother and her three young children. We briefly recount the events which led to that indictment. On December 2, 2016, defendant entered Nahyan Aquino's car with the intent to take possession of it and drive it away without Aquino's permission. Aquino was in the car, as were her three minor children, ages two, four, and five years. When defendant entered the car, the children were in the back seat. Defendant drove off with the children still in the car and Aquino clinging to the car. Even after becoming aware there were small children in the car, defendant dragged a desperate Aquino alongside the car until she fell away. Defendant then drove to an auto parts store parking lot where he abandoned the children and the car. He stole another car from the parking lot. Eventually, police tracked defendant in the second stolen car and arrested him. At the time of defendant's arrest, Aquino's credit cards were found in his possession.

After a guilty plea, defendant was sentenced. At sentencing, the court considered the aggravating and mitigating factors and made findings. It found

the nature and circumstances of defendant's offense to be cruel and depraved, given his actions after learning there were three toddlers in the car. The court next reviewed defendant's criminal history, noting defendant had forty-four adult arrests and eighteen indictable convictions, including a previous car theft conviction. The court found defendant at "extraordinarily high risk" of committing another offense. It noted defendant's extensive history of drug treatment at various centers, both in-patient and out-patient, as early as 1997. The sentencing court also recognized defendant's attendance at various Alcoholics Anonymous and Narcotics Anonymous meetings as well as his participation in mental health treatment. The court found defendant had "sufficient opportunity" to address his addiction issues and remained severely addicted to drugs. The court noted the lack of injury to the children, and, making observations of defendant at counsel table, concluded defendant was "sincerely sorry for what he did."

The court found aggravating factors one, three, six, and nine, with no mitigating factors. After weighing and balancing the aggravating and mitigating factors, the court sentenced defendant to a sixteen-year term of incarceration with eighty-five percent parole ineligibility on Indictment 17-06-0550. The

court also sentenced defendant to five years on each of the three remaining indictments, concurrent to each other and the sixteen-year sentence.

Defendant filed a PCR petition, alleging trial counsel was ineffective by failing to provide the court with his psychiatrist's written bipolar disorder diagnosis. PCR counsel argued the report showed defendant was prone to having severe manic episodes lasting for weeks and requiring hospitalization, that these episodes were related to his substance abuse, and his condition had not been fully treated. Defendant's diagnosis occurred about eight months before the carjacking and kidnapping. Noting that trial counsel omitted the report in the sentencing memorandum, PCR counsel contended defendant's actions were related to his bipolar disorder, not just his drug use.

The PCR court rejected defendant's theory and found trial counsel's representation was not deficient under Strickland.¹ It denied defendant's PCR application without a hearing.

On appeal, defendant reprises his PCR argument that trial counsel was ineffective for failing to present defendant's psychiatric report at sentencing, and that the PCR court erred in rejecting his application.

¹ Strickland v. Washington, 466 U.S. 668, 687 (1984).

We use a de novo standard of review when a PCR court denies relief without an evidentiary hearing. State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016) (citing State v. Harris, 181 N.J. 391, 421 (2004)). To establish a prima facie claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; State v. Fritz, 105 N.J. 42, 52 (1987) (adopting Strickland).

There is a strong presumption counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, because prejudice is not presumed, Fritz, 105 N.J. at 52, a defendant must demonstrate "how specific errors of counsel undermined the reliability" of the proceeding. United States v. Cronin, 466 U.S. 648, 659 n.26 (1984).

Defendant posits that the PCR court erred by denying relief even though trial counsel failed to present the sentencing court the psychiatric report detailing defendant's bipolar disorder history. Defendant argues his drug use was connected to his mental illness, and the report provided crucial evidence supporting the argument that defendant self-medicated his untreated bipolar disorder with drugs. Defendant contends trial counsel's failure to present the

report constituted ineffective assistance because "failing to present mitigating evidence or [failing to] argue for mitigating factors" can constitute ineffective assistance under State v. Hess, 207 N.J. 123, 154 (2011). Finally, defendant contends that the PCR court erred by denying an evidentiary hearing because he demonstrated a prima facie case for ineffective assistance. We are not persuaded.

Defendant has not met his burden to show ineffective assistance of counsel. At the sentencing hearing, trial counsel submitted a sentencing memorandum and engaged in substantive and lengthy oral argument. There is nothing in the record which demonstrates trial counsel had possession or even knowledge of the psychiatrist's report at that time. There is no allegation that defendant informed trial counsel of the report's existence and counsel failed to act. We find it reasonable for trial counsel to rely on his client to advise of the existence of the client's medical records.

The record shows the sentencing court was aware of and accounted for defendant's history of mental illness and substance addiction. The court referenced that history in its findings, but it did not conclude defendant's history was sufficient to make any finding on mitigating factor four. N.J.S.A. 2C:44-1b(4) states the court may consider if "[t]here were substantial grounds tending

to excuse or justify the defendant's conduct, though failing to establish a defense" as a mitigating factor. Even if trial counsel submitted the psychiatric report at sentencing and argued for the application of mitigating factor four, the report would have been simply a factor for the court to consider. See State v. Setzer, 268 N.J. Super. 553, 567 (App. Div. 1993). The record shows the trial court had before it sufficient credible evidence of both defendant's drug addiction and mental health at the time of sentencing.

Defendant has failed to overcome the "strong presumption" that counsel "rendered adequate assistance" Strickland, 466 U.S. at 690.

Even if we were to find trial counsel was ineffective in not presenting the report, the record reveals no nexus between defendant's alleged bipolar diagnosis and the criminal acts to which he pled guilty, hence there can be no showing of prejudice under prong two of Strickland.

We discern no error in the PCR court's denial of defendant's application without a hearing.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION