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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1861-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IMANI A. PRIESTER, a/k/a
IMANI PRISTER, AMANI
PRIESTER, AMANTI
PRIESTONE, IMANIA
PRIESTER, and PIT RU,

Defendant-Appellant.

Submitted January 19, 2023 – Decided May 31, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey,
Law Division, Cumberland County, Indictment No.
17-11-1058.

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

Jennifer Webb-McRae, Cumberland County
Prosecutor, attorney for respondent (Andre R. Araujo,
Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Imani A. Priester appeals from the Law Division's September 23, 2021 order denying his petition for post-conviction relief (PCR) without an evidentiary hearing. We affirm.

I.

We discern the following facts from the record. In November 2017, a Cumberland County grand jury indicted defendant on the following charges: first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a)(1) (count two); second-degree unlawful possession of a weapon, N.J.S.A. 2C:58-4 (count three); and second-degree possession of a weapon by a convicted person, N.J.S.A. 2C:39-7(b)(1) (count four).

On August 18, 2017, Marquis Green alleged he was shot multiple times while sitting on a porch with friends in Millville. EMS arrived at the scene and transported Green to the hospital for treatment of the gunshot wounds. During an interview with Millville Police Department Detectives Jonathon

Seidel and Brandon Kavanagh while in the hospital, Green identified defendant as the person who shot him.

Prior to trial a Wade/Henderson¹ hearing was held, and the motion was denied.

Defendant elected to proceed to trial and maintained his innocence. The trial commenced on September 18, 2018. Green was set to testify on behalf of the State but was a reluctant witness. Prior to Green's trial scheduled testimony, he claimed he was not certain who shot him. The trial judge conducted a mid-trial Gross² hearing to determine the reliability of Green's hospital interview with the police. At the hearing, Green testified that he could not recall a number of details about his interview nor initializing the photograph of defendant shown to him by Seidel during the interview.

Seidel also testified at the Gross hearing. Seidel stated he investigated the shooting and determined Green was the victim. Seidel and Kavanagh interviewed Green in the hospital the day after the shooting. Seidel described Green as "emotional" but "coherent," and able to provide detailed responses to

¹ United States v. Wade, 388 U.S. 218 (1972); State v. Henderson, 208 N.J. 208 (2011). It is apparent to us the PCR judge did not have the benefit of the motion transcript because his opinion makes no reference to it.

² State v. Gross, 121 N.J. 1 (1990).

the detectives' questions. Specifically, Green identified defendant by the street name "Pip," provided a brief description of Pip, and confirmed defendant as the shooter after viewing the photograph.

After hearing testimony, the trial judge determined Green's prior statement would be admitted in the event Green testified differently at trial. The judge determined Green was not credible because Green remembered "everything about [the interview]" except identifying defendant as the shooter. The judge explained, "I don't believe a single word with regard to his feigned recollection of whether he gave this statement, whether he was able to identify Pip as being the person in the photograph as the person that shot him." The judge concluded the "reliability [of Green's interview with the police] simply [could not] be questioned."

After a recess, on September 18, 2018, defendant entered an "open plea"³ to attempted murder and possession of a weapon by a convicted person. The State made no recommendation regarding defendant's sentence nor represented whether a motion to extended term would be filed. Trial counsel

³ "An 'open plea' [is] one that d[oes] not include a recommendation from the State, nor a prior indication from the court, regarding sentence." State v. Ashley, 443 N.J. Super. 10, 22 (App. Div. 2015) (alterations in original) (emphasis omitted) (quoting State v. Kates, 426 N.J. Super. 32, 42 n.4 (App. Div. 2012), aff'd, 216 N.J. 393 (2014)).

represented that question 7 of the plea form required modification because defendant pleaded guilty to attempted murder which had a mandatory extended term. The plea form was also modified to reflect if the State filed a motion to extend term, defendant was subject to twenty years to life imprisonment.

Defendant signed the written plea agreement which confirmed the nature of the open plea. During the plea proceeding, defendant admitted to shooting Green, received a full explanation from trial counsel regarding the possibility of life imprisonment, subject to an extended term for the weapons plea, reviewed the plea forms, initialed and signed the forms where required. Defendant further stated he was satisfied with his attorney's services, voluntarily pled guilty, and willingly signed the plea forms.

Prior to sentencing on November 5, 2018, defendant moved to withdraw his guilty plea. Defendant argued he "[did not] feel like [the trial] was fair," Defendant claimed he thought Green "was pressuring" defendant to plead guilty by "switching his statement." In relying on the Slater⁴ factors, the

⁴ State v. Slater, 198 N.J. 145, 150 (2009) (establishing four factors that the court should weigh in evaluating a motion to withdraw a guilty plea: "(1) whether the defendant has asserted a colorable claim of innocence; (2) the nature and strength of defendant's reasons for withdrawal; (3) the existence of a plea bargain; and (4) whether withdrawal would result in unfair prejudice to the State or unfair advantage to the accused").

sentencing judge denied defendant's motion. The judge concluded defendant did not demonstrate: a colorable claim of innocence; the nature and the strength of the defendant's assertions for withdrawal was based solely on Green's testimony; and defendant entered into an open plea. Lastly, the judge considered the prejudice to the State based on the time it took to select a jury, that Green was a "reluctant and recalcitrant" victim, and the fact that double jeopardy had attached. The judge reasoned he "[did not] find that the Slater factors really weigh[ed] in favor of allowing [defendant] to withdraw [his] [g]uilty [p]lea."

The judge conducted a sentencing hearing after denying defendant's motion to withdraw his guilty plea. The State argued for the imposition of a forty-year term, while trial counsel asked the judge to sentence defendant to twenty years in prison. After considering counsels' arguments, the judge found aggravating factors three, six, and nine with no mitigating factors. Accordingly, the judge imposed a sentence of eight years on the possession of a weapon by a convicted person charge to run concurrent with an aggregate term of twenty-five years in prison for the attempted murder charge, subject to

the No Early Release Act (NERA), N.J.S.A. 2C:43-7, and the Graves Act⁵, and five years of parole supervision upon release. The remaining charges were dismissed. A judgment of conviction was filed on November 7, 2018.

On direct appeal, defendant challenged his sentence, which this court heard on a sentencing oral argument calendar pursuant to Rule 2:9-11. Additionally, defendant argued the sentencing judge erred in denying his motion to withdraw his guilty plea. Rejecting defendant's challenges, we affirmed defendant's sentence and denial of the motion to withdraw his guilty plea. State v. Priester, No. A-3690-18 (App. Div. Jan. 8, 2020).

In July 2021, defendant timely filed a pro se PCR petition, asserting: prosecutorial misconduct; ineffective assistance of trial counsel by the failure to cross examine Green and failing to argue defendant's age as a mitigating factor during the sentencing; ineffective assistance of appellate counsel by failing to challenge the denial of a Wade/Henderson hearing on appeal, failing to challenge the denial of the application to withdraw the guilty plea on appeal, and failing to file an appeal upon defendant's request.

⁵ The term "Graves Act" now references all firearms offenses that carry a mandatory minimum sentence. See N.J.S.A. 2C:43-6.

Following oral argument on September 23, 2021, the PCR judge issued a written opinion denying the petition without an evidentiary hearing. The judge concluded prosecutorial error should have been raised on direct appeal rather than a PCR petition pursuant to Rule 3:22-4. The judge further found trial counsel did not render ineffective assistance of counsel because the decision to not re-cross Green was a matter of trial strategy. Nor was trial counsel ineffective at sentencing because he argued for more lenient sentencing based on defendant's age. Regarding defendant's claim of ineffective assistance of appellate counsel, the judge determined an appeal from the denial of the Wade/Henderson hearing was procedurally barred under State v. Robinson, 224 N.J. Super. 495 (App. Div. 1988) and would have violated the plea agreement, subjecting defendant to potential life imprisonment. In rejecting defendant's argument that his appellate counsel failed to challenge the denial of the request to withdraw the guilty plea, the judge found appellate counsel raised the issue on direct appeal.

II.

Defendant raises the following points for our consideration:

POINT ONE

THE PCR COURT ERRED IN DENYING
[DEFENDANT] AN EVIDENTIARY

HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL REGARDING HIS FAILURE TO ARGUE PROSECUTORIAL MISCONDUCT DURING TRIAL AND IN FAILING TO RE-CROSS EXAMINE MARQUIS GREEN AFTER THE MISCONDUCT OCCURRED.

POINT TWO

THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM APPELLATE COUNSEL REGARDING HER FAILURE TO CHALLENGE THE DENIAL OF THE WADE MOTION ON APPEAL.

A.

A judge's decision to deny a PCR petition without an evidentiary hearing is reviewed under an abuse of discretion standard; however, we may review the factual inferences and legal conclusions drawn by the court de novo. State v. Brewster, 429 N.J. Super. 387, 401 (App. Div. 2013) (citing State v. Marshall, 148 N.J. 89, 157-58 (1997)); State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016).

In dismissing defendant's prosecutorial misconduct argument, the PCR judge relied on Rule 3:22-4(a). Rule 3:22-4(a) provides that "[a]ny ground for relief not raised in the proceedings resulting in the conviction, . . . or in any

appeal taken in any such proceedings is barred from assertion in a proceeding" for PCR. R. 3:22-4(a); see also State v. Nash, 212 N.J. 518, 546 (2013) (recognizing that Rule 3:22-4(a) bars a defendant from employing a PCR petition to assert a claim that could have been raised at trial or on direct appeal).

The PCR judge explained defendant should have—and did not—raise the issue of prosecutorial misconduct on direct appeal. The judge further noted the only argument defendant raised on direct appeal was that his sentence was "manifestly excessive." He also found defendant's claim was not cognizable under Rule 3:22-2 or -3. After reviewing the record, the judge dismissed the prosecutorial misconduct claim on procedural grounds.⁶ R. 3:22-4.

Despite the judge finding that defendant's PCR petition was procedurally barred, the judge addressed and rejected the merits of defendant's ineffective assistance of counsel arguments. We agree with the judge's rejection of defendant's PCR petition on the merits.

⁶ The PCR judge was provided only the Notice of Appeal and two Appellate Division orders related to the sentencing oral argument calendar dispositions. Despite the absence of documents in the record regarding defendant's motion to withdraw the guilty plea, the judge noted our consideration and rejection of the issue.

Defendant claimed that trial counsel was ineffective in failing to re-cross-examine Green, after he "succumbed to the pressure of the prosecution on re-direct examination" and testified that defendant shot him. Defendant further claimed trial counsel failed to re-cross-examine Green to determine whether he felt pressured by the State to admit defendant shot him, which violated defendant's due process and compulsory process rights. Thus, defendant had "no other option" but to plead guilty, without a recommendation from the State, to avoid the possibility of life imprisonment. Defendant's contentions are unavailing.

The PCR judge properly concluded that defendant's ineffective assistance of trial counsel claim for failing to re-cross-examine Green failed both prongs of Strickland.⁷ The record contradicts defendant's contention that he had to plead guilty to avoid life imprisonment. The plea colloquy demonstrates trial counsel explained to defendant he faced the possibility of a life sentence. Further, defendant testified that he understood the following:

⁷ Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a defendant first must show that his or her attorney's handling of the matter "fell below an objective standard of reasonableness." Id. at 688; see also State v. Fritz, 105 N.J. 42, 58 (1987). A defendant also must show there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; see also Fritz, 105 N.J. at 60-61.

the plea terms; that the judge could impose a life sentence if he pleaded guilty; he pleaded guilty to an open plea; and the State did not recommend a particular sentence.

Contrary to defendant's arguments in Point I, the record reveals that the terms of his open plea were placed on the record in clear terms that defendant testified he understood. The judge made no promises to defendant, defense counsel, or the State that he would impose a specific sentence under Rule 3:9-3(c). Defendant was fully aware that although his attorney planned to argue for a lesser sentence, the judge could impose the minimum ten-year term for first-degree aggravated murder. Thus, we discern no basis for disturbing defendant's guilty plea or his sentence.

Defendant also contends the jury, and not the PCR judge, should have determined Green's credibility. Defendant's contention is misplaced. In determining whether to admit prior statements, the trial court conducts a Gross hearing and renders credibility determinations and related factual findings. See State v. Soto, 340 N.J. Super. 47, 69 (App. Div. 2001), overruled in part on other grounds, State v. Dalziel, 182 N.J. 494 (2005). These "credibility determinations are entitled to deference and [the court's] factual findings must

be sustained as long as they are supported by sufficient, credible evidence in the record." State v. Yohnnson, 204 N.J. 43, 62 (2010).

The PCR judge found defendant's contention that trial counsel was ineffective for failing to re-cross-examine Green lacked merit. The judge explained the potential risks had trial counsel elected to re-cross examine Green, including the possibility Green would have seemed more credible having given an interview, highlighted Green's identification and initialing of defendant's photograph the day after the shooting; and the possibility that Green would have expressed a fear of retribution by defendant directed to Green or his family or displayed a "genuine" fear before the jury. Thus, he found trial counsel's decision not to re-cross-examine Green was within the bounds of reasonable, professional, and competent representation.

We find no merit to any of defendant's contentions to the contrary. We are satisfied, as was the PCR judge, that defendant failed to demonstrate his trial counsel made any errors that deprived him of effective legal assistance and that he suffered prejudice because of trial counsel's strategy. Accordingly, defendant failed to establish a prima facie claim of ineffective assistance of trial counsel to warrant an evidentiary hearing. See State v. Preciose, 129 N.J. 451, 462 (1992). We discern no reason to disturb the judge's decision.

B.

Point II of defendant's argument is equally unconvincing. Defendant contends appellate counsel rendered ineffective assistance of counsel in failing to challenge the denial of a Wade/Henderson motion on appeal. Defendant contends if the issue had been raised on appeal, the matter would have been remanded to the trial court since the police "used suggestive procedures" by showing only defendant's photograph to Green which created a "false identification." Moreover, defendant argues the judge erred in "assuming" an appeal from the denial of the Wade/Henderson motion violated defendant's plea agreement, was not preserved for appeal, and was raised in the sentencing oral argument calendar appeal.

Again, the record does not support defendant's contentions. We first address whether defendant waived his right to appeal from the denial of the Wade/Henderson motion. In question 4(e) of defendant's plea form, defendant waived his "right to appeal the denial of all other pretrial motions" without exception. The trial judge did not give approval on the plea record to defendant to reserve the right to appeal the Wade/Henderson motion. Nor did the State consent.

A guilty plea constitutes a waiver of all issues which could have been addressed before the guilty plea. State v. Robinson, 224 N.J. Super. 495, 498 (App. Div. 1988). "Generally, a defendant who pleads guilty is prohibited from raising, on appeal, the contention that the State violated his constitutional rights prior to the plea." State v. Knight, 183 N.J. 449, 470 (2005) (quoting State v. Crawley, 149 N.J. 310, 316 (1997)). This waiver applies to constitutional defects both in the investigation and the proceedings themselves. Pressler & Verniero, Current N.J. Court Rules, cmt. 2. on R. 3:9-2 (2023).

Here, the record demonstrates defendant waived his right to seek appellate review of the denial of the Wade/Henderson motion. Thus, appellate counsel's failure to raise that argument on appeal did not amount to ineffective assistance of appellate counsel.

Additionally, the PCR judge reasoned an appeal of the trial court's denial of defendant's Wade/Henderson motion would have violated his plea agreement. The judge also found defendant did not preserve the denial of the Wade/Henderson motion as part of the plea agreement. As noted above, the judge noted defendant acknowledged he waived the right to appeal the pre-trial motions. Equally important, the record demonstrates trial counsel thoroughly explained the plea form to defendant.

To prevail on a Wade/Henderson motion, a defendant must first "proffer . . . some evidence of impermissible suggestiveness" which could lead to a mistaken identification to be entitled to a hearing. Henderson, 208 N.J. at 238 (alteration in original) (quoting State v. Rodriguez, 264 N.J. Super. 261, 269 (App. Div. 1993)). If a defendant presents sufficient evidence of impermissible suggestiveness, the court should conduct an evidentiary hearing where the State must offer proof that the proffered eyewitness identification is reliable based on an analysis of several variables. Id. at 288-89.

However, a Wade/Henderson hearing is not required for a "confirmatory" identification, "which is not considered suggestive." State v. Pressley, 232 N.J. 587, 592 (2018). "A confirmatory identification occurs when a witness identifies someone he or she knows from before but cannot identify by name." Id. at 592-93. The Court noted, by way of example, that the person identified "may be a neighbor or someone known only by a street name." Id. at 593 (citations omitted).

Here, the PCR judge concluded defendant's contention was nothing more than a "bald assertion." The judge determined defendant was known to Green by his street name, "Pip," based on Green's testimony, and defendant's

submissions. Therefore, Green's identification was a "confirmatory identification."

We are convinced there is sufficient evidence in the record to support the judge's findings and his conclusion that Green's identification of defendant was a "confirmatory identification" and did not present "a very substantial likelihood of irreparable misidentification." Henderson, 200 N.J. at 289; Pressley, 232 N.J. at 592. For these reasons, appellate counsel was not ineffective in failing to raise the denial of the Wade/Henderson motion on appeal.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION