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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2125-20**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LEMONT O. LOVE, a/k/a
LEMONT OMAR LOVE,
and LAMONT LOVE,

Defendant-Appellant.

Submitted March 1, 2023 – Decided March 27, 2023

Before Judges Mitterhoff and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 07-03-0408, 07-03-0502 and 08-01-0123.

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

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

This matter returns to our court for the third time following the Law Division's March 10, 2020 partial denial of defendant Lemont Love's second petition for post-conviction relief, which he now appeals. We affirm, substantially for the reasons expressed in Judge Alberto Rivas's thorough oral opinion.

We will not recite the factual antecedents of defendant's appeal in detail. Instead, we incorporate by reference the factual findings contained in Judge Rivas's oral opinion. Critical to this appeal, however, is the procedural history relating to the prosecution of defendant on charges reflected in four separate indictments based on various incidents occurring between 2006 and 2009.

On March 1, 2007, a Middlesex County grand jury returned Indictment No. 07-03-0408 ("Indictment 0408"), charging defendant with two counts of third-degree aggravated assault on a police officer, contrary to N.J.S.A. 2C:12-1(b)(5)(a), one count of third-degree resisting arrest, contrary to N.J.S.A. 2C:29-2(a)(3)(a), and one count of fourth-degree obstructing the administration of law or other government function, contrary to N.J.S.A. 2C:29-1(b).

On March 22, 2007, a Middlesex County grand jury returned Indictment No. 07-03-0502 ("Indictment 0502"), charging defendant with one count of third-degree eluding, contrary to N.J.S.A. 2C:29-2(b).

On January 22, 2008, a Middlesex County grand jury returned Indictment No. 08-01-0123 ("Indictment 0123"), charging defendant with two counts of third-degree distribution of cocaine, contrary to N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3), one count of third-degree possession of phencyclidine ("PCP"), contrary to N.J.S.A. 2C:35-10(a)(1), one count of third-degree forgery, contrary to N.J.S.A. 2C:21-1(a)(2), and one count of fourth-degree theft or unlawful receipt of a credit card, contrary to N.J.S.A. 2C:21-6(c).

Finally, on September 11, 2009, a Middlesex County grand jury returned Indictment No. 09-09-1537 ("Indictment 1537"), charging defendant with one count of second-degree distribution of cocaine within 500 feet of a public park, contrary to N.J.S.A. 2C:35-5(a) and N.J.S.A. 2C:35-7.1, third-degree possession of cocaine, contrary to N.J.S.A. 2C:35-10(a)(1), third-degree possession of cocaine with intent to distribute, contrary to N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(3), and one count of fourth-degree tampering with evidence, contrary to N.J.S.A. 2C:28-6(1).

On March 16, 2010, defendant entered into a negotiated global plea agreement, resolving all charges reflected in the four indictments. Through this agreement, defendant pled guilty to one count of third-degree distribution of cocaine under Indictment 0123, one count of third-degree possession of cocaine with intent to distribute under Indictment 1537, fourth-degree obstructing the administration of law under Indictment 0408, and third-degree eluding under Indictment 0502. On December 8, 2010, consistent with the plea agreement, defendant was sentenced to an aggregate term of ten years' imprisonment, with five years of parole ineligibility.

Defendant has attempted to reverse his conviction or withdraw his plea seven times. On June 22, 2010, defendant submitted a certification in support of his application to withdraw his guilty plea, which was denied on July 2, 2010. On direct appeal, defendant argued that the court erred in denying his application to withdraw his guilty plea. On June 21, 2013, we rejected defendant's argument and affirmed. State v. Love, No. A-2483-10 (App. Div. June 21, 2013) (slip op. at 1).

On January 17, 2012, defendant filed his first PCR application self-represented, claiming that he was "tricked" by plea counsel into accepting the plea deal. Specifically, defendant claimed that he only pled guilty because his

attorney lied by telling him that he could easily take back his plea. On March 14, 2014, court-appointed PCR counsel filed a brief and exhibit in support of defendant's petition. On May 9, 2014, the court denied defendant's petition without an evidentiary hearing, reasoning that defendant did not submit any competent evidence supporting his allegation of ineffective assistance of counsel.

Defendant filed a motion for reconsideration of the denial of his PCR on June 27, 2014, which was ultimately denied on August 22, 2014. On September 22, 2016, we affirmed the court's decision to deny defendant's motion, finding that defendant's "self-serving spurious allegations of impropriety" against his plea counsel were not sufficient to meet his burden of proof. State v. Love, No. A-0480-14 (App. Div. Sept. 14, 2016) (slip op. at 6). We further stated:

Independent of this substantive deficiency, this court has addressed and rejected on direct appeal defendant's argument attacking the legal viability of his guilty plea.

...

Defendant's PCR is a transparent attempt to relitigate the issue we have previously rejected on appeal and is therefore procedurally barred under Rule 3:22-5.

[Id. at 6-7.]

On October 12, 2016, defendant filed a second petition for PCR, alleging ineffective assistance of plea, appellate, and PCR counsel; and newly discovered

evidence of racial profiling, selective policing, and prosecutorial misconduct based on a Brady¹ violation. On August 21, 2018, the court conducted a hearing on the matter and issued an oral opinion.² Following oral argument, the court first rejected defendant's racial profiling argument, finding that it was not relevant to defendant's claim of ineffective assistance of counsel. Then, the court found that defendant's second PCR was not procedurally time-barred under Rule 3:22-12(a), reasoning that the untimeliness was not egregious and that the thrust of defendant's second PCR was his claim that original PCR counsel was ineffective. However, the court did find that defendant's request to withdraw his guilty plea was procedurally barred under Rule 3:22-5 because that argument had already been raised and rejected by both the trial court and this court.

As for the merits of defendant's second petition, defendant argued that appellate counsel and original PCR counsel were ineffective for failing to properly investigate or make inquiries into possibly exculpatory evidence that would have been valuable to an attorney attempting to mount an effective

¹ See Brady v. Maryland, 373 U.S. 83 (1963).

² By order dated October 28, 2021, the court memorialized the oral decision placed on the record on August 21, 2018.

defense. In support of his argument, defendant provided certifications with regard to all four indictments.

Indictment 1537 involved the sale of cocaine in New Brunswick. Respecting that indictment, the court denied defendant's petition for PCR without an evidentiary hearing, reasoning that the only relevant certification was defendant's own, which contained information that could have been available to counsel "regardless of whether or not they conducted an adequate investigation."

Indictment 0408 involved the assault of police officers. For this charge, defendant presented the certification of his brother, Andre Love, whose purported eyewitness account directly contradicted the factual basis established during the plea colloquy. Finding that this witness would have been valuable to an attorney attempting to mount an effective defense, the court found grounds for an evidentiary hearing concerning this allegation.

Indictment 0502 involved eluding the police in a motor vehicle. In Christine Schmidutz's certification, the passenger in defendant's vehicle at the time of the incident, she claimed that she never witnessed defendant throw anything out of the window, which directly contradicted the facts established at the plea colloquy. Therefore, the court found grounds for an evidentiary hearing of this matter, as well.

Finally, Indictment 0123 involved the selling of cocaine to an undercover police officer. Defendant's roommate at the time, Nathan Ingram, certified that defendant was not involved with the alleged transaction; rather, he contended that the transaction was conducted by a man named Deshaun Williams. Finding that this certification spoke directly to defendant's innocence, the court also granted an evidentiary hearing on this matter.

Judge Rivas conducted the evidentiary hearings on Indictments 0408, 0502, and 0123 over the course of three days: December 10, 2018, February 15, 2019, and May 13, 2019. After hearing the testimony of defendant's witnesses, on March 10, 2020, the judge issued his well-reasoned oral decision, which was memorialized by order of the same date.

As for Indictment 0408,³ Andre Love testified that defendant never assaulted or laid his hands on anyone, including the officers at the scene, during the night in question. Andre Love further testified that the officers were "unprovoked" when they attacked defendant, beating him for several minutes while defendant was handcuffed. Upon review of the testimonies of defendant

³ Defendant's mother, Betty Love, also testified as to what she observed on the night in question; however, the court found that defendant was "unable to show that [his mother] possessed direct knowledge and as a result that her testimony would have made the results different."

and his brother, the court found that defendant satisfied the two-prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984). Specifically, the court found that "failure to contact, investigate, or interview Andrew Love, an exculpatory witness, cannot be considered sound trial strategy[.]" Therefore, the court granted defendant's PCR petition on this matter.

As for Indictment 0502, Christine Schmidutz, who was listed as a State witness in defendant's original case, testified as to the traffic stop in this matter. Her testimony largely corroborated the police report, stating that defendant was aware the police were following him, that they had turned on their lights and sirens, and that defendant refused to stop for them based on an alleged fear of law enforcement. Because defendant was only charged with eluding in this matter, the court found that Schmidutz's testimony did not "provide a justification or a basis" for disregarding the officer's lawful authority. Therefore, the court found that defendant failed the second prong of the Strickland test and denied his petition for PCR on this matter. The court reasoned that defendant failed to provide any testimony that contradicted the existing record, which made it unlikely that Schmidutz's testimony would have altered the results of the proceeding.

As for Indictment 0123, undercover officer, Det. Carolyn Bertucci, testified at the evidentiary hearing. She testified that she bought \$80 worth of cocaine from defendant, who had introduced himself to her as "L," during two separate undercover purchases. In addition to her testimony, Bertucci also positively identified defendant as the cocaine dealer via photo identification. Nathan Ingram also testified at the hearing, stating that the individual who committed the sale of cocaine to the undercover officer on the date in question was Deshaun Williams, who is now deceased. Ingram further testified that Williams went by the name of "L."

In denying defendant's PCR petition in this matter, the judge stated that he did not find Ingram's testimony to be credible. Specifically, the judge stated, "[t]he idea that . . . Williams went by the name of "L" does not make any sense, and so the Court [finds] him not to be credible." Ultimately, the court found that the evidence against defendant in regard to Indictment 0123 was "so overwhelming" that it was unlikely that the outcome would have been different regardless of the alleged evidence in defendant's favor.

This appeal followed. On appeal, defendant raises the following arguments:

POINT I

MR. LOVE IS ENTITLED TO RELIEF ON HIS CLAIMS THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND CAUSING HIM TO FORGO A TRIAL ON INDICTMENTS 07-03-0502 AND 08-01-0123.

POINT II

MR. LOVE IS ENTITLED TO A REMAND ON HIS CLAIM ASKING FOR RELIEF BASED ON NEWLY DISCOVERED EVIDENCE.

We find that defendant's arguments lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(2). We write only to add the following brief comments.

A defendant's right to effective assistance of counsel extends to the plea-negotiation process. Lafler v. Cooper, 566 U.S. 156, 162 (2012); see also State v. Chau, 473 N.J. Super. 430, 445 (App. Div. 2022). To justify relief after a guilty plea, a defendant must satisfy a modified Strickland standard, which requires a showing that: "(i) counsel's assistance was not within the range of competence demanded of attorneys in criminal cases; and (ii) 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. Nuñez-Valdéz, 200 N.J. 129, 139 (2009) (quoting State v. DiFrisco, 137 N.J. 434, 457

(1994)) (alteration in original); see Lafler, 566 U.S. at 163 (holding that a defendant claiming ineffective assistance at the plea stage must show that "the outcome of the plea process would have been different with competent advice"). A criminal defendant must also "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla v. Kentucky, 559 U.S. 356, 372 (2010); see also State v. Aburoumi, 464 N.J. Super. 326, 339 (App. Div. 2020).

Our review of a PCR claim after a court has held an evidentiary hearing is "necessarily deferential[.]" State v. Nash, 212 N.J. 518, 540 (2013). We "defer to the PCR court's factual findings, given its opportunity to hear live witness testimony, and ' . . . uphold the PCR court's findings that are supported by sufficient credible evidence in the record.'" State v. Gideon, 244 N.J. 538, 551 (2021) (quoting Nash, 212 N.J. at 540). "When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete, and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal." State v. Johnson, 42 N.J. 146, 162 (1964).

On the other hand, we review a judge's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. See State v. Preciose,

129 N.J. 451, 462 (1992) (discussing Rule 3:22-10). The mere raising of a claim for PCR does not entitle the defendant to an evidentiary hearing and the defendant "must do more than make bald assertions that he was denied the effective assistance of counsel." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999). When petitioning for PCR, the defendant must establish, by a preponderance of the credible evidence, that he is entitled to the requested relief. Nash, 212 N.J. at 541; Preciose, 129 N.J. at 459. To sustain that burden, the defendant must allege and articulate specific facts that "provide the court with an adequate basis on which to rest its decision." State v. Mitchell, 126 N.J. 565, 579 (1992).

Having considered defendant's contentions in light of the record and the applicable law, we affirm the denial of defendant's PCR petition for Indictments 0502, 0123, and 1537, substantially for the reasons detailed at length in Judge Rivas's oral opinion. We discern no abuse of discretion in the judge's consideration of the issues, or in his decision to deny defendant's petition for Indictment 1537 without an evidentiary hearing. As for the subject Indictments, we are satisfied that defendant's representation—at each stage of the proceedings—was not ineffective, and defendant provides nothing of relevance to the contrary.

Finally, we find that defendant's argument regarding racial profiling is procedurally barred under Rule 3:22-4(a), as it could have been raised in an earlier proceeding, such as his first petition for PCR, or on direct appeal. See Nash, 212 N.J. at 546.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION