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APPROVAL OF THE APPELLATE DIVISION**

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2196-19**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DARIUS M. WILSON,

Defendant-Appellant.

Submitted November 1, 2022 – Decided January 13, 2023

Before Judges Sumners and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Salem County, Indictment No. 06-01-0001.

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

Kristin J. Telsey, Salem County Prosecutor, attorney for respondent (David M. Galemba, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

In 2006, defendant Darius M. Wilson was found guilty of first-degree robbery, N.J.S.A. 2C:15-1, and second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1), involving a ninety-five-year-old man in a fast-food restaurant's restroom. At the conclusion of the State's case, the trial judge dismissed charges of third-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4; fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); fourth-degree aggravated assault on a law enforcement officer, N.J.S.A. 2C:12-1(b)(5)(a); and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a). Defendant was sentenced to an aggregate prison term of fifteen years subject to the No Early Release Act, N.J.S.A. 2C:43-7.2.

Defendant timely appealed, alleging: (1) his constitutional due process rights were violated because the trial court failed to sever charges of fourth-degree aggravated assault on a law enforcement officer, N.J.S.A. 2C:12-1(b)(5)(a), and fourth-degree resisting arrest, N.J.S.A. 2C:29-2(a), which allegedly occurred during his arrest by parole officers four days after the robbery and aggravated assault; and (2) an excessive sentence. We affirmed the conviction and sentence. State v. Wilson, No. A-3488-06 (App. Div. Mar. 4, 2009). Defendant's subsequent efforts to overturn his conviction through post-

conviction relief (PCR) have taken many twists and turns, bringing us to this appeal.

In 2013, a little over six years after his conviction, defendant filed a pro se PCR petition alleging that both trial and appellate counsel provided ineffective assistance. The first PCR judge ruled the claim against trial counsel was time-barred under Rule 3:22-12 because it was filed five years after defendant's conviction. We reversed and remanded for the first PCR judge to provide the reasons for his factual and legal conclusions. State v. Wilson, No. A-2959-13 (App. Div. June 15, 2015) (slip op. at 8-9).

Following remand, the first PCR judge issued an order and letter opinion explaining why defendant's claims against trial counsel were time-barred but that his claims against appellate counsel were timely and an evidentiary hearing was needed to address them. The first PCR judge then retired, and a second PCR judge was assigned to conduct the evidentiary hearing. After rejecting defendant's motion that she recuse herself due to a conflict of interest, the second PCR judge conducted the evidentiary hearing, and issued an order and written opinion denying defendant relief concerning the performance of appellate counsel.

Defendant appealed. We concluded "[t]o avoid an appearance of impropriety," the second PCR judge "should not have presided over the evidentiary hearing" regarding claims against appellate counsel. State v. Wilson, No. A-0425-16 (App. Div. Dec. 10, 2018) (slip op. at 20). Therefore, "we revers[ed] the order [denying defendant's PCR claim against his appellate counsel] and remand[ed] to a different judge for a new evidentiary hearing." Ibid.

Following another remand and evidentiary hearing, a third PCR judge, applying the two-prong test established in Strickland v. Washington, 466 U.S. 668 (1984), entered an order and issued a twenty-two-page written decision rejecting defendant's claim that appellate counsel was ineffective by failing to contend the trial court erred in amending the first-degree robbery charge. To provide context to that ruling, we detail the pertinent trial judge's ruling with respect to the charges involving the robbery victim.

Defendant was indicted for first-degree robbery through the infliction of bodily injury by use of a deadly weapon, second-degree aggravated assault, third-degree possession of a weapon for an unlawful purpose, and fourth-degree unlawful possession of a weapon. At the close of the State's case, defendant moved for acquittal of all charges except the aggravated assault charge.

Defendant argued there was no testimony to support the weapon-related charges. In opposition, the State acknowledged the victim testified he did not know what the assailant hit him with but argued that his statement "coupled with the injuries that [he] suffered" was enough evidence to provide a reasonable inference that a deadly weapon was used in the assault. Noting the State only presented evidence of second-degree robbery because there was no testimonial evidence that a weapon was used to establish first-degree robbery through the infliction of bodily injury by use of a deadly weapon, the trial court was initially inclined to amend the first-degree robbery charge to second-degree robbery and dismiss the charges of possession of a weapon for an unlawful purpose, and unlawful possession of a weapon.

Upon hearing further argument, however, the trial court, applying Rule 3:7-4, amended the first-degree robbery charge because under N.J.S.A. 2C:15-1(b), the offense could also be committed where the actor attempts to inflict serious bodily injury. The statute provides:

A person is guilty of robbery if, in the course of committing a theft, he:

(1) Inflicts bodily injury or uses force upon another;

. . . .

b. Grading. Robbery is a crime . . . of the first degree if in the course of committing the theft the actor . . . purposely inflicts or attempts to inflict serious bodily injury, or is armed with, or uses or threatens the immediate use of a deadly weapon.

[N.J.S.A. 2C:15-1.]

The trial court therefore decided that the jury could consider first-degree robbery while committing a theft. The jury was instructed on first-degree robbery, the lesser-included offense of second-degree robbery, the lesser-included offense of theft, and second-degree aggravated assault. The judge dismissed the weapon charges.

Upon assessing the trial record and reviewing the transcript testimony of trial counsel and appellate counsel from the evidentiary hearing before the second PCR judge,¹ the third PCR judge held the claim that appellate counsel should have challenged the trial court's amendment of the first-degree robbery charge was not an unconstitutional denial of due process based on a totality of the circumstances. Citing to State v. Dixon, 125 N.J. 223, 231 (1991), and State

¹ Although PCR counsel advised the third PCR judge that appellate counsel was subpoenaed to testify again but that service was not made on trial counsel, defendant was satisfied the judge could rely on the transcripts of appellate counsel's prior testimony and his trial counsel's statements on the trial record in lieu of calling them to testify. Defendant further agreed to admit any evidentiary documents in the record and requested judicial notice of the pleadings, briefs, and attachments.

v. Lopez, 276 N.J. Super. 296, 297 (App. Div. 1994), the third PCR judge stated the "trial court's decision to submit a charge to the jury which was not identical to that set forth in the indictment in similar situations [is upheld] so long as the defendant was not prejudiced for lack of notice." The judge found there was no prejudice because the indictment clearly stated the first-degree robbery charge was due to defendant's "inflict[ion of] bodily injury . . ., by use of a deadly weapon" and aggravated assault for "purposely or knowingly . . . caus[ing] serious bodily injury." Given the undisputed evidence the victim was seriously injured, the judge reasoned that, in accordance with Dixon, the indictment "fairly appraised defendant of the charge" because the alleged offense was first-degree robbery regardless of whether it occurred with a weapon or with serious bodily injury. 125 N.J. at 257. Finding an appellate argument would have been unsuccessful, the third PCR judge determined defendant was not prejudiced and, consequently, based on State v. Worlock, 117 N.J. 596, 625 (1990), appellate counsel was not ineffective and dismissed the petition.

Based on the relevant law and the record, we find no merit to defendant's arguments:

POINT I

THE ORDER DENYING POST-CONVICTION
RELIEF MUST BE REVERSED BECAUSE

DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT-APPEAL SINCE COUNSEL FAILED TO CHALLENGE THE TRIAL COURT'S AMENDMENT TO AN ESSENTIAL ELEMENT OF THE ROBBERY CHARGE AND A CHALLENGE WOULD HAVE RESULTED IN A REVERSAL OF DEFENDANT'S CONVICTION.

POINT II

THE PCR COURT ERRED WHEN IT DID NOT HOLD AN EVIDENTIARY HEARING IN ACCORDANCE WITH THE APPELLATE DIVISION'S REMAND ORDER.

We affirm substantially for the reasons set forth in the third PCR judge's sound written decision. We add the following comments.

We disagree with defendant's argument that the trial court cannot justify amending the indictment simply because the amendment maintains the degree of the charged offense. We reject his contention that Dixon and Lopez were incorrectly relied upon by the trial court. Defendant argues that in Dixon the charge was amended to add a predicate act, rather than an essential element of the crime, whereas the trial court's amendment here changed the predicate element of his indictment, and not simply added an element that was not stated in the indictment. As for Lopez, defendant argues there, the amendment of the charge of first-degree robbery using a deadly weapon charge occurred to include

more weapons than originally detailed in the indictment. Defendant states "[u]nlike Lopez . . . the weapons element [here] was eliminated altogether and replaced with an entirely different element which was serious bodily injury."

The trial court's amendment did not prejudice defendant because it neither changed the degree of the offense charged nor charged defendant with a different offense. Defendant was originally charged with first-degree robbery by inflicting serious bodily injury through the use of a weapon under N.J.S.A. 2C:15-1(b). The amendment eliminating the use of a weapon was supported by the State's evidence that defendant inflicted serious bodily injury upon the victim and did not alter the allegation against him because N.J.S.A. 2C:15-1(b) prescribes first-degree robbery occurs when "in the course of committing the theft the actor . . . purposely inflicts or attempts to inflict serious bodily injury." Thus, defendant was tried for a crime he was on notice to defend. See State v. Dorn, 233 N.J. 81, 96 (2018) ("[W]hether an amendment under Rule 3:7-4 was appropriate hinges upon whether the defendant was provided with adequate notice of the charges and whether an amendment would prejudice defendant in the formulation of a defense.").

To the extent we have not addressed them, any remaining arguments made by defendant lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(2).

Affirmed.

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



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