SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2455-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

KEVIN G. JAMES a/k/a
KEVIN J. JAMES, and
KEVIN JAMES,

Defendant-Appellant.

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Submitted December 7, 2022 – Decided February 28, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Indictment Nos. 10-10-1142 and 12-06-0606.

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

Angelo J. Onofri, Mercer County Prosecutor, attorney for respondent (Laura C. Sunyak, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Kevin James appeals from a February 12, 2021 order denying his petition for post-conviction relief (PCR). We affirm in part, reverse in part, and remand for an evidentiary hearing.

I.

We discern the following facts from defendant's plea hearing and other materials in the record. In October 2010 and June 2012, defendant was charged in two indictments with eighteen offenses, including two counts of first-degree robbery, N.J.S.A. 2C:15-1(a). The two robberies occurred on May 30, 2010 and May 31, 2010 in Trenton.[1]

According to the State, on May 29, 2010, at approximately 9:30 p.m., former co-defendant Hetepheres Ali lured Martial Charleron into a Trenton apartment complex under the guise of engaging in sexual relations for money. Upon his arrival, defendant and another former co-defendant, Jeramiah Johnson, threatened, robbed, and bound Charleron, and held him for several hours into the morning of May 30, 2010. They ultimately released him and fled the scene.

[1] The first robbery took place from May 29, 2010 to May 30, 2010. For ease of reference, we have referred to this robbery as having occurred on May 30, 2010.

Two days later on May 31, 2010, at approximately 7:30 p.m., Ali met with a second victim, Werner Gramajo, at his apartment in Trenton, again under the false pretenses of having sex with him. While Gramajo was preoccupied in another room, Ali let Johnson and defendant into the apartment. Defendant threatened Gramajo with a gun and assaulted and bound him. While defendant, Ali, and Johnson were ransacking the apartment, Gramajo jumped out of his bedroom window. He was able to contact the police at approximately 9:20 p.m., and informed them of the assault and robbery. Defendant, Johnson, and Ali fled the scene, but Ali's wallet was found in the apartment.

Defendant was arrested at 12:07 a.m. on June 1, 2010, and as noted, indicted in 2010 and 2012. He initially intended to proceed to trial, with Ali and Johnson expected to serve as the State's witnesses following their guilty pleas. In addition to Ali's and Johnson's testimony, the State also asserted it possessed surveillance video placing defendant in Trenton at the apartment complex where the May 30, 2010 robbery occurred.[2]

In June 2013, defendant pled guilty to two counts of first-degree robbery. At sentencing, defendant's plea counsel requested a lesser sentence than the

[2] The State referenced this surveillance video both in their brief and at the PCR hearing. The State has not, however, included the tape in the record on appeal.

negotiated plea agreement, arguing defendant was only twenty years old[3] when he committed the robberies, "a young man," who found himself in "some really serious business with people that influenced him," and who was "trying to improve himself." The State objected and requested the court sentence defendant pursuant to the plea agreement, as defendant's "whole life" had been spent "committing crimes and victimizing members of the community."

After reviewing defendant's presentence report and the parties' submissions, the court found applicable aggravating factors three (risk of re-offense), N.J.S.A. 2C:44-1(a)(3); six (prior criminal record), N.J.S.A. 2C:44-1(a)(6); and nine (need to deter), N.J.S.A. 2C:44-1(a)(9). The court explained factor three applied based on defendant's history of "adjudicat[ions] [as a] delinquent" and his continuing history of re-offense. As to factor six, the court supported its finding based on defendant's unabated criminal activity, as well as "the seriousness of the offense for which [he] [was] convicted." Finally, the court found factor nine applied and explained "there is always a need for deterring [defendant] and others from violating the law."

[3] Defendant's plea counsel incorrectly stated he was twenty years old at the time of the robberies, when he was in fact nineteen years old.

The court found no applicable mitigating factors and concluded the "negotiated sentence to be within the authorized range and in accordance with the law." Accordingly, the court sentenced defendant to an aggregate seventeen-year term, consistent with the negotiated plea agreement.

Defendant appealed only his sentence. We considered the matter on our Excessive Sentencing Calendar and affirmed, concluding "the sentence [was] not manifestly excessive or unduly punitive and d[id] not constitute an abuse of discretion." State v. James, No. A-3303-14 (App. Div. June 22, 2015) (slip op. at 1).

Defendant filed a timely pro se PCR petition generally alleging he possessed newly discovered evidence and his plea counsel was ineffective. He also contended his sentence was excessive. Defendant's appointed PCR counsel filed a supplemental brief explaining defendant's plea counsel was ineffective for failing to properly investigate and prepare his case, specifically with respect to several alibi witnesses, each of whom purportedly exculpated defendant of his participation in the robberies.

In a supplemental certification, defendant specifically attested his plea counsel "failed to investigate and confirm that a witness would testify that [Ali], the State's main witness, was heard . . . saying her boyfriend told [her] to 'put

the entire robbery on [defendant].'" Defendant stated he would not have pled guilty and would have proceeded to trial had he been aware of that statement. Defendant also argued his plea counsel was ineffective for failing to inform the sentencing court defendant lacked an adult criminal record and was a youthful offender when he committed the robberies. See N.J.S.A. 2C:44-1(b)(14).

Defendant also submitted certifications from various alibi witnesses including: (1) Starr James[4] (defendant's sister); (2) Tiecas James (defendant's mother); (3) Stacey Ervin (formerly incarcerated with Ali); and (4) Johnson. Defendant also submitted a handwritten letter from Sierre James (defendant's sister).

In her certification, Starr attested defendant was at a "surprise party . . . for Sierre" in Plainfield on May 31, 2010, and Sierre and defendant arrived at the party "around dinner time" and did not leave the party until "past midnight." Starr also stated she wrote and mailed a notarized letter to defendant's plea counsel regarding defendant's whereabouts on May 31, 2010 "prior to [defendant's] court date in 2011."

[4] As Starr, Tiecas, and Sierre share a common surname, we refer to them by their first names intending no disrespect.

Tiecas' certification stated defendant's plea counsel previously took her statement but informed her "[the statement] would not be put into evidence" as "[plea counsel] thought the jury would think [she] would lie for [defendant]" because she was his mother. She also attested defendant could not have committed the robbery on May 31, 2010 because defendant and his sister, Sierre, were in Plainfield that day and returned to Trenton between 10:30 p.m. and 12:00 a.m.

Ervin certified that during her incarceration, Ali informed Ervin that Ali's boyfriend instructed her "to put the entire robbery on [defendant] and that she would do it so [Ali] and her boyfriend could be together." She also stated, "one day [Ali] went to court and then she never came back."

Johnson certified he was unsure why Ali implicated defendant in the May 31, 2010 robbery but unequivocally stated defendant was "definitely not there that night." Finally, Sierre stated defendant was "with [her] in Plainfield . . . on May 28, 2010" for her birthday party, and defendant did not return to Trenton until May 31, 2010.

After considering the parties' submissions and oral arguments, the PCR court applied the well-recognized standard in Strickland v. Washington, 466

U.S. 668, 687 (1984),[5] finding defendant failed to establish a prima facie claim his plea counsel was ineffective. Accordingly, it issued an order denying defendant's petition without an evidentiary hearing in a corresponding written statement of reasons.

As to the first Strickland prong, the PCR court determined defendant's plea counsel's pretrial investigation was not deficient, and the attached certifications of Starr, Tiecas, Ervin, Johnson and Sierre's letter "establish[ed] that [trial] counsel did in fact conduct interviews and collect statements as to [defendant's] alibi witnesses." Further, the PCR court found as to Starr's certification and Sierre's letter, plea counsel "investigated each alibi and provided the information to the State . . . [but] could not have used any of the statements because they proved to be untrue," and would be in violation of the Rules of Professional Conduct (RPC). The PCR court further found plea counsel's decision not to rely upon Tiecas' statement was strategic, as evidenced

[5] To establish ineffective assistance of counsel, a convicted defendant must satisfy the two-part test enunciated in Strickland, 466 U.S. at 687, by demonstrating that: 1) counsel's performance was deficient, and 2) the deficient performance actually prejudiced the accused's defense. The Strickland test has been adopted for application under our State constitution in New Jersey. See State v. Fritz, 105 N.J. 42, 58 (1987).

by her certification indicating plea counsel believed jurors may perceive Tiecas would lie as she was defendant's mother.

The PCR court also determined Ervin's certification failed to indicate if defendant provided her name to plea counsel, or "was in possession" of Ervin's statement and further concluded if plea counsel possessed this information the decision not to investigate was "reasonable under the circumstances." The PCR court further found Johnson's certification failed to provide whether plea counsel possessed Johnson's potentially exculpatory statement, and also determined plea counsel's choice not to "further investigate was reasonable under the circumstances."

With respect to the second Strickland prong, the PCR court explained where a challenged conviction is the result of a guilty plea, a "defendant must demonstrate a reasonable probability that, but for counsel's errors, he would have refused to plead guilty and insisted on proceeding to trial." The PCR court determined defendant "offer[ed] no information to suggest" he would have done so, and therefore was not prejudiced by his plea counsel's pretrial investigation.

As to defendant's sentencing arguments, the PCR court similarly concluded defendant failed to establish he was prejudiced by any asserted error of his plea counsel because "he received the sentence, he agreed to during plea

negotiations." The PCR court further determined defendant was not entitled to a resentencing as mitigating factor fourteen applied prospectively and defendant's age was raised and considered by the sentencing court. In the alternative the PCR court explained "[e]ven if mitigating factor [fourteen] was applied retroactively, [defendant's] result would remain unchanged" based on his extensive juvenile record.

This appeal followed in which defendant raises the following issues:

> I. THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL REGARDING HIS FAILURE TO INVESTIGATE AND PRESENT ALIBI [WITNESSES] WHOSE TESTIMONY WOULD HAVE GIVEN RISE TO REASONABLE DOUBT AND [WEAKENED] THE STRENGTH OF THE STATE'S CASE, RESULTING IN A DISMISSAL OF CHARGES.
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> II. THE PCR COURT ERRED IN DENYING [DEFENDANT] AN EVIDENTIARY HEARING AS TESTIMONY IS NEEDED FROM PRIOR COUNSEL REGARDING HIS FAILURE TO PROPERLY REPRESENT [DEFENDANT] AT SENTENCING.

II.

We review a court's decision to deny a PCR petition without an evidentiary hearing for abuse of discretion. State v. Brewster, 429 N.J. Super.

387, 401 (App. Div. 2013). However, where no evidentiary hearing was conducted, we "may review the factual inferences the court has drawn from the documentary record de novo." State v. Blake, 444 N.J. Super. 285, 294 (App. Div. 2016). When determining whether to grant an evidentiary hearing for a PCR petition, the court must consider the facts in the light most favorable to the defendant. State v. Preciose, 129 N.J. 451, 462-63 (1992).

An evidentiary hearing for a PCR petition is not automatic. See id. 129 at 462. Trial courts, however, should grant an evidentiary hearing "to resolve ineffective assistance of counsel claims if a defendant has presented a prima facie claim in support of PCR and the facts supporting the claim are outside the trial record." State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999).

As noted, to establish a prima facie claim of ineffective assistance of counsel, a defendant must show not only the particular manner in which counsel's performance was deficient, but also that the deficiency prejudiced defendant. Strickland, 466 U.S. at 687; Fritz, 105 N.J. at 60-61. In the context of a guilty plea, a defendant must establish "that there is a reasonable probability that, but for counsel's errors, [he or she] would not have pled guilty and would have insisted on going to trial." State v. Gaitan, 209 N.J. 339, 351 (2012) (alteration in original) (quoting State v. Nuñez-Valdéz, 200 N.J. 129, 139

(2009)). A 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).

"An ineffective assistance of counsel claim may occur when counsel fails to conduct an adequate pretrial investigation." State v. Porter, 216 N.J. 343, 352 (2013). This is because "counsel has a duty to make 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" State v. Chew, 179 N.J. 186, 217 (2004) (quoting State v. Savage, 120 N.J. 594, 618 (1990)).

Our Supreme Court has recognized that "[f]ailure to investigate an alibi defense is a serious deficiency that can result in the reversal of a conviction," as "few defenses have greater potential for creating reasonable doubt as to a defendant's guilt in the minds of the jury [than an alibi]." Porter, 216 N.J. at 353 (quoting State v. Mitchell, 149 N.J. Super. 259, 262 (App. Div. 1977)). Counsel's decision to "forego evidence that could have reinforced [an] alibi" may "f[all] below the objective standard of reasonableness guaranteed by the United States and New Jersey constitutions." State v. Pierre, 223 N.J. 560, 583 (2015).

The "decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. If plea counsel "thoroughly investigate[d] law and facts, considering all possible options, his or her trial strategy is 'virtually unchallengeable.'" Savage, 120 N.J. at 617 (quoting Strickland, 466 U.S. at 690-91). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688-89. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "In evaluating a defendant's claim, the court 'must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'" State v. Castagna, 187 N.J. 293, 314 (2006) (quoting Strickland, 466 U.S. at 690).

"But strategy decisions made after less than complete investigation are subject to closer scrutiny." Savage, 120 N.J. at 617-18. Indeed, when counsel conducts an inadequate, or no, investigation, "counsel deprive[s] himself [or

herself] of a reasonable basis on which to later make informed tactical defense decisions." Id. at 620-21.

A PCR petitioner asserting his trial attorney inadequately investigated potential witnesses "must do more than make bald assertions," Cummings, 321 N.J. Super. at 170, rather he is required to assert facts that "an investigation would have revealed, supported by affidavits or certifications based upon the personal knowledge of the affiant or the person making the certification." Ibid. "Even a suspicious or questionable affidavit supporting a PCR petition 'must be tested for credibility and cannot be summarily rejected.'" Porter, 216 N.J. at 355 (quoting State v. Allen, 398 N.J. Super. 247, 258 (App. Div. 2008)).

A defendant's alibi witness supported by the witness' affidavit or certification should not be summarily dismissed as not credible without an evidentiary hearing to make proper credibility determinations. See State v. Jones, 219 N.J. 298, 314 (2014) (noting that "[a]lthough the timing and motivation of [the alibi witness'] statement and [her] reason for not voluntarily appearing to testify as apparently had been expected raise important questions, those questions cannot be assessed and resolved without determining credibility"). "Assessment[s] of credibility [are] the kind of determinations 'best made through an evidentiary proceeding with all its explorative benefits,

including the truth-revealing power which the opportunity to cross-examine bestows.'" Porter, 216 N.J. at 347 (quoting State v. Pyatt, 316 N.J. Super. 46, 51 (App. Div. 1998)).

III.

In defendant's first point, he argues the certifications of his alibi witnesses provided exculpatory evidence establishing he was not present for either of the two robberies for which he pled guilty, and his plea counsel was deficient in failing to investigate those witnesses, and properly advise him before his plea. He specifically claims an evidentiary hearing was necessary to obtain testimony from his plea counsel regarding his decision "to forego evidence that could have reinforced [] [defendant's] alibi defense."

Although we agree with the PCR court it appears defendant's plea counsel did conduct a pretrial investigation with respect to certain witnesses, as evidenced by Tiecas' certification for example, the issue before us centers not on whether plea counsel interviewed each alibi defense witness, but rather how any interviews influenced plea counsel's decision to pursue a plea as opposed to proceeding to trial. An evidentiary hearing was necessary to explore plea counsel's decision-making on that point and what information he communicated to defendant.

We initially observe that the record before us does not contain information necessary to support all of the PCR court's findings. As noted, we do not possess the surveillance tapes or any support for the proposition that defendant was the individual seen on those tapes. We acknowledge based on the representations of the parties, certain portions of Starr's and Sierre's statements contain impeachable inconsistencies. For example, Starr certified defendant did not leave Plainfield to return to Trenton until "past midnight," although defendant was apparently arrested at 12:07 a.m. in Trenton, while Sierre stated defendant was with her in Plainfield from May 28, 2010 until May 31, 2010, despite the State's assertion surveillance video placed defendant in Trenton on May 29, 2010. Even if a portion of the statements are impeachable, the effect of any inconsistences should be addressed in the first instance at an evidentiary hearing followed by necessary credibility findings.

In any event, on their face, certain statements in the certifications place defendant outside of Trenton for both robberies. According to the State, the May 30, 2010 robbery took place from 9:30 p.m. on May 29, 2010 until around 1:00 a.m. on May 30, 2010, and Sierre's letter places defendant with her in Plainfield during the first robbery. The May 31, 2010 robbery allegedly

occurred between 7:30 and 9:20 p.m., and Starr's certification places defendant in Plainfield during that time period.

Without an evidentiary hearing, we lack any factual or credibility findings by the PCR court regarding the asserted alibis provided by Starr, Sierre, and Tiecas. We simply cannot glean from the record before us if plea counsel conducted an adequate pretrial investigation or if his decision to not investigate further was reasonable, without plea counsel's testimony. We similarly disagree with the PCR court's determination plea counsel's decision not to use Tiecas' alibi witness statement "f[ell] into the purview of trial strategy" without further explanation from plea counsel.

We also conclude the PCR court erred when it concluded an evidentiary hearing was not warranted to evaluate plea counsel's decision-making with respect to Ervin's statement. As noted, the PCR court found defendant's and Ervin's certifications failed to provide an adequate foundation that plea counsel was aware of Ervin's statements prior to defendant's guilty plea. It further stated, "even if . . . [trial] counsel made the choice not to investigate such information, this decision was reasonable under the circumstances."

If Ervin were to testify credibly and consistent with her certification, such testimony could cast doubt as to defendant's role in the robberies, and could also

reinforce defendant's alibis based on Starr's, Sierre's, and Tiecas' statements. Further, defendant specifically certified he would not have pled guilty had he been made aware of Ervin's statement.

Finally, we similarly reject the PCR court's determination plea counsel's decision not to further investigate Johnson's statements was "reasonable" as the record contains no support for such a finding. As previously stated, without plea counsel's testimony we are unable to discern what steps, if any, were taken to investigate Johnson as a potential alibi witness and if plea counsel's decision-making with respect to defendant's plea was reasonable.

We acknowledge defendant's statements during his plea hearing provided a factual basis for his participation in the crimes. See State v. Gregory, 220 N.J. 413, 419 (2015) ("The factual basis for a guilty plea can be established by a defendant's explicit admission of guilt or by a defendant's acknowledgment of the underlying facts constituting essential elements of the crime."). We also note those sworn admissions appear to contradict his current arguments and the statements of his alibi witnesses. We remain convinced, however, that an evidentiary hearing is necessary for the court to address defendant's plea counsel's strategic decisions and those witnesses' statements. The PCR court should additionally consider those proofs against defendant's prior sworn

statements at his plea hearing, and any explanation he provides as to why he admitted his participation in both robberies.

IV.

In his second point, defendant argues the PCR court should have conducted an evidentiary hearing for plea counsel to explain "why he misrepresented [defendant's] criminal record and mitigating factors to the sentencing court." Specifically, defendant contends his plea counsel misstated that defendant possessed a prior adult conviction, and in doing so, failed to properly argue this absence of a record as a mitigating factor. Defendant further argues plea counsel failed to properly advocate defendant's youth at the time of the robberies, which is now a mitigating factor to be considered in sentencing. See N.J.S.A. 2C:44-1(b)(14). He claims both errors prevented the court from properly evaluating the aggravating and mitigating factors and imposing a lesser sentence. We reject both arguments.

First, we are satisfied any misstatement by defendant's plea counsel regarding defendant's adult convictions did not prejudice him as the record indicates the court possessed and considered defendant's presentence report which contained an accurate summary of his conviction history. We also note

defendant was sentenced consistent with his negotiated plea agreement, and in accordance with the applicable sentencing ranges for the two robberies.

Second, as to mitigating factor fourteen, defendant was sentenced in 2013. After he was sentenced the Legislature enacted N.J.S.A. 2C:44-1(b)(14) — a new mitigating factor which applies when a defendant is less than twenty-six years old at the time of the crime. The new mitigating factor was explicitly deemed "effective immediately" on October 19, 2020, see L. 202, c. 110, and is to be applied prospectively. See State v. Bellamy, 468 N.J. Super. 29, 44 (App. Div. 2021); see also State v. Lane, 251 N.J. 84, 88 (2022) ("We construe N.J.S.A. 2C:44-1(b)(14) to be prospective. We find in the statutory language no indication that mitigating factor fourteen applies to defendants sentenced prior to the provision's effective date."). As defendant was sentenced in 2013, his plea counsel was not under any obligation to advocate for mitigating factor fourteen.

Even if mitigating factor fourteen applied, a review of the record indicates plea counsel advocated for the court to consider defendant's youth at his sentencing. Specifically, plea counsel argued before the court that defendant was twenty years old when he committed the robberies and was "a young man"

who found himself in "some really serious business with people that influenced him."

In sum, we are convinced that defendant presented a prima facie case of ineffective assistance of plea counsel which could not be resolved without an evidentiary hearing. We express no view on the ultimate success of defendant's PCR application.

Affirmed in part as to the PCR court's denial of defendant's petition without an evidentiary hearing regarding his sentencing. Reversed in part and remanded for an evidentiary hearing to establish findings consistent with this opinion. We do not retain jurisdiction.